Senator Chuck Grassley,

Ranking Member

Questions for the Record
Evelyn Padin

Judicial Nominee to the United States District Court for the District of New Jersey

1. **As president of the New Jersey State Bar Association, you wrote a 2019 letter to New Jersey Supreme Court Chief Justice Stuart Rabner. Your letter said in part:**

> **With the New Jersey Legislature poised to pass legislation that would legalize marijuana in New Jersey beyond the current permissibility of medical marijuana, the New Jersey State Bar Association urges the Court to revisit the language in RPC 1.2 relating to medical marijuana. We request that the Court expand the Rule to expressly allow for the counseling of clients on the marijuana laws of New Jersey and other states. Such action will advance the public interest by ensuring attorneys can appropriately advise clients in this fast-changing area of the law without fear of facing a future ethics violation.**

Under your leadership, the New Jersey State Bar Association was seeking to amend state ethics rules so that a lawyer could counsel clients on any New Jersey marijuana laws (rather than only New Jersey's medical marijuana laws) and counsel on other states' marijuana laws ("provided the lawyer meets the requirements of those states"). Your letter sought this change preemptively, in anticipation of "the Legislature seeking to take action on the legalization of marijuana within the next few months." Your letter did not address the federal Controlled Substances Act or meeting the requirements of federal drug laws.

On the day that the Judiciary Committee held your hearing, we learned that the Biden administration's employee-conduct guidelines caution that eligibility for security clearances "may be negatively impacted if an individual knowingly and directly invests in stocks or business ventures that specifically pertain to marijuana growers and retailers."[1] In its guidance document, the Biden administration explains that "[d]ecisions to willfully invest in such activity could reflect questionable judgment and an unwillingness to comply with laws, rules, and regulations."[2]

Based on these circumstances, I have two questions for you.

a. **Can you point to any letter, article, speech, or other item you authored or otherwise worked on—particularly during your tenure as the New Jersey State Bar Association president—that encouraged New Jersey attorneys to counsel their clients in a manner consistent with federal drug laws?**

b. **If you are confirmed to the federal bench, will you enforce federal drug laws as they are written?**

Response to all subparts: In 2010 the New Jersey legislature passed the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:61-1 et seq. Prior to its passage the New Jersey State Bar Association in 2015 studied the impact of the proposed change in the law and formed an ad hoc committee to address a proposed amendment to the New Jersey RPC 1.2(d). (See attached memorandum to the New Jersey State Bar Association, Board of Trustee of which I was a member). The recommendation of the New Jersey State Bar Association was to revise the RPC so that attorneys would be in compliance with state and federal laws. In 2021, the State of New Jersey decriminalized cannabis. The legislature placed this issue on the ballot, and it was approved by the citizens of New Jersey. As New Jersey State Bar President, I was requested by the members of the New Jersey State Bar Association in 2019 to inquire whether it was a violation for New Jersey lawyers to counsel their clients on the issue of "medical marijuana". As officers of the court, the members did not want to face future ethics charges if they counselled clients on the medical marijuana laws of New Jersey. At no time did the New Jersey State Bar Association take a position that attorneys should violate the Federal Controlled Substances Act. In fact, RPC 1.2 (e) further states "The lawyer shall advise the client regarding related federal law and policy". The inquiry was intended to define the scope of their representation within the State of New Jersey and for those New Jersey State Bar Association members who practice commercial transactional work in other jurisdictions. If confirmed as a federal district court judge, I commit to faithfully enforce federal drug laws as they are written.

2. **In the context of federal case law, what is the academic or scholarly definition ofsuper precedent? Which cases, if any, count as super precedent?**

Response: Legal scholars have offered various definitions of this phrase. One constitutional scholar, Michael J. Gerhardt, who is the Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina School of Law, has defined it as "Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law and lives through the subsequent activities of the other branches. Super precedents seep into the public consciousness and become a fixture of legal framework." Gerhardt, Michael J., "Super Precedent," *Minnesota Law Review* (2006). If confirmed as a district court judge, I would faithfully follow all precedent from the Supreme Court and Third Circuit.

3. **You can answer the following questions yes or no:**

    a. **Was *Brown v. Board of Education* correctly decided?**

    b. **Was *Loving v. Virginia* correctly decided?**

    c. **Was *Griswold v. Connecticut* correctly decided?**

    d. **Was *Roe v. Wade* correctly decided?**

    e. **Was *Planned Parenthood v. Casey* correctly decided?**

    f. **Was *Gonzales v. Carhart* correctly decided?**

    g. **Was *District of Columbia v. Heller* correctly decided?**

    h. **Was *McDonald v. City of Chicago* correctly decided?**

    i. **Was *Hosanna-Tabor Evangelical Lutheran Church* and *School v. EEOC* correctly decided?**

    j. **Was *Sturgeon v. Frost* correctly decided?**

    k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

    Response to all subparts: As a district court judge nominee, I am constrained by the Code of Conduct for United States Judges from commenting on any case that may come before me in the future. However, I am aware that prior judicial nominees have identified *Brown v. Board of Education* and *Loving v. Virginia* as foundational cases unlikely to be the subject of future controversy. Consistent with that approach, I believe it is appropriate for me to state my opinion that both *Brown* and *Loving* were rightly decided.

4. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she didnot believe in a "living constitution"?**

    Response: I am not familiar with Judge Jackson's remarks or the context in which they were made. The Constitution is an enduring document. If I am confirmed as a district court judge, I would faithfully follow all precedent from the Supreme Court and Third Circuit regarding the interpretation of Constitutional provisions.

5. **Should judicial decisions take into consideration principles of social "equity"?**

    Response: Judicial decisions should be based on the case law, statute and the facts as presented by the opposing parties. According to Black's Law Dictionary, "equity" is

defined as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). Judicial decisions should be based on fairness and impartiality. Should I be confirmed I would apply binding precedent to the facts of the case before the court.

6. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tellyou to reach."**

   Response: I disagree with the statement. A judge's personal views and values are irrelevant when it comes to interpreting and applying the law.

7. **Is climate change real?**

   Response: The question of whether climate change is real is one within the purview of scientists, scholars, and policy makers. If I am confirmed as a district court judge and a case came before me that raised a question regarding the existence of climate change, I would faithfully apply any binding Supreme Court and Third Circuit precedent to the relevant facts of the case.

8. **Do parents have a constitutional right to direct the education of their children?**

   Response: Yes. The Supreme Court has held that parents have the right to direct the educationof their children. *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923) ("[The plaintiff's] right thus to teach and the right of parents to engage [the plaintiff] so to instruct their children,we think, are within the liberty of the [Fourteenth Amendment]".).

9. **Is whether a specific substance causes cancer in humans a scientific question?**

   Response: This is a scientific question. Federal Rule of Evidence 702 "Testimony by Expert Witnesses" governs this area and indicates that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

   (1) the testimony is based upon sufficient facts or data,

   (2) the testimony is the product of reliable principles and methods, and

   (3) the witness has applied the principles and methods reliably to the facts of the case.

   The district courts play a gate-keeping function to ensure that "all scientific testimony or evidence admitted is not only relevant, but reliable," and that the expert testimony will assist the trier of fact in better understanding the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

10. **Is when a "fetus is viable" a scientific question?**

Response: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992) (emphasis added), the Supreme Court held that "*advances in neonatal care* have advanced viability to a point somewhat earlier" than in the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973), and it further confirmed State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health *Id*. Determining viability would be a medical or scientific question governed by Federal Rule of Evidence 702. Please see also my response to Question 9.

11. **Is when a human life begins a scientific question?**

Response: Some consider this a scientific question, and there are also religious, moral, political, and philosophical implications to the question. If confirmed as a district court judge and a case came before me presenting this issue, I would faithfully apply anybinding Supreme Court and Third Circuit precedent to the relevant facts of the case. Please see also my response to Question 9.

12. **Can someone change his or her biological sex?**

Response: To the extent this question is directed at the role of expert testimony in federal cases, please see my response to Question 9.

13. **Is threatening Supreme Court justices right or wrong?**

Response: Any threat against a Supreme Court justice is wrong. It may also be a crime pursuant to 18 U.S.C. § 115.

14. **Does the president have the power to remove senior officials at his pleasure?**

Response: Generally, the President's authority to remove executive-branch employees is defined by the Constitution, Supreme Court precedent, and applicable federal law. There are, however, certain limitations to this power. For example, Congress may "create expert agencies led by a group of principal officers removable by the President only for good cause." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020). If confirmed as a district court judge and a case involving the President's removal power came before me, I would faithfully apply Supreme Court and Third Circuit precedent to the specific facts of the case.

15. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

Response: The question of the appropriate level of funding for police departments is a

policy question not within the purview of the judicial branch. The role of the judiciary is limited to interpreting the law. If confirmed as a district court judge, I would have no role in making policy.

16. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

    Response: Please see my response to Question 15.

17. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

    Response: The question of how to manage the prison population during the COVID-19 pandemic is the sort of issue within the purview of policy makers. If I am confirmed as a district court judge and a case presenting this issue comes before me, I would faithfully apply any binding Supreme Court and Third Circuit precedent to the facts presented inthe case and would also look to the sentencing factors set forth in 18 U.S.C. §§ 3582(c)(1)(A) and 3553(a).

18. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

    Response: If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Third Circuit precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

19. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

    Response: I am unaware of any Supreme Court or Third Circuit precedent that wouldddetermine the answer to this question.

20. **Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?**

    Response: While I am aware of the Born-Alive Infants Protection Act of 2002, as well as the Supreme Court's decision in *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833 (1992), and its progeny, I am not aware of any Supreme Court or Third Circuit precedent that would determine the answer to this question.

21. **Under the Religious Freedom Restoration Act the federal government cannot"substantially burden a person's exercise of religion."**

    a. **Who decides whether a burden exists on the exercise of religion,**

the government or the religious adherent?

Response: While courts "have no business addressing" whether a religious belief is reasonable, the question of whether a law substantially burdens the free exercise of religion, is a determination for the court. *Burwell v. Hobby Lobby*, *Inc*., 573 U.S. 682, 724 (2014).

b. **How is a burden deemed to be "substantial" under current caselaw?**

Response: The Supreme Court addressed this issue in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Applying a two-part analysis, courts must first determine whether non-compliance with the challenged law would impose "severe" economic costs, *id.* at 720, and second whether compliance with the challenged law would force plaintiffs to violate their sincere religious beliefs. *Id.* at 720-26.

22. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears alimited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

Response: I am not familiar with this quote or the context in which it was made. If confirmed as a district court judge, I would faithfully apply Supreme Court and Third Circuit precedent and would strive to render decisions consistent with that precedent. The duty of a federal judge is to apply the law impartially and faithfully in all cases.

23. **As a matter of legal ethics do you agree with the proposition that some civil clientsdon't deserve representation on account of their identity?**

Response: I do not agree with this proposition. Under the American Bar Association's Model Rules of Professional Conduct, "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule1.2(b).

24. **Do Blaine Amendments violate the Constitution?**

Response: I understand Blaine Amendments to be a reference to efforts to prohibit government aid to religiously affiliated schools in order to avoid conflict with the Establishment Clause. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that a state-based scholarship program that provides public funds for students to attend private schools cannot discriminate against religiously affiliated schools under the Free ExerciseClause of the First Amendment.

25. **Is the right to petition the government a constitutionally protected right?**

Response: Yes. The First Amendment provides for the right "to petition the government for a redress of grievances."

26. **What is the operative standard for determining whether a statement is not protectedspeech under the "fighting words" doctrine?**

Response: This was addressed by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In this case, the Court found that "fighting words" fall under the category of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. In *Cohen v. California*, 403 U.S. 15, 20 (1971), the Supreme Court defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction."

27. **What is the operative standard for determining whether a statement is not protectedspeech under the true threats' doctrine?**

Response: Under this doctrine, the First Amendment will protect allegedly threatening speech unless the government can prove that the speaker intends to commit an unlawful, violent act to a particular individual. In *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Supreme Court defined "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The Court went on to hold that the First Amendment does not prohibit a state from "banning a true threat." *Id.*

28. **Demand Justice is a progressive organization dedicated to "restor[ing] ideologicalbalance and legitimacy to our nation's courts."**

    a. **Has anyone associated with Demand Justice requested that you provide anyservices, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice,including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice,including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or**

Stasha Rhodes?

Response: No.

29. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and thecreation of an equitable, just, and free society."**

    a. **Has anyone associated with Alliance for Justice requested that you provideany services, including but not limited to research, advice, analysis, writingor giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance forJustice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice,including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

30. **Arabella Advisors is a progressive organization founded "to provide strategicguidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in thisanswer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

    b. **Are you currently in contact with anyone associated with Arabella Advisors?Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

c. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella'sknown subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark- money fund that is still shrouded.**

Response: No.

31. **The Open Society Foundations is a progressive organization that "work[s] to buildvibrant and inclusive democracies whose governments are accountable to their citizens."**

a. **Has anyone associated with Open Society Fund requested that you provideany services, including but not limited to research, advice, analysis, writingor giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Open SocietyFoundations?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Open SocietyFoundations?**

Response: No.

32. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

a. **Has anyone associated with Fix the Court requested that you provide anyservices, including but not limited to research, advice, analysis, writing orgiving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quintand/or Mackenzie Long?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quintand/or Mackenzie Long?**

Response: No.

33. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led toyour nomination and the interviews in which you participated).**

Response: On April 28, 2021, I expressed to Senator Robert Menendez that I was interested in being considered for a vacancy on the United States District Court for the District of New Jersey. On May 17, 2021, I interviewed with Senator Menendez. On June 1, 2021, I interviewed with Senator Cory Booker. On June 9, 2021, I interviewed with attorneys from the White House Counsel's Office. Since June 29, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On November 3, 2021, my nomination was submitted to the Senate.

34. **During your selection process did you talk with any officials from or anyone directlyassociated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: I did not. I am not aware of anyone doing so on my behalf.

35. **During your selection process did you talk with any officials from or anyone directlyassociated with the American Constitution Society, or did anyone do so on your behalf?? If so, what was the nature of those discussions?**

Response: I did not. I am not aware of anyone doing so on my behalf.

36. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? Ifso, what was the nature of those discussions? Please include in this answer anyoneassociated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: I did not. I am not aware of anyone doing so on my behalf.

37. **During your selection process did you talk with any officials from or anyone directlyassociated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: I did not. I am not aware of anyone doing so on my behalf.

38. **During your selection process did you talk with any officials from or anyone directlyassociated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: I did not. I am not aware of anyone doing so on my behalf.

39. **List the dates of all interviews or communications you had with the White Housestaff or the Justice Department regarding your nomination.**

Response: Please see my response to Question 33. Additionally, I was in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding preparations for my confirmation hearing.

40. **Please explain, with particularity, the process whereby you answered these questions.**

Response: I received the questions on March 9, 2022. I drafted answers to each question based on my own knowledge and research. I submitted draft answers to the Office of Legal Policy for feedback and finalized my answers for submission to the Senate Judiciary Committee.

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HERSH KOZLOV, RESIDENT PARTNER

MEMORANDUM

DATE: June 7, 2016

TO: Board of Trustees, New Jersey State Bar Association

CC: Adam Berger
Eric Frank
Paul P. Josephson
Ben Kaplan
David Rubin
Sean D. Schafer
David Trombadore

FROM: James J. "J." Ferrelli,
Chair of Ad Hoc Committee to Review RPC 1.2(d) and
Issues Pertaining to Medical Marijuana

SUBJECT: Recommendation regarding revision to New Jersey RPC 1.2(d)

In 2015, our Committee was formed to review the New Jersey Rules of Professional Conduct ("NJRPC"), and NJRPC 1.2(d) in particular, to determine whether the NJSBA should suggest revisions that would enable New Jersey lawyers to advise and assist clients, consistent with the NJRPC, with respect to activities in connection with the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1 *et seq.* ("Act"). Such activities would include, for example, advising clients about the requirements of the Act, assisting clients in establishing and licensing non-profit business entities that meet the requirements of the Act, and representing clients in proceedings before state agencies regarding licensing and certification issues. Prospective categories of clients could include patients, physicians, dispensers, and ancillary businesses such as suppliers and financial institutions.

Presently pending is a request by the New Jersey Supreme Court for comments on a proposed amendment to NJRPC 1.2(d), which comments are to be submitted to the Court by June 20, 2016. The work of our Committee is directly on point to the request for comments to

this proposed amendment to NJRPC 1.2(d), and we respectfully submit this memorandum summarizing our work and our recommendation for the Board of Trustees' consideration. We surveyed and reviewed the ethical issue presented by NJRPC 1.2(d) as it has been addressed in 23 other states, and the District of Columbia, which have legalized marijuana use in some form, and include a summary for your reference.[1] In light of the legal status of marijuana in these other states, we also address whether any proposed revision to the NJRPC should permit lawyers to ethically advise and assist clients with respect to activities that comply with the marijuana laws of other states.

By way of background, federal law makes it a crime to grow, sell, or possess marijuana,. *See, e.g.*, the Controlled Substances Act, 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812, Schedule I (c), (d). Further, possession of marijuana for personal use is a federal misdemeanor. 21 U.S.C. § 844a(a). The manufacture, distribution, possession with intent to distribute, or attempts and conspiracies to do so involve penalties that vary with the type and quantity of drug and other factors. 21 U.S.C. §§ 841(b), 846 & 960(b). Of particular importance to New Jersey attorneys, "aiding and abetting" a violation of federal marijuana laws is also a crime.[2] 18 U.S.C. § 2(a); *see also United States v. Dixon*, 658 F.2d 181, 189 n. 17 (3d Cir.1981) (setting forth elements of aiding and abetting).

In light of the applicable federal law, the present issue arises with respect to Rule 1.2(d) of the NJRPC, which in its current form prohibits attorneys from advising clients on certain matters. Rule 1.2(d) provides:

> A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

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[1] *See* Appendix A for information related to the marijuana laws of other states and the District of Columbia as well as a summary of the adopted and proposed revisions to the rules of professional conduct of those states.

