Senator Chuck Grassley, Ranking Member
Questions for the Record
The Honorable Julie Rebecca Rubin
Judicial Nominee to the United States District Court for the District of Maryland

1. **Judge Rubin, according to the Circuit Court of Maryland's website, you oversaw portions of litigation that Wendy Devine brought against LeRoy Carhart. Ms. Devine brought a medical-malpractice suit against Dr. Carhart, alleging that he caused severe and long-term damage to her when he performed an abortion. According to the case docket, you set a jury trial for September 2017 and handled at least one status hearing. Other than setting the trial date and overseeing a status hearing, did you have any judicial or settlement role in this case? If so, what was your role?**

   Response: *Wendy Devine v. Leroy Carhart, Jr*., Case 42537V, was filed in the Circuit Court for Montgomery County, Maryland. I have only been a judge in the Circuit Court for Baltimore City; therefore, I did not preside over any proceeding related to this case. I believe Judge Ronald B. Rubin (ret.), who serves in Montgomery County, was likely the judge who presided over the portions of the case referred to in the question.

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

   Response: As far as I am aware, the term "super precedent" does not appear in any Supreme Court opinion. In general, it is inappropriate for a sitting judge or a judicial nominee to express an opinion regarding whether particular decisions of a court were rightly or wrongly decided. As a judge, I am sworn to uphold the law regardless of my personal opinions about whether particular decisions were rightly or wrongly decided. If I am confirmed as a judge of the United States District Court for the District of Maryland, I will apply all Supreme Court and Fourth Circuit precedent regardless of whether someone considers it "super precedent" or not.

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

   Response: In general, it is inappropriate for a sitting judge and a judicial nominee to express an opinion as to whether a Supreme Court opinion was rightly or wrongly decided. However, in certain rare cases where the passage of time, national consensus, and significant subsequent caselaw have established a decision as well beyond debate and not subject to serious question or revisitation, it can be acceptable for a judge to express such an opinion. Against this backdrop, I provide my substantive answers below:

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

Response: Yes, in my opinion.

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

Response: Yes, in my opinion.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

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

Response: Please see my answer to question 3, above.

4. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am unaware of the context of Judge Ketanji Brown Jackson's statement. I do not subscribe to any particular judicial philosophy or approach in reading the Constitution. If I am confirmed to serve as a judge on the United States District Court for the District of Maryland, I would be bound by the methods of constitutional interpretation that the Supreme Court and Fourth Circuit have employed for various constitutional provisions. For example, in the Second Amendment context, the Supreme Court has looked to the original public meaning of the Second Amendment. *District of Columbia v. Heller,* 554 U.S. 570 (2008).

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

   Response: No, not unless controlling Supreme Court or Fourth Circuit precedent calls for a court to do so.

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 tell you to reach."**

   Response: As a sitting judge since January 2013, I have faithfully applied the law to the facts of the cases that have come before me without regard to my personal values, beliefs or opinions as to the outcome of a case or the policies to be promoted by application of a given rule of law or controlling precedent. Were I confirmed to the District Court, I would continue to do so without exception.

7. **Is climate change real?**

   Response: Although I am not aware of a prevailing or generally accepted definition of "climate change" and do not subscribe to any particular meaning of the phrase as a non-scientist, I am generally aware that the subject of whether and/or how the climate is affected by human behaviors is a matter of scientific research and discussion. Were I confirmed to the District Court and a case presented issues relevant to the subject of "climate change," I would consider the facts and evidence presented, and apply controlling Supreme Court and Fourth Circuit precedent on the subject if same exists.

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

   Response: In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Supreme Court held that a state law forbidding instruction in school of a language other than English was unconstitutional under the Fourteenth Amendment due process clause, and did not bear a

rational relationship to the legitimate exercise of state police powers. The Court further held that parents have a Fourteenth Amendment due process right to engage instruction of their children in non-English languages.

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

   Response: Causation in the legal context requires application of a legal standard to a set of facts. In cases involving questions of human disease causation, whether a substance has caused a medical condition requires application of scientific evidence to the legal standard of causation. More specifically, whether a specific substance may cause cancer in humans is a general question of science. Whether a specific substance has caused a particular person to develop cancer would be based first upon the preliminary scientific principle that the specific substance at issue may or does cause cancer, and secondarily upon consideration of the facts relevant to that person's circumstances as to whether the cancer-causing substance in fact caused cancer to grow in that specific person. The degree of or weight of evidence required to satisfy the legal standard of causation for purposes of imposing liability for cancer causation is a question of law. Therefore, the question as posed requires consideration of both scientific and non-scientific evidence, as well as the legal standard of causation applicable in a given case.