[2] The possibility exists that an attorney could be prosecuted for aiding and abetting a client's violation of federal law. However, the likelihood of prosecution of such crimes is presently in doubt. Under recent guidance from the U.S. Department of Justice ("DOJ"), it is the DOJ's position that such enforcement is deferred in states where there are state authorized and regulated marijuana laws that affirmatively address DOJ priorities such as preventing "diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for." James M. Cole, U.S. Dep't of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Enforcement, (Aug. 29, 2013); *see also* James M. Cole, U.S. Dep't of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes, (February 14, 2014).

The question, accordingly, becomes whether an attorney may ethically represent a New Jersey client with respect to the lawful compliance with the Act as well as other related matters permissible under New Jersey law or the laws of other states, even though the attorney may thereby be considered to be counseling or assisting a client in conduct that the lawyer knows is illegal under federal law.

This issue is not novel to the state of New Jersey. Attorneys across the country, as well as state organizations that regulate attorney conduct, are grappling with the same issues where marijuana use has been legalized for either medicinal or recreational purposes. After reviewing the means by which other states have chosen to address the issue, and in consideration of the policy objectives underlying ethical standards for lawyers generally, we recommend that the New Jersey Supreme Court amend Rule 1.2(d) as follows (**additions in bold;** deleted words with ~~strikethrough~~; underlining shows additional language not in revision proposed by Advisory Committee on Professional Ethics):

> RPC 1.2(d): **Except as provided in paragraph (e), a**~~A~~ lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.
>
> **RPC 1.2(e): A lawyer may counsel a client regarding New Jersey's marijuana laws <u>or the marijuana laws of other states</u> and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.**

Similar revisions to the rules of professional conduct have been adopted in Alaska, Connecticut, Hawaii, Illinois, Nevada, and Oregon. Additionally, similar proposed rule modifications are pending in Maine, Pennsylvania, and Vermont, but no official action has been taken to date.

Note that the proposed revision set forth above contains slightly different language from the proposed amendment on which the Supreme Court seeks comment. Our Committee's proposed revision adds the phrase "or the marijuana laws of other states" (underlined above) to the proposed language presented by the Advisory Committee on Professional Ethics. As explained below, our Committee believes that this additional language is necessary because of the reasonable probability that New Jersey lawyers advising clients on New Jersey's marijuana laws may also need to advise their clients regarding the marijuana laws of other states where those clients may be involved in business.

The proposed rule modification aligns with the core purposes of the NJRPC and lawyer ethics standards generally – namely, to encourage lawyers to advise their clients to act in a manner that comports with the law and to be aware of all potential risks that may result from their conduct. In the case of the Act, the New Jersey legislature has determined that marijuana, if

used under certain specified circumstances, may appropriately provide certain health benefits. Those specified circumstances are dictated by New Jersey law, namely the Act. Accordingly, in order for individuals and companies to ensure that they are following the law, the guidance and counsel of attorneys will be necessary. To the contrary, were New Jersey lawyers to be prohibited by the NJRPC from advising clients as to the contours of the Act, lay persons would be left to interpret complex nuances of the law and make determinations as to the legality of their actions – determinations that they lack the background and experiences to adequately make.

Additionally, our Committee's proposed rule modification permits New Jersey attorneys to advise clients on issues related to the marijuana laws of other states. This serves to allow both New Jersey businesses and New Jersey attorneys to become more competitive in a burgeoning industry. Often times, New Jersey businesses will seek counsel of New Jersey attorneys on matters related to their business operations not just in New Jersey, but across the country. As New Jersey businesses build their operations as permitted under the Act, it is likely that they will have the opportunity expand their operations outside of the state. As their businesses develop, they will likely require legal counsel. New Jersey attorneys, who have developed a strong understanding of the legal marijuana industry generally, will be well suited to assist such companies, and the NJRPC should address this issue as well. Thus, the proposed rule modification will make New Jersey attorneys more desirable and give them the opportunity to become leaders in a new field of law.

We recognize that the rule modification method is not the only means to address the issue at hand. Alternatively, New Jersey could follow the leads of certain other states and the Supreme Court could adopt of a comment to Rule 1.2(d) or the State Bar Association could adopt a form opinion on the issue.

After carefully reviewing and considering the actions taken by other states and options available in New Jersey, we have determined that the adoption of a comment to Rule 1.2(d) or the adoption of an ethics opinion would be less effective than a modification to NJRPC. While the alternative methods might provide some degree of comfort to New Jersey attorneys desiring to advise clients on matters related to the Act (or the similar laws of other states), they would not provide the same degree of certainty as a rule modification. Opinions frequently have relatively narrow parameters and can be changed essentially on a whim and without warning to attorneys. Similarly, comments, although instructive, lack the same force as a formal rule.

New Jersey attorneys, following the passage of the Act and the adoption of similar laws in other states, will likely be called upon by clients to handle complex matters and matters of first impression in a rapidly developing industry. In order to adequately advise clients on such issues, attorneys must devote significant time to gaining an understanding of the applicable laws, and developing sufficient expertise to provide adequate guidance and representation to such clients. Attorneys practicing in this area need some degree of certainty that a formal Rule provides. We, therefore, suggest that the proposed rule modification would provide New Jersey practitioners certainty and assurance that they can devote the necessary time to develop a practice in the area of marijuana law without the fear that a future change of opinion will deem their conduct in violation of the NJRPC and effectively nullify their prior efforts and undermine their ability to provide necessary legal services to the public.

In conclusion, it is our opinion that the NJSBA should strongly support the proposed amendment to NJRPC 1.2(d) suggested by the Advisory Committee on Professional Ethics, and in addition should propose a slight modification to the language of that proposed amendment as set forth above in order to address situations where New Jersey attorneys are called upon by clients to provide advice relating to the marijuana laws of other jurisdictions in connection with their representation. Our proposed modification to the proposed amendment would permit New Jersey attorneys to conscientiously advise their clients on an emerging area of the law. In doing so, this would ensure that New Jersey businesses and individuals desiring to become a part of the medical marijuana industry do so in a manner that complies with the applicable state laws that form the basis for the industry.

We thank you for your consideration of this matter. Please contact me if our Committee may be of further assistance.

JJF/fs

-Senator Marsha Blackburn
Questions for the Record to Ms. Evelyn Padin
Nominee to be United States District Judge for the District of New Jersey

1. **In 2019, you participated in a Hispanic Heritage Month event that involved a discussion about a 1971 case out of New Jersey, *State v. Shack*. This case was a sharp departure from precedent, in that it held that a property owner's right to exclude does not include the right to exclude access to government services for migrant workers housed on the property. It appears, however, that you read this case even more broadly. You stated that this case authorizes the government to enter into a "private individual's premises" for safety inspections "because the overriding concern was always what is best for the public." This statement concerns me because it suggests you have an alarmingly expansive view of the government's power to override individual rights in the name of public safety. What is your view of the government's authority to enter a private home without a warrant?**

   Response: The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." If I am fortunate enough to be confirmed, I will apply the Constitution, and United States Supreme Court and Third Circuit precedent.

2. **In your view, is public safety always a legitimate justification for infringing on an individual's privacy or property, or violating their constitutional rights?**

   Response: In general, the police do not have the right to enter a person's house or other private premises without their permission unless they have a warrant. However, they can enter without a warrant when in close pursuit of someone the police believe has committed, or attempted to commit, a serious crime, or to sort out a disturbance. In *Caniglia v. Storm*, 141 S. Ct. 1596 (2021) the Court refused to make it easier for police to enter a home without a warrant for reasons of health or public safety, throwing out a lower court's decision to dismiss a lawsuit brought by a Rhode Island man after officers entered his home and confiscated his guns. Writing for a unanimous Court, Justice Thomas held that warrantless searches and seizures of homes exceed the authority of police officers pursuant to any so-called community caretaking duties. If confirmed I would be bound by precedent and will follow Supreme Court and Third Circuit precedent.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Evelyn Padin, Nominee for the District of New Jersey

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: If confirmed as a district court judge, I would "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. Consistent with that oath, I would approach each case in a neutral manner and would carefully consider the arguments presented by the parties, determine the applicable law considering controlling Supreme Court and Third Circuit precedent, and apply that law to the relevant facts in a fair and impartial. I am not familiar with the philosophy of any of the above Supreme Court Justice's views and cannot comment on this issue.

manner.

2. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?

Response: Originalism is interpreted to mean that the words in the Constitution or a statute are to be given the original meaning they had when the Constitution or statute was drafted. If confirmed as a district court judge and I am called upon to interpret the Constitution or a statute, I would look to the original, public meaning of the relevant text consistent with binding Supreme Court and Third Circuit precedent.

3. Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a "living constitutionalist"?

Response: The term "living constitutionalism" means the method of constitutional interpretation that takes into account societal changes that have occurred since the time when the relevant Constitutional provision was adopted. I would not characterize myself as a "living constitutionalist."

4. If you were to be presented with a constitutional issue of first impression—that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: If confirmed as a district court judge, and I encountered this issue, I would be bound by Supreme Court and Third Circuit precedent and would look to that precedent to determine the framework within which to analyze the relevant constitutional provision. The Supreme Court has looked toward original public meaning in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and I would use this as a guide to form my analysis.

5. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: The Supreme Court has held that the public understanding of a legal text in the period after its enactment or ratification is a critical tool of constitutional interpretation. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) If confirmed as a district court judge, I would be bound to follow Supreme Court and Third Circuit precedent regardingissues of constitutional and statutory interpretation.

6. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: Beyond the amendment process, the Constitution is an enduring document that establishes the framework for our system of government.

7. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Yes. The Supreme Court has identified limits in the context of the First Amendment as to what government may attempt to impose or require of small businesses and religious organizations. In the context of state government action, the Supreme Court has articulated a framework under which to analyze the extent to which state action is violative of the Free Exercise Clause of the First Amendment. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc*. 134 S. Ct. 2751 (2014). The applicable limits to government action in the context of First Amendment and statutory protections of the free exercise of religion will depend on the specific facts of the case. For example, with respect to actions by the federal government, Congress enacted the Religious Freedom Restoration Act, which applies to the federal government and the Religious Land Use and Institutionalized Persons Act, which applies to state governments, and these statutes impose strict scrutiny on any government restrictions encroaching on a citizen's religious freedom.

8. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: No. If confirmed I would follow and apply all binding Supreme Court and Third circuit precedent to the protections afforded under the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

9. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order, restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020), the Supreme Court enjoined enforcement of a New York state executive order limiting capacity in certain religious gatherings. The Court found that the religious entities had "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 66. The applicants demonstrated a likelihood of success on the merits of their claim,

that they would suffer irreparable harm if the injunction was not granted and that the granting of the injunction was not against the public interest. Applying "strict scrutiny," the Court further concluded that it was "hard to see how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* 66–67.

10. Please explain the Supreme Court's holding and rationale in *Tandon v. Newsom*.

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for a preliminary injunction pending appeal on the issue of whether restrictions on at-home religious gatherings imposed by California were constitutional. The Court concluded that the California restrictions did not satisfy the strict scrutiny standard because the government regulation was not neutral or narrowly tailored. The California restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297.

11. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

12. Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's violated the First Amendment when it issued a cease-and-desist order against an owner of a public accommodation, Masterpiece Cakeshop, a privately owned bakery that refused to make a wedding cake for a same-sex couple. The Supreme Court held that owners of a public accommodations can refuse certain services based on First Amendment claims of free speech and free exercise of religion and be granted an exemption from the law ensuring non-discrimination in public accommodations by refusing to provide a custom wedding cake to a gay couple.

13. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

Response: The Supreme Court has held that an individual's religious belief is protected under the First Amendment regardless of whether it comports with the tenets of a religious organization so long as the religious belief is sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834–35 (1989); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

a. Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?

Response: In *Frazee v. Illinois Department of Employment Security, et al.*,

489 U.S. 829, 834 (1989), the Supreme Court determined that individuals are entitled to invoke First Amendment protections for "sincerely held religious beliefs."

b. Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?

Response: Please see my response to Question 13a.

c. Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?

Response: As a district court judge nominee, it would be inappropriate for me to comment on what is or is not the official position of any religion.

14. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court applied the "ministerial exception" to preclude two teachers' discrimination claims against religious schools under various federal statutes. The Court found that the exception applies where the employees perform "vital religious duties," including "[e]ducating and forming students in the [religious institution's] faith." *Id.* at 2066.

15. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court considered the City of Philadelphia's decision not to refer foster children to Catholic Social Services (CSS) unless CSS agreed to certify same-sex couples as foster parents. The Court determined that the City's nondiscrimination provision in Philadelphia's contract, violated the Free Exercise Clause of the First Amendment. The Court also held that because the city offered "no compelling reason why it has a particular interest in denying an exception to CSS," its decision did not satisfy strict scrutiny and violated the First Amendment. *Id.* at 1882.

16. Explain your understanding of Justice Gorsuch's concurrence in the Supreme Court's decision to grant certiorari and vacate the lower court'sdecision in *Mast v. Fillmore County*.

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), members of the Swartzentruber Amish community claimed that compliance with a county ordinance that required they install a septic system impinged on their religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act. The Supreme Court remanded to the Court of Appeals of Minnesota for consideration in light of its decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In his concurrence, Justice Gorsuch pointed out that the government must establish its interest with specificity. Secondly, the county and lower courts must consider the exemptions the state gives to other groups. Third, the strict scrutiny standard should be applied, and the governmental interest must be compelling.

17. In 2010, your firm lost a bid for a contract of legal services to a state agency. You protested that bid on multiple grounds. Most concerning to me, you protested the bid on the grounds that the successful firm was a "two-person, all-male, Caucasian firm." In denying your bid protest, the state agency rejected your allegation, stating instead that the successful firm had four attorneys—two female—and neither of the named partners of the firm were Caucasian. But regardless of that, the agency told you that race and gender had no place in their decisional criteria.

a. Did you conduct any inquiry into the demographic makeup of the successful firm prior to alleging that it was an all-male, white firm?

Response: I do not recall.

b. Even if your claim was true—which it wasn't—what made you believe that allegation was relevant under the state agency's limited selection criteria?

c. In that same failed bid protest, you argued that the state agency improperlyrelied on comments from the Administrative Office of the Courts, the bodythat created the program over which you placed your bid. That office toldthe agency, "Evelyn Padin is frequently late for appearances and has had cases dismissed for failure to appear." Do you believe that the skin color of the competing bidder's firm was more relevant to the final determinationthan your professional reputation for timeliness?

Response as to subparts b and c: A bid was submitted to the New Jersey Housing and Mortgage Finance Agency by my firm to handle foreclosure matters. I subsequently became aware that an anonymous

court staffer had made ungrounded and baseless comments which I subsequently addressed with the presiding judge. I later received an apology from the court regarding this comment. I do not have any recollection of protesting this bid. I have consistently handled all matters in a professional and appropriate manner. I have zealously represented my clients and appeared for all court hearings. Please further note that I was awarded the Professional Attorney of the Year award from the New Jersey State Bar Association in 2019. If confirmed as a district court judge, I would be bound by the canons of judicial conduct to uphold the integrity and independence of the judiciary. I will impartially apply the law to the legal disputes that arise before me and consider any matters alleging discrimination on an individualized basis consistent with Supreme Court and Third Circuit authority. Racial discrimination has no place in our society or in any court and if I am fortunate enough to be nominated, I will strive to ensure that every litigant who comes before me is treated fairly and impartially and to deliver equal justice under the law.

18. Does the fair adjudication of a case depend on whether or not the judge looks like the defendant? What does the fair adjudication of a case rely on?

Response: No. The fair adjudication relies on the fair application of the controlling statute or Constitutional authority, the legal positions presented by the parties and the application of binding Supreme Court and Third Circuit precedent.

19. Is a judge able to treat a defendant that does not share their skin color, or someother immutable characteristic, fairly? Would you be able to treat a defendantthat does not look like you fairly?

Response: Yes.

20. Would it appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;
b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;

c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or

d. Meritocracy or related values such as work ethic are racist or sexist?

Response to all subparts: No. I am not aware of what role, if any, the judges of

the District Court of New Jersey would play in the training program for court employees.

21. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: Yes. As a district court judicial nominee, I am not familiar with the training program implemented for court staff. I will assist and support staff with training that is in compliance with federal law.

22. Is the criminal justice system systemically racist?

Response: Whether or not the criminal justice system is systemically racist is a question within the purview of policy makers. If confirmed as a district court judge, and a case of discrimination based on race comes before me, I would apply Supreme Court and Third Circuit precedent to the facts of the case in a fair and impartial manner.

23. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from commenting on a pending or impending matter that may come before me if I am confirmed as a district court judge. If confirmed and this issue were to be presented in a case before me, I would faithfully apply Supreme Court and Third Circuit precedent.

24. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease,the number of justices on the U.S. Supreme Court? Please explain.

Response: The size of the Supreme Court is a question within the purview of policy makers. If confirmed as a district court judge, I am bound by the Supreme Court's precedent regardless of its size.

25. Is the ability to own a firearm a personal civil right?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." Subsequently, the Supreme Court held in *McDonald v. City of Chicago,* 561 U.S. 742 (2010), that the right to bear arms was enforceable against the states.

26. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the

Constitution?

Response: I am not aware of any Supreme Court or Third Circuit precedent thatholds that the right to own a firearm receives less protection than other individual rights enumerated in the Constitution.

27. Does the right to own a firearm receive less protection than the right to voteunder the Constitution?

Response: I am not aware of any United States Supreme Court or Third Circuit precedent that holds that the right to own a firearm receives less protection than the right to vote under the Constitution.

28. Is it appropriate for the executive under the Constitution to refuse to enforcea law, absent constitutional concerns? Please explain.

Response: Article II, § 3, of the Constitution, provides that the President "shall take Care that the Laws be faithfully executed." As a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed as a district court judge and presented with a case that challenges the executive's refusal to enforce a law, I would apply Supreme Court precedent and Third Circuit precedent to the relevant facts of the case before me

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29. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: The Supreme Court has found that "a substantive rule" is one that "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). The issue of what administrative conduct falls into the definition of substantive rulemaking does not appear to be well settled. The distinction between an act of "prosecutorial discretion" and that of a substantive administrative rule change is a matter currently pending in federal courts and Canon 3(A)(6) of the Codeof Conduct for United States Judges constrains me from commenting on a matter that may come before me if I am confirmed as a district court judge.

30. Does the President have the authority to abolish the death penalty?

Response: No. The death penalty is established by statute, *see* 18 U.S.C. § 3591, and it would take an act of Congress to repeal the statute.

31. Explain the U.S. Supreme Court's holding on the application to vacate stayin Alabama *Association of Realtors v. HHS*.

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated an eviction stay of a judgment declaring that a nationwide COVID-related eviction moratorium mandated by the Centers for Disease Control and Prevention (CDC) was unlawful. The Court determined that the statute on which the CDC relied did not grant the CDC authority to impose the moratorium. The court found that it "strains credibility to believe that this statute grants the CDC the sweeping authority it asserts." *Id.*

32. Explain the New Jersey Supreme Court's holding and reasoning in *State v.Shack*.

a. You have previously stated that *State v. Shack* allows the government to enter into "a private individual owner's premises" for safety inspections "because the overriding concern was always what is best for the public." What did you mean by this statement?

Response: The New Jersey Supreme Court held in *State v. Shack*, 58 N.J. 297 (1971), that state sponsored charitable groups cannot be charged with trespass in entering privately owned property when they are supplying government aid to migrant workers. Under New Jersey State law, the ownership of real property does not include the right to bar access to government services available to migrant workers. Title to real property does not include control over the destiny of people. According to *Shack*, a person's right to property is not absolute. Private or public necessity may justify entering property such as in this case for health and legal services. Government has the right to enter private dwellings for safety fire inspections and housing code enforcement. The New Jersey Supreme Court further elaborated by stating that Congressional funding was available for seasonal farmworkers and their families who needed day care for their children, education, health services, improved housing, and sanitation.

b. What limiting principles constrain the government's ability to enter onto private property?

Response: The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." If I am fortunate enough to be confirmed, I will apply the Constitution, and United States Supreme Court and Third Circuit precedent

c. What branch of the federal government decides what is best for the public?

Response: The executive branch of government enforces the law, the legislative branch of government creates the law, and the role of the judiciary is to determine "what the law is" as set forth in *Marbury v. Madison,* 5 U.S. 137,177 (1803). As a judicial nominee it would not be appropriate for me to comment on what branch of government decides what is best for the public.

Senator Josh Hawley
Questions for the
Record

Evelyn Padin
Nominee, U.S. District Court for the District of New Jersey

1. **As President of the New Jersey State Bar Association, you said, "we supported a measure to give prisoners, paroles and people serving probation the right to vote. Right now, one can only vote in New Jersey after they have served their full sentence. This bill would allow them and those still in prison to vote."**

   a. **Do you stand by this statement today?**

   b. **Do you believe convicted criminals should be able to vote to release themselves from prison?**

   Response: The New Jersey State Bar Association is a professional organization comprised of 18,000 attorneys. The position taken in 2019 was the official position of the New Jersey State Bar. The Board of Trustees is the governing body of the New Jersey State Bar Association, and all policy positions are voted upon by the Board. As a nominee, it is generally inappropriate for me to comment on whether I believe that convicted criminals should be able to vote. If any similar issue presents itself in the future, I will apply the law to the facts of the case and follow Supreme Court and Third circuit precedent without consideration of my personal views.

2. **In a 2019 address, you stated, "It matters in the fair adjudication of the cases that come to our courts —that a person from diverse background can see diverse Judges who look like them. Those who come before the court will know that they will treated fairly by one of their own." Do you believe that Americans cannot expect judges of different races or ethnicities to give them a fair hearing?**

   Response: No. If I am confirmed as a district court judge, I will neutrally apply the law, carefully listen to all issues raised by the parties and follow Supreme Court and Third Circuit precedent.

3. **In 2010, you submitted a contracting bid to the New Jersey Housing and Mortgage Finance Agency. Your bid was rejected. One of the stated reasons was that court staff had said that you are "frequently late for appearances and have had cases dismissed for failure to appear. What did you learn from this experience, and what adjustments have you made?**

   Response: A bid was submitted to the New Jersey Housing and Mortgage Finance Agency by my firm to handle foreclosure matters. I subsequently became aware

that an anonymous court staffer had made ungrounded and baseless comments which I subsequently addressed with the presiding judge. I later received an apology from the court regarding this comment. I have consistently handled all matters in an appropriate manner. I have zealously represented my clients and appeared for all court hearings. Please further note that I was awarded the Professional Attorney of the Year award from the New Jersey State Bar Association in 2019. If confirmed as a district court judge, I would be bound by the canons of judicial conduct upholding the integrity and independence of the judiciary.

4. Justice Marshall famously described his philosophy as "You do what you think isright and let the law catch up."

a. Do you agree with that philosophy?

Response: No. It is a judge's duty and responsibility to faithfully adhere to the law regardless of whether he likes the outcome. If confirmed as a district court judge, I would take an oath requiring me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. A judge's personal views and values should not have a role in his decision making.

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

Response: Please see my response to Question 4(a).

5. What is the standard for each kind of abstention in the court to which you have been nominated?

Response: Abstention is a doctrine where courts may or in some cases must refuse to hear a case if hearing the matter would potentially intrude upon the power of another court. There are several grounds for abstention that are recognized in the Third Circuit and the district court of New Jersey.

The *Younger* abstention doctrine precludes a federal court from enjoining or otherwise interfering with pending state judicial proceedings absent extraordinary circumstances. Y*ounger v. Harris,* 401 U.S. 37, 91 (1971). In the Third Circuit the court applies the following *Younger* abstention analysis: (1) there is a pending state proceeding, (2) the state proceeding implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims. *Dixon v. Kuhn*, 257 F. App'x 553 (3d. Cir. 2007)

The Thibodaux abstention doctrine may occur when a federal court sitting in diversity jurisdiction chooses to allow a state to decide issues of state law that are of great public importance to that state, to the extent that a federal determination would

infringe on state sovereignty. *See generally Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Timasi v. Twp. of Long Beach,* 364 F. Supp. 3d 376 (D.N.J. 2019)

The *Colorado River* abstention doctrine raises the issue of whether a federal court should exercise its jurisdiction where there is a parallel state proceeding addressing similar claims. *Nationwide Mutual Fire Ins. Co. v. George V. Hamilton, Inc.,* 571 F.3d 299, 307 (3d Cir. 2009); *Spellman v. Express Dynamics,* LLC, 150 F. Supp. 3d 378 (D.N.J. 2015); Colorado *River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The framework in the Third Circuit for how to apply the *Colorado River* factors is set forth in a six-part test to ascertain whether "extraordinary circumstances" would justify abstention. The *Spellman* decision balanced these 6 factors equally and weighed in favor of exercising jurisdiction. The test is (1) which court first exercised jurisdiction over property *in rem* case, (2) "the inconvenience of a federal forum", (3) "the desirability of avoiding piecemeal litigation", (4) "the order in which jurisdiction was obtained", (5) "whether federal or state law controls", and (6) "whether the state court will adequately protect the interests of the parties".

Under the *Rooker-Feldman* abstention doctrine, federal courts should abstain from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.Corp.*, 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In the Third Circuit, the framework district courts should follow in determining whether to apply this doctrine is set forth in *Great W. Mining & Mineral Co. v. Fox Rothchild, LLP*, 615 F.3d 159 (3d. Cir. 2010). The *Rooker-Feldman doctrine* requires that 4 elements must be satisfied: "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state court judgment."

The *Brillhart/Wilton* abstention doctrine applies in those cases where a plaintiff seeks "purely declaratory relief" and there is a pending, parallel state-court action. *W. Coast Life Ins. Co. v. Harry Esses 2007-1 Ins. Trust, ex rel its Trustees,* 2010 WL 1644799 at *2 (D.N.J. 2010) (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942)); *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995).

6. Have you ever worked on a legal case or representation in which you opposed aparty's religious liberty claim?

Response: No.

a. If so, please describe the nature of the representation and the extent of yourinvolvement. Please also include citations or reference to the cases, as appropriate.

Response: Not Applicable.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: If confirmed as a district court judge, I would apply the original public meaning of the Constitution's text as required by Supreme Court and Third Circuit precedent. The Supreme Court has looked to original public meaning in interpreting certain constitutional provisions, such as the Second Amendment. In the case of *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court analyzed the text of the Second Amendment by relying on historical sources to determine the ordinary meaning at the time of enactment and considering how the amendment was interpreted immediately after enactment.

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Third Circuit precedent setting forth the methods of constitutional and statutory interpretation. If there is no binding precedent, I would begin my analysis by reviewing the text of the relevant provision and would construe that text according to its plain or ordinary meaning. If there was ambiguity in the text, I would look to any relevant canons of statutory construction. If these steps did not yield an answer, I would then look to legislative history, but only in an effort to resolve an ambiguity in the statutory language. According to the Supreme Court, legislative history should be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. See, e.g*., Milner v. Dep't of the Navy,* 562 U.S. 562, 574 (2011).

a. If so, do you treat all legislative history the same or do you believe somelegislative history is more probative of legislative intent than others?