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

    Response: Determination of when a fetus is viable is a question of medical science; when a fetus is viable has legal significance as fetal viability marks the earliest point when a state's interest in fetal life is legally sufficient to warrant restriction to abortion as a means to terminate pregnancy. The Supreme Court held in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that a woman has a Fourteenth Amendment due process right to terminate a pregnancy by abortion without undue government interference prior to fetal viability. After the point of fetal viability, the government may restrict abortion access provided the legal restrictions accommodate circumstances where pregnancy endangers the woman's life or health. The Court further held that fetal viability marks the earliest point at which a state's interest in fetal life is adequate to warrant government restriction to nontherapeutic abortion access. The Court described fetal viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman," which, at the time of *Roe v. Wade* was understood to occur at 28 weeks of pregnancy and at the time of *Casey* to fall in the 23 to 24 week period. *Roe v. Wade,* 410 U.S. 113, 160 (1973); *Casey*, 505 U.S. 833, 860 (1992). The Court acknowledged that "there may be some medical developments that affect the precise point of viability . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter." Against that backdrop, the Supreme Court's holding allows that developments in medical science may affect the "precise point of viability" and likewise, therefore, whether a challenged state restriction

to abortion services passes constitutional muster under the *Casey* fetal viability framework.

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

    Response: The question of when human life begins has been the subject of religious, scientific and philosophical discussion and debate since time immemorial. Further, the question of when human life begins figures prominently in pending litigation within our country's courts at the state and federal levels. As a sitting judge and a judicial nominee, therefore, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue, and, if so, what that belief or opinion is. If I am confirmed to the District Court, I will faithfully apply controlling Supreme Court and Fourth Circuit precedent to all cases that come before me bearing on this and all other issues.

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

    Response: Whether gender transition has legal significance with respect to sex-based or gender-based legal categorization is the subject of ongoing legal and political debate. As a sitting judge and a judicial nominee, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue, and, if so, what that belief or opinion is. If I am confirmed to the District Court, I will faithfully apply controlling Supreme Court and Fourth Circuit precedent to all cases that come before me bearing on this and all other issues.

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

    Response: I am unsure whether this question inquires whether I believe it is right or wrong to threaten removal of a Supreme Court justice in accordance with the Constitution's mandate that justices shall hold their offices during "good Behaviour" or whether it is right or wrong to threaten personal harm to a Supreme Court justice, or something else. I believe it is wrong to make unlawful threats of personal harm to any individual, including Supreme Court justices. Absent a specific factual context, I do not have a personal opinion as to whether it is right or wrong to threaten a public official, including a Supreme Court justice, with removal from office. I am, however, mindful that citizens have a First Amendment right to express personal opinions as to a Supreme Court justice within the parameters of lawful government speech regulation, and that the Constitution provides that the life tenure of Supreme Court justices is not absolute.

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

    Response: Due to the broad nature of this question and absent a provided definition of "senior officials," it is difficult for me to answer the question as posed. I believe the President's authority to remove senior officials generally would be the subject of

constitutional and/or statutory provisions on the subject of removal authority and the scope or duration of a senior official's position and tenure, as well as any case law interpreting application of same.

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: How best to allocate resources for public safety like police departments and law enforcement is the subject of ongoing policy and political debate at local and national scales. As a sitting judge and a judicial nominee, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue of this policy question, and, if so, what that belief or opinion is.

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

    Response: How best to allocate funding for public safety and other services is the subject of ongoing policy and political debate at local and national scales. As a sitting judge and a judicial nominee, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue of this policy question, and, if so, what that belief or opinion is.

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: As a sitting judge, my role is to carefully consider the facts and evidence of a case and to identify and apply the relevant law to resolve the case. If I am confirmed to the District Court and called upon to consider a case of compassionate release relevant to the COVID-19 pandemic, I will consider the evidence and argument of counsel (or the petitioner, if self-represented), and apply controlling law, including all relevant enumerated factors for consideration, including public safety, in determining whether to deny or grant the requested release.

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

    Response: If I were confirmed to the District Court, I would follow the Supreme Court holding of *District of Columbia v. Heller*, 554 U.S. 570 (2008), as well as precedent of the Fourth Circuit Court of Appeals.

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 controlling precedent of the Supreme Court or the Fourth Circuit that answers this question as posed. I can assure you that if a case came before me that presented this question, I would carefully research any binding precedent relevant to the question and apply it to the facts of the case.

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

    Response: The issue of provision of medical care to children born alive following attempted abortion is the subject of policy and political debate, as well as the subject of recently proposed legislation. Further, the constitutionality of state regulation of access to abortion, which bears upon the fetal viability/undue burden standard articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is the subject of current litigation at the state and federal levels. As a sitting judge and a judicial nominee, it would be inappropriate for me to express whether I have a personal opinion on the question posed, and, if so, what that opinion is. If I am confirmed to the District Court, I will faithfully apply controlling Supreme Court and Fourth Circuit precedent to all cases that come before me bearing on this and all other issues.

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: The Religious Freedom Restoration Act ("RFRA") prohibits the "Government from substantially burdening a person's exercise of religion, even if that burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." According to Fourth Circuit precedent (citing the Supreme Court), a substantial burden means "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 99–100 (4th Cir. 2013) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 718 (1981)). As an initial matter, a plaintiff bears the burden of proving that the challenged law or policy imposes the requisite substantial burden. If the challenged law or policy does implicate a plaintiff's religious exercise per the substantial burden test, the court will impose a strict scrutiny standard of review to determine whether the law or policy is constitutional, *i.e.,* the government will bear the burden to demonstrate that the challenged law or policy promotes a compelling state interest and that the law or

policy is narrowly drawn and poses the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014).

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

Response: In *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014), the Supreme Court did not articulate an express test to determine whether a burden is "substantial" within the RFRA context. However, as set forth in my answer to 21(a), above, the Fourth Circuit, relying on Supreme Court precedent, has held that a plaintiff bears the initial burden to demonstrate a substantial burden that the challenged government law poses "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 99–100 (4th Cir. 2013) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 718 (1981)).

22. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited 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 do not believe this is an appropriate approach for a federal district judge to take. District Court judges, as Article III trial judges, are duty bound to hear all cases and controversies properly brought before the court.

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

Response: The subject of whether a litigant or party deserves representation is a question of policy. The canons of judicial conduct to which I am bound as a sitting state trial judge, and to which I would be bound were I confirmed to the District Court, require that I treat all who come before me equally under the law, and with dignity and respect irrespective of their identity. As a judge I have faithfully abided these canons and would continue to do so were I confirmed as a District Court judge.

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

Response: I understand "Blaine Amendments" to refer to state constitutional provisions or laws prohibiting provision or allocation of state funds to parochial or religious schools. The Supreme Court held in *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020), that the state's "no aid" law, which was enacted to enhance separation of church and state beyond that provided by federal law, violated the Free Exercise guarantee of the First Amendment by barring students of religious schools from contention for an award of state-funded educational scholarships. The Court held that the law could not survive strict scrutiny analysis because Montana's interest in enhancing

separation of church and state could not be compelling if it by necessity impaired an individual's right to the free exercise of his or her religion protected by the First Amendment.

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

    Response: Yes. Under the First Amendment, citizens have the right to petition the government to redress grievances.

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

    Response: The Supreme Court's first articulation of a definition of "fighting words" in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" has evolved over the course of time to fairly exclude the requirement or consideration of whether the words at issue "inflict injury." In *Terminiello v. City of Chicago*, 337 U.S. 1 (1944), the Supreme Court held that the government may only criminally prosecute as a "fighting word" speech "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Further in *Gooding v. Wilson,* the Supreme Court, held that *Chaplinsky's* limiting construction of speech unprotected based on its "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" is to be read into any state law that criminalizes language as abusive. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Supreme Court held that "fighting words" is narrowly limited to "direct personal insults" directed to a person actually present at the time the words are uttered and which would likely invoke an immediate, violent response. The Supreme Court further cautioned in *Johnson* that the "fighting words" exception to protected speech must be evaluated based on the specific factual context presented by each case.

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

    Response: In 2003, the Supreme Court in *Virginia v. Black,* 538 U.S. 343 (2003), reaffirmed its 1969 holding in *Watts v. United States,* 394 U.S. 705 (1969), that a state may constitutionally prohibit or ban speech amounting to a "true threat," which is speech made to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" but not to include mere political hyperbole. Further whether the speaker intends to carry out the threat is not determinative, but rather whether the hearer experiences a fear of violence or execution of the threat. The unprotected nature of "true threat" speech is to protect the hearer from the injury caused by fear of violence and the like.

28. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice 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?**

       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 the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice 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?**

       Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, 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 strategic guidance 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 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.**

       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'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.

31. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund 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?**

       Response: No.

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

       Response: No.

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

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 any services, 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 Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/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-Quint and/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 to your nomination and the interviews in which you participated).**

Response: In December 7, 2020, I submitted to the offices of Senator Benjamin Cardin and Senator Christopher Van Hollen a Questionnaire for consideration to fill a vacancy on the United States District Court for the District of Maryland. I was thereafter contacted by Senator Cardin's staff to arrange an interview by the Senators' selection committee, which took place on December 21, 2020. Thereafter, I was contacted by Senator Cardin's staff to arrange an interview with Senator Cardin and Senator Van Hollen, which took place on March 9, 2021. Following that interview, I was contacted by Senator Cardin on July 28, 2021. Senator Cardin advised that I was being considered for nomination. Later that day, I was contacted by the White House Counsel's Office to schedule an interview with attorneys from that Office, which took place on August 2, 2021. From August 5, 2021 until submission of my nomination to the Senate, I was in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office instructing me regarding steps and requirements regarding

the vetting process and the ongoing consideration of my potential nomination. 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 directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

    Response: No.

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

    Response: No.

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? If so, what was the nature of those discussions? Please include in this answer anyone associated 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: No.

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

    Response: No.

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

    Response: No.

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

    Response: I do not have or know the precise dates of all communications with White House staff or the Justice Department regarding my nomination. I have been in routine contact with both throughout the vetting process and in preparation for my hearing before the Senate Judiciary Committee.

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

Response: I received these questions by email from the Senate Judiciary Committee by way of the Office of Legal Policy on the evening of December 22, 2021. I immediately took steps to research fulsome, appropriate answers over the next several days. I shared them with the Office of Legal Policy, received and considered feedback by members of that Office, and finalized my answers for submission.

Senator Marsha Blackburn
Questions for the Record to Judge Julie Rebecca Rubin
Nominee for the District of Maryland

1. **On the radio show you hosted called Midday on the Law, you commented on two cases in Maryland that dealt with pregnancy centers and free speech. Montgomery County and the City of Baltimore both had ordinances that required pregnancy counseling centers to post signs saying that they did not provide abortion services, and the Montgomery Country ordinance also required the centers to urge women to consult with licensed healthcare providers. The government in both cases argued that it was regulating commercial speech and that strict scrutiny did not apply. Baltimore ultimately lost this lawsuit, but you said that you agreed with the dissenting judge's argument. Can you please explain the proper analysis in this case in light of the Supreme Court's decision in *NIFLA v. Becerra*?**

   Response: The public radio program that is the subject of the question took place approximately a decade ago and prior to the start of my service as a judge, which began in January 2013. I appeared on the public radio program in my capacity as a private citizen and private attorney to engage in discussion of current matters of listener public interest in the law. It is difficult to answer this question, because I do not recall the specific purpose(s) of the regulations at issue, the specific bases of the challenges to the lawfulness of the regulations, or the date of the program; nor do I recall the legal analysis on which the court's ruling was based.

   In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the district court originally denied an injunction sought by plaintiffs who wanted to enjoin enforcement of a California law requiring reproductive healthcare clinics to notify patients regarding availability of free and low-cost publicly funded reproductive healthcare and family planning services, including abortion, and, in the case of unlicensed clinics, to advise patients of their unlicensed status. The Ninth Circuit upheld the district court's ruling. In reversing the Ninth Circuit, the Supreme Court held that the petitioners (two pro-life pregnancy centers) had satisfied the preliminary injunction element of likelihood of success on the merits. In so holding, the Supreme Court found that the California law at issue imposed a content-based regulation of speech that fell outside of the two exceptions where lesser protection may be afforded "professional" speech (*i.e*., factual, non-controversial speech; and where the regulation incidentally implicates speech without more). The Supreme Court also held that the California law would not survive even intermediate judicial scrutiny on the basis that the government's proposed government interest of ensuring citizens access to reproductive health services regardless of income was not adequately served by the proposed statutorily required notice to patients regarding the availability of free or low-cost reproductive healthcare. If confirmed to the United States District Court for the District of Maryland, I would be bound to follow *National Institute of Family and Life Advocates v. Becerra,* as I would be bound to follow all Supreme Court and Fourth Circuit precedent.