Response: The Court has made clear that some types of legislative history are more probative of congressional intent than others. See, e.g., *Milner v. Dep't of the Navy,* 562 U.S. 562, 574 (2011)*; NLRB v. SW Gen., Inc.,* 137 S. Ct. 929 (2017). If confirmed as a district court judge, I would be bound by Supreme Court and Third Circuit precedent setting forth the proper use of legislative history for ascertaining legislative intent. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017); *Garcia v. United States*, 469 U.S. 70 (1984).

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: Never.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the

Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The standard for determining whether an execution protocol violates the Eighth Amendment is set forth in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). The Supreme Court noted that the Constitution affords a measurement of deference to a state's choice of execution procedures, and the Eight Amendment does not come into play unless the risk of pain associated with the State's method is substantial when compared to a known and available alternative. Under *Bucklew*, a prisoner must demonstrate the existence of an alternative method of execution that would significantly reduce a substantial risk of severe pain. Not only must this alternative method be feasible and readily implemented, but the record must also show that the state refused to adopt the alternative method without a legitimate penological reason. *Id* at 1125. I am not aware of a Third Circuit precedent applying this standard.

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes. Please see my response to Question 9.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: In *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that a habeas corpus petitioner does not have a substantive due process right to access DNA evidence for testing. This standard has been recognized and applied by the Third Circuit. *See Bonner v. Montgomery County*, 458 Fed. Appx. 135 (3d Cir. 2012).

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No. If confirmed, I will faithfully follow Supreme Court and Third Circuit precedent.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you havebeen nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: As to a First Amendment claim, the Supreme Court has determined that the Free Exercise Clause does not prohibit governments from burdening religious practices through generally applicable laws. If a law affecting the free exercise of religion is either not neutral or is not generally applicable the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge under the Free Exercise Clause. See *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 110 S. Ct. 1595, 1598-1606 (1990). For example, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for a preliminary injunction pending appeal on the issue of whether COVID-related restrictions on at-home religious gatherings imposed by California passed constitutional muster. The Court concluded that the restrictions did not satisfy strict scrutiny because they were not narrowly tailored, since the restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297. The same standard has been applied by the Third Circuit in *Tenafly Eruv Association,Inc. v. The Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (recognizing that the Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 13.

Additionally, state laws that discriminate against a religious group or religious belief are subject to strict scrutiny review, which requires that the state demonstrate (1) a compelling governmental interest in the regulation, and that (2) the regulation is narrowly tailored to meet the needs of the compelling interest. There must be no less restrictive alternative available to meet the compelling need identified. The Supreme Court has adjudicated numerous cases involving claims of state action discrimination against religious groups or beliefs. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), *Tandon v. Newson*, 141 S. Ct 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. (2020). If confirmed, I would faithfully follow Supreme Court and Third Circuit precedent, including those related to the Free Exercise Clause.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: In *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003), the court held that the plaintiffs' sincerely held views were sufficiently rooted in religion to merit First Amendment protection because they were not so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause. The Third Circuit relied on a prior United States Supreme Court case that held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection. *See Thomas v. Review Bd. of Ind. Employment Sec.*, 450 U.S. 707 (1981).

16. The Second Amendment provides that, "A well regulated Militia, being necessary tothe security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: The Second Amendment guarantees an individual the right to possess firearms independent of service in a state militia and to use firearms for traditionally lawful purposes, including self-defense within the home. In the *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms."

b. Have you ever issued a judicial opinion, order, or other decision adjudicatinga claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that,"The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: In *Lochner v. New York*, the Supreme Court held that New York's limitations on bakers' working hours were unconstitutional. 198 U.S. 45, 53-64 (1905). In subsequent cases, the Supreme Court abrogated *Lochner* and now applies a lesser standard of review when evaluating restrictions on economic activity. *See., e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-400 (1937); *Williamson v. Lee Optimal of Oklahoma, Inc*., 348 U.S. 483, 487-91 (1955).

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctlydecided? Why or why not?

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated its decision in *Lochner*. In a subsequent decision, the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). I would not apply the *Lochner* decision.

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

b. With those exceptions noted, do you commit to faithfully applying all otherSupreme Court precedents as decided?

Response to all subparts: I am not aware of a Supreme Court opinion that has not been formally overruled by the Supreme Court but that is no longer good law. If confirmed as a district court judge, I commit to faithfully applying all Supreme Court precedents as decided.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

b. If not, please explain why you disagree with Judge Learned Hand.

c. What, in your understanding, is in the minimum percentage of market sharefor a company to constitute a monopoly? Please provide a numerical answeror appropriate legal citation.

Response to all subparts: If confirmed as a district court judge for the District of New Jersey, I would be bound by all Supreme Court and Third Circuit precedent. If a case came before me presenting the issue of what percentage of market share was necessary to constitute a monopoly, I would look to binding Supreme Court and Third Circuit precedent and faithfully apply that precedent to the relevant facts of the case.

20. Please describe your understanding of the "federal common law."

Response: "Federal common law" is defined as "[t]he body of decisional law derived

from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between states and foreign relations, but excluding all cases governed by state law." *Black's Law Dictionary* (11th ed. 2019). *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: One of the pillars of our federal system of government is that states may provide greater protections than what is provided for in the U.S. Constitution, but all states are bound by the provisions of the U.S. Constitution. The scope of a state constitutional right is determined by the highest court of that state. Therefore, federal courts must defer to decisions of the highest court in the state when interpreting that state's constitution. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Noting that state courts may interpret their state constitutional provisions differently than the federal constitutional provisions, as a judge I would begin the analysis by researching the relevant state court precedent interpreting the state constitutional provision at issue.

a. Do you believe that identical texts should be interpreted identically?

Response: Please see my response to Question 21.

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: Please see my response to Question 21.

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided?

Response: As a judicial nominee, I am constrained by the Code of Conduct for United States Judges from commenting on any case that may come before me in the future. Notwithstanding the above, I am aware that prior judicial nominees have identified *Brown v. Board of Education* as a foundational case unlikely to be the subject of future controversy and have therefore commented on the case. Consistent with that approach, I believe it is appropriate for me to state my opinion that *Brown v. Board of Education,* 347 U.S. 483 (1954), was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

a. If so, what is the source of that authority?

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response to all subparts: If confirmed as a district court judge, I would be bound to follow Supreme Court and Third Circuit precedent regarding the propriety of issuing a nationwide injunction. Federal Rule of Civil Procedure 65 governs injunctions, which are an equitable remedy. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 129 S. Ct. 365, 376 (2008). The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 99 S. Ct. 2545, 2558 (1979). The Court has also observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. *See Lewis v. Casey*, 116 S. Ct. 2174, 2184 (1996).

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 23.

25. What is your understanding of the role of federalism in our constitutional system?

Response: "Federalism" is defined as the "legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." *Black's Law Dictionary* (11th ed. 2019). In *Gregory v. Ashcroft*, 501 U.S.452, 458 (1991), the Supreme Court noted that "a healthy balance of power between the States and the Federal Government . . . reduce[s] the risk of tyranny and abuse from either front." According to the Tenth Amendment of the U.S. Constitution, any right not specifically granted to the federal government is reserved to the states.

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Please see my response to Question 5.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: If confirmed as a district court judge and a case came before me presenting this issue, the answer to the question would turn on the particular facts and applicable law of the case before me. Based on those case-specific factors, there maybe situations where one form of relief is more appropriate than the other. If cases come before me which requires an assessment of the issue, I will follow the controlling Supreme Court and Third Circuit authority and analyze the relevant

factors based on the specific record before the court.

28. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted), the Supreme Court held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and are implicit in the concept of ordered liberty. These rights and liberties include, among others: (i) the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); (ii) to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); (iii) to direct the upbringing of one's children, *Meyer v.Nebraska,* 262 U.S. 390 (1923); (iv) to marital privacy and use of contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); (v) to terminate a pregnancy under certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); (vi) to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999). The Court has stated that the Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint. The Due Process Clause also provides heightened protection against government interference with certain fundamental rights and liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: The Supreme Court has long held that the First Amendment's Free Exercise Clause is a foundational and fundamental constitutional right. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940) the court considered whether a Connecticut statute requiring a permit from Jehovah's Witnesses to solicit the public for religious purposes violated the First Amendment Free Speech or Free Exercise Clause. The Supreme Court held that peaceful expression of beliefs is protected by the First Amendment from infringement by not only the federal government, but also by the state government through the Due Process Clause of the Fourteenth Amendment. Generally, where a law affecting the free exercise of religion is either not neutral or is not generally applicable, the lawmust be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). For example, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for apreliminary injunction pending appeal on the issue of whether COVID-related restrictions on at-home religious gatherings imposed by

California passed constitutional muster. The Court concluded that the restrictions did not satisfy strict scrutiny because they were not narrowly tailored, since the restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoorrestaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Free Exercise Clause protects both the freedom of worship, which includes the right to choose one's religion and attend those services, and the right to free exercise of religion, which includes the right to practice one's religion. *See Lee v. Weisman*, 505 U.S. 577, 591 (1992).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: A governmental action substantially burdens the free exercise of religion when it requires one to "engage in conduct that seriously violates his religious beliefs." In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014), the Supreme Court held that a substantial burden on the free exercise of religion exists where adhering to a religious belief result in the payment of a "very heavy" financial price for failing to comply with the challenged law.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see response to Question 29a above.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act (RFRA) applies to all federal law, but "permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). If confirmed, I would apply binding United States Supreme Court and Third Circuit precedent including *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

f. Have you ever issued a judicial opinion, order, or other decision adjudicatinga claim under the Religious Freedom Restoration Act, the Religious Land useand Institutionalized Person Act, the Establishment

Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with Justice Scalia's statement. However, a judge is duty bound to adhere to the law regardless of whether the judge agrees with the outcome in a fair and impartial manner without consideration of any personal views or opinions.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: In my nearly thirty years of practice, I have worked on a wide variety of matters. To the best of my recollection, I do not believe that I have ever taken the position in litigation or a publication that a federal or state statute was unconstitutional.

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response. To the best of my recollection, no.

33. Do you believe America is a systemically racist country?

Response: Whether or not the criminal justice system is systemically racist is a question within the purview of policy makers. If confirmed as a district court judge and a case of discrimination based on race comes before me, I would faithfully apply Supreme Court and Third Circuit precedent to the facts of the case in a fair and impartial manner.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: In my nearly thirty years of practice, I have worked on a wide variety of matters. I am unable to definitively answer this question yes or no because I do not recall a specific instance of taking a position in litigation that conflicted with my

personal views.

35. How did you handle the situation?

Response: Not Applicable.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes, I commit to applying the law fully and faithfully.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: There is no one Federalist Paper that has particularly shaped my view of the law.

38. Do you believe that an unborn child is a human being?

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from expressing my opinion on an issue implicating legal, ethical, religious, political and public policy questions such as this one. If confirmed as a district court judge and a case came before me presenting this issue, I would faithfully apply Supreme Court and Third Circuit precedent to the facts of the case in a fair and impartial manner.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: Yes. Sometime in 2018 I testified on behalf of the Hispanic Bar Association and the New Jersey State Bar Association before the New Jersey Assembly panel regarding a legislative bill seeking to reform attorney malpractice legislation. I do not have a record of this testimony. On another occasion, I was deposed regarding a lawsuit against my homeowners insurance carrier with regard to a contract dispute regarding damage my home sustained during Superstorm Sandy. I do not have a record of this deposition transcript.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade,* 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

41. Do you currently hold any shares in the following companies?

a. Apple?

Response: I own a small number of shares in Apple.

b. Amazon?

Response: I do not own any individual shares in Amazon.

c. Google?

Response: I do not own any individual shares in Google.

d. Facebook?

Response: I own a small number of shares in Facebook.

e. Twitter?

Response: I own a small number of shares in Twitter.

42. Have you ever authored or edited a brief that was filed in court without your nameon the brief?

Response: At this time, I cannot recall authoring or editing a brief that was filed in court without my name on the brief. Throughout my nearly thirty years as a practicing attorney, I have on occasion provided comments or feedback on briefs for colleagues, but I cannot recall any specific brief I did that was filed in court without my name on it.

a. If so, please identify those cases with appropriate citation.

Response: Not Applicable.

43. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: Not that I can recall.

44. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I understand I have a responsibility to answer all questions truthfully and honestly and have tried to do so to the best of my ability.

Questions for the Record for Evelyn Padin
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexualfavors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee
Questions for the Record
Evelyn Padin, Nominee to the District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

Response: If confirmed as a district court judge, I would "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. Consistent with that oath, I would approach each case in a neutral manner and would carefully consider the arguments presented by the parties, determine the applicable law considering controlling Supreme Court and Third Circuit precedent, and apply that law to the relevant facts in a fair and impartial manner.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: I would consult and be bound by Supreme Court and Third Circuit precedent setting forth the methods of statutory interpretation. I would follow the Third Circuit precedent. If there is no binding precedent, I would review the text of the relevant provision and would construe that text according to its plain or ordinary meaning. If there was ambiguity in the text, I would look to any relevant canons of statutory construction. If necessary, as a last resort, I would consider legislative history to the extent permitted by Supreme Court and Third Circuit precedent.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Third Circuit precedent and would look to that precedent to determine the most applicable framework within which to analyze the constitutional provision. I would apply the plain meaning of the constitutional provision. If there was ambiguity, I would look at other circuit court opinions to determine how they interpreted the constitutional provision. I would also look to the canons of construction.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The Supreme Court has indicated that text and original public meaning play an important role in interpreting the Constitution. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: I would begin the analysis with the statutory text. If the meaning of the text is plain, this resolves the relevant question and the analysis ends.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court has held that the "plain meaning" of a statute or constitutional provision refers to the "ordinary public meaning of its terms at the time of its enactment." See *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

6. What are the constitutional requirements for standing?

Response: In order for the court to consider a question of standing, there must be a controversy or case. There are three necessary elements for constitutional standing: (i) an "injury in fact"; (ii) a nexus between the injury and the challenged conduct; and (iii) the injury would likely be "redressed by a favorable decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: In *McCulloch v. State of Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized that Congress has powers beyond those enumerated in the Constitution. Congress, through the Necessary and Proper Clause has the authority to pass laws necessary for it to execute the powers conferred to Congress under the Constitution. In particular, the Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: I would first consult all Supreme Court and Third Circuit precedent to see if those courts have previously reviewed a similar law. The absence of a reference to a specific Constitutional enumerated power, however, is not dispositive of the question whether the challenged law is constitutional. Rather, the analysis must first look to whether the law falls within one of Congress's enumerated powers. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012); *McCulloch v. State of Maryland*, 17 U.S. 316 (1819).

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Supreme Court has recognized rights that are not specifically stated in the Constitution, such as the right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and are implicit in the concept of ordered liberty. These rights and liberties include, among others: (i) the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); (ii) to have children,

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); (iii) to direct the upbringing of one's children, *Meyer v.Nebraska,* 262 U.S. 390 (1923); (iv) to marital privacy and use of contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); and (v) the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: *Lochner* was a landmark decision where the Court ruled that bakers could work more 60 hours per week and that a New York state law was deemed unconstitutional as it interfered with the bakers' freedom of contract. Thereafter, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated its decision in *Lochner*. In a subsequent decision, the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), established certain reproductive rights. If confirmed as a district court judge, I would be bound to apply binding Supreme Court and Third Circuit precedent regarding these rights.

12. What are the limits on Congress's power under the Commerce Clause?

Response: In *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the Supreme Court noted that under the Commerce Clause, Congress has the power to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." Congress, however, does not have the power to "compel individuals to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Court has identified race, national origin, religion, and alienage as suspect classifications. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Supreme Court has stated that a "suspect class" is one "saddled with such disabilities or subjected to such a history of purposeful unequal treatment or relegated tosuch a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v Robinson*, 415 U.S. 361, 375 n. 14 (1974).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The Constitution establishes three branches of government. A mechanism of "checks and balances" exists separating the powers of government

among the legislative, executive, and judicial branches. This system of divided government protects against the concentration of power in one branch and thus serves to secure liberty by limiting the powers of each branch.

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would look to Supreme Court and Third Circuit precedent analyzing the relevant constitutional text to determine whether the assumed authority exceeded the constitutional authority of that branch.

16. What role should empathy play in a judge's consideration of a case?

Response: If confirmed as a district court judge, personal views and values would play no role in the adjudication of a case. I would faithfully and impartially apply Supreme Courtand Third Circuit precedent to the relevant facts of every case before me.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Neither outcome is desirable, and judges should strive to avoid these outcomes.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not studied this trend in Supreme Court practice and therefore do not have a basis upon which to form an opinion.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: Judicial review is the power of the judicial branch to review the actions of the other branches of government and determine whether such actions are constitutional. *See Marbury v. Madison*, 5 U.S. 137 (1803). "Judicial supremacy" refers to the principle that the Supreme Court is the final interpreter of the meaning of the Constitution and the law. Black's Law Dictionary defines it as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. United States Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Black's Law Dictionary* (11th ed. 2019).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials take an oath to uphold the Constitution and, by extension, to follow decisions of the federal judiciary when interpreting the Constitution.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: The role of the judiciary is to determine "what the law is" as set forth in *Marbury v. Madison,* 5 U.S. 137,177 (1803). The idea that courts have neither force nor will is an important reminder for judges that their role is not to make law, but to interpret the law.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If confirmed as a district court judge, I would be bound to apply controlling Supreme Court and Third Circuit precedent. If there is no controlling precedent that "speak[s] directly to the issue at hand," I would look to analogous precedent from the Supreme Court and Third Circuit and persuasive authority from other circuits. In addition, I would apply the methods of interpretation described in the response to Question 3.

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with this quote or the context in which it was made, nor do I have a personal definition of "equity." The quote appears to relate to the sort of issues within the purview of policy makers. However, Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." If confirmed as a district court judge, I would have no role in making policy.