2. **On the August 9, 2012, episode of your radio show, you discussed voter-ID laws that had recently passed in Texas. You expressed opposition to voter-ID laws and said that you were "highly suspicious" of the motivations behind these laws. What did you mean by that?**

Response: The public radio program that is the subject of the question took place nearly a decade ago and prior to the start of my service as a judge, which began in January 2013. I appeared on the public radio program in my capacity as a private citizen and private attorney to engage in discussion of current matters of listener public interest in the law. During the course of the radio program discussion, I relayed that the recently enacted Texas voter ID law had been the subject of legal challenge under the National Voter Registration Act and that five of its provisions had been struck down as unlawful violations of the NVRA, including restrictions on how citizens could register to vote and requirements pertaining to who may register citizens to vote and where. In response to that, the radio program host inquired, "So how suspicious should we be about the motivations of all these laws?" I responded: "Well, personally, highly suspicious, but I'm a lawyer, so I'm always suspicious." When I said I believe citizens and program listeners should be suspicious of the motivations behind what are generally described as voter ID laws, I meant that individual constitutional rights so deeply rooted in our nation's history like the right to vote should be, and are, entitled to legal protection from government regulation that does not satisfy constitutional judicial scrutiny. I also meant that citizens should endeavor to be aware of their individual constitutional rights so that, where appropriate, steps may be taken to ensure their protection. The Fifth Circuit Court of Appeals engaged in a careful legal analysis of the Texas law's constitutionality and, in so doing, struck down five of its features as violative of the National Voter Registration Act. It was in the vein of this legal context I answered the radio host's questions. It was not a commentary on the moral or ethical motivations of any particular legislator or legislation, but rather on the importance and sanctity of the Constitution.

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

Questions for the Record for Julie Rebecca Rubin, Nominee for the District Court for the District of Maryland

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. **After about eight years on the bench, how would you characterize your judicial philosophy thus far? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

   Response: As a sitting trial judge since January 2013, my judicial philosophy has been grounded in approaching every case with a strong work ethic, an open mind to listen and learn, and to conduct myself and my courtroom with professionalism. My principles of professionalism as a judge are rooted in the particular objectives of fairness in fact and in perception. This requires that I conduct myself to ensure all parties and lawyers are treated fairly and with respect, that I listen actively and openly to testimony and oral

argument, that I take the time and devote my energy to consider carefully the evidence of each case and to identify and apply the relevant law. When a case requires a written memorandum opinion, I am particularly mindful of balancing promptness with thoroughness and quality. Having been a practicing litigator for fifteen years prior to my service as a judge, I very much appreciate the frustration that can attend waiting for judges to rule and the need for opinions that provide a clear and complete explanation of the court's ruling and its bases. I take great pride in making every effort to ensure that all parties, especially non-prevailing parties, feel confident that the judicial process and the outcome of their case were rooted in fairness and the highest degree of workmanship. Although I consider myself a lifelong student of the law and Supreme Court precedent, I am unaware of the personal judicial philosophy of any Supreme Court justice and do not identify any particular Supreme Court justice as analogous or reflective of my judicial philosophy. Inasmuch as my judicial philosophy encompasses and is founded upon core principles espoused by judicial canons and the role of courts in our society, I imagine my judicial philosophy is reflected in the manner in which all Supreme Court justices approach their service.

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

Response: Originalism is an interpretive method of reading and understanding legal texts, including the Constitution, based on the principle that a text's meaning is found in how it was understood or intended to be understood at the time of its writing. Were I confirmed to the District Court, I would faithfully apply Supreme Court and Fourth Circuit precedent in all cases, whether such application calls for construction of the original meaning of the Constitution or pursuant to a different approach implemented by the Supreme Court or the Fourth Circuit.

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

Response: Living constitutionalism is an interpretive method of reading and understanding legal texts, including the Constitution, based on the principle that legal texts ought to be viewed as having a dynamic meaning that evolves and adapts to new circumstances, changes in society's needs and widely held values and beliefs. Were I confirmed to the District Court, I would faithfully apply Supreme Court and Fourth Circuit precedent in all cases, whether such application calls for construction of the original meaning of the Constitution or pursuant to a different approach implemented by the Supreme Court or the Fourth Circuit.

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: Possibly, but not necessarily. I would begin with Supreme Court and Fourth Circuit precedent. Together, these Courts have issued precedent covering most constitutional provisions that tend to be the subject of litigation. If, as