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: According to Black's Law Dictionary, "equity" is defined as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). "Equality" is defined as "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Fourteenth Amendment refers to the "Equal Protection Clause of the laws." The word "equity" does not appear in the equal protection clause of the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism" nor have I studied it. If confirmed as a district court judge and a case of discrimination based on race comes before me, I would fairly and impartially apply Supreme Court and Third Circuit precedent to the facts of the case.

28. How do you define "critical race theory?"

Response: I do not have a personal definition of "critical race theory" nor have I studied it. Black's Law Dictionary defines that term as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Because I do not have a personal definition of either term, I am unable to distinguish the two terms. Please see my responses to Questions 27 and 28.

Senator Ben Sasse
Questions for the Record for Evelyn Padin
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No

3. **How would you describe your judicial philosophy?**

   Response: If confirmed as a district court judge, I would faithfully and impartially discharge and perform all duties incumbent upon me under the Constitution and laws of the United States. Consistent with that oath, I would approach each case in a neutral manner and would carefully consider the arguments presented by the parties, determine the applicable law considering controlling Supreme Court and Third Circuit precedent, and apply that law to the relevant facts in a fair and impartial manner.

4. **Would you describe yourself as an originalist?**

   Response: I do not subscribe to any specific school of constitutional interpretation.

5. **Would you describe yourself as a textualist?**

   Response: See answer to question 4.

6. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: The Constitution is an enduring document. It is the supreme law of the land. The meaning of the Constitution is interpreted by the Supreme Court and its terms may be amended over time through the process outlined in Article V. If I am confirmed as a District Court judge, I would interpret the Constitution in accordance with the established precedent of the Supreme Court and the Third Circuit.

7. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: Many of the Justices appointed to the Supreme Court are admirable and remarkable Justices. If I am confirmed, I will follow the precedent of the Supreme Court regardless of which Justice authored the decision.

8. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?**

   Response: The appellate court follows circuit precedent unless overruled by a Supreme Court decision or an en banc holding of the circuit court. The Federal Rule of Appellate Procedure 35(a) directs that, in determining when to grant *en banc* review, the court must decide whether: "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. 35(a)(1)-(2).

9. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?**

   Response: Please see my response to Question 8.

10. **What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?**

    Response: Precedent dictates that the interpretation of a statute begins with the text itself and ends with the text itself where that text is clear and unambiguous. If confirmed and I am presented with a statutory interpretation question, I will look to binding precedent to determine what role legislative history, general principles of justice, or any other factor should play when the statute is ambiguous.

11. **If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?**

    Response: Under 18 U.S.C. § 3553(a) federal court judge must determine the appropriate sentence for each defendant individually. If confirmed, I would be guided by the factors enumerated under 18 U.S.C. § 3553(a). Section 3553(a) instructs courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id. at* § 3553 (a)(6).

Questions from Senator Thom Tillis for Evelyn Padin
Nominee to be United States District Judge for the District of New Jersey

1. Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?

Response: Yes.

2. What is judicial activism? Do you consider judicial activism appropriate?

Response: The term "judicial activism" may have different meanings to different people. Black's Law Dictionary defines activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism, Black's Law Dictionary* (11th ed. 2019). "Judicial activism" is not appropriate, and a judge must impartially and objectively apply the law to the facts, following binding precedent of the Supreme Court and the Third Circuit.

3. Do you believe impartiality is an aspiration or an expectation for a judge?

Response: An expectation.

4. Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?

Response: No.

5. Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?

Response: Yes, there may be occasions where faithfully interpreting the law may result in an outcome that is at odds with a judge's personal views. The duty of a judge, however, is to apply the law dispassionately and impartially to the facts regardless of the outcome.

6. Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?

Response: No.

7. What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?

Response: If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Third Circuit precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) holding that individuals have the right to bear arms and that that the right to bear arms extends to the states.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone'sconstitutional rights?

Response: The Covid-19 pandemic did not close our government. Federal courts have safeguarded our constitutional rights during the pandemic. "Our Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). If confirmed as a district court judge and a case came before me presenting this question, I would consider Supreme Court and Third Circuit precedent such as *District of Columbia v. Heller*, 554 U.S. U.S. 570 (2008), as well as any other relevant constitutional and statutory provisions, and faithfully apply that law to the facts presented by the parties in the case.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: Under the qualified immunity doctrine, a government official is entitled to qualified immunity when they are performing discretionary functions. They are thus shielded from liability for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Clearly established means that at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. *Wesby*, 138 S. Ct. at 589. If confirmed as a district court judge, I would faithfully follow all binding Supreme Court and Third Circuit precedent related to the issue of qualified immunity.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split second decisions when protecting public safety?

Response: I respect all law enforcement officers and have family members who served honorably as detectives and as the Chief of Police with the Jersey City Police Department. If confirmed as a district court judge, my role would be to apply the qualified immunity doctrine faithfully as set forth in binding precedent from the Supreme Court and the Third Circuit.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my responses to Questions 9 and 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: In my nearly thirty years of experience in private practice, I do not recall working on a case involving patent law. The Supreme Court has examined patent eligibility in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l,* 573 U.S. 208 (2014). If I am

confirmed as a district court judge and a patent case came before me, I would carefully research the applicable law, including any binding Supreme Court and Third Circuit precedent, and faithfully and impartially apply that law to the relevant facts.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the

computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

g. ***BioTechCo*discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTechCo* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

i. ***Hanston Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

j. ***Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response to all subparts: If confirmed as a district court judge and presented with facts like any of the hypotheticals set forth above, I would faithfully apply any relevant precedent to the specific facts of the case. As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from elaborating further on how I would resolve any of the issues presented in these hypotheticals.

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 12.

15. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has

become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my nearly thirty years of experience as an attorney, I do not recall working on a case involving copyright law. If I am confirmed as a district court judge and a copyright case came before me, I would carefully research the applicable law, including any binding Supreme Court and Third Circuit precedent, and faithfully and impartially apply that law to the relevant facts.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: None.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: None.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: In my nearly thirty years of experience in private practice, I do not recall working on a case addressing free speech or intellectual property issues. If I am confirmed as a district court judge and a case involving these issues came before me, I would carefully research the applicable law, including any binding Supreme Court and Third Circuit precedent, and faithfully and impartially apply that law to the relevant facts.

16. The legislative history of the of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If I am confirmed as a district court judge, I would faithfully apply Supreme Court and Third Circuit precedent. In the absence of controlling

precedent, I would apply the ordinary and plain meaning of the relevant statutory text. If that text is ambiguous, I would consider the canons of statutory construction, as well as persuasive authority from other circuits. If necessary, I would consider as a last resort the legislative history to the extent permitted by Supreme Court and Third Circuit precedent.

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: When the court is faced with an interpretation contained in an agency letter or policy statement or enforcement guidelines it provides *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As such the deference afforded will be determined by the ability of the agency's interpretive "power to persuade". Advice and analysis from the expert federal agency such as the U.S. Copyright Office do not carry the force of law entitled to *Chevron* style deference. At most, such interpretations are "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a judicial nominee, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, I am constrained from commenting on a matter that could potentially come before me. If presented with similar facts, I would faithfully apply Supreme Court and Third Circuit precedent to the specific facts of the case.

17. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: If I am confirmed as a district court judge, I would faithfully apply the Digital Millennium Copyright Act as written and would be bound to apply controlling Supreme Court and Third Circuit precedent related to the Act. The Act must be interpreted according to the plain language of the text and in light of all precedent.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then current state of technology once that technological landscape has changed?

Response: Please see my response to Question 17a.

18. In some, judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: All litigants should be treated fairly by neutral jurists. The bedrock of our democracy relies on the notion of equal justice for all. Forum shopping should be discouraged. If confirmed, I would follow all Supreme Court and Third Circuit precedent regarding venue, forum non conveniens and personal jurisdiction questions.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: District court judges have a duty to follow Supreme Court and binding circuit court precedent. If confirmed as a district court judge, I would faithfully apply all binding precedent regarding issues of venue and would adhere to all local rules regarding the assignment of cases.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: As a district court nominee it is inappropriate for me to comment on the appropriate conduct of other judges. Please also see my response to Question 18b.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: I commit to following the Supreme Court and Third Circuit precedent in evaluating questions of "forum selling", "judge shopping", venue, forum non conveniens and jurisdiction. I will follow the Judicial Code of Conduct, Rules of Federal Civil Procedure and Local Rules of the New Jersey District Court. Please also see my response to Question 18b.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: As a judicial nominee, it would not be appropriate for me to comment on how the Federal Circuit should address this hypothetical. If confirmed as a district court judge, I would faithfully apply all binding precedent regarding issues of venue and would adhere to all local rules regarding the assignment of cases.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: Please see my response to Question 19a.

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

Response: The question of whether a particular type of litigation is overwhelmingly concentrated in just one or two judicial districts and what effect this would have on the administration of justice is a question within the purview of policy makers. I commit to follow binding precedent and evenhandedly administering justice. Please see also my response to Question 18b.

a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: Please see my response to Question 20.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 20.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?

Response: As a judicial nominee, it would not be appropriate for me to comment on the conduct of other judges.

b. Would five mandamus reversals be sufficient? Ten? Twenty?

Response: Please see my response to Question 21a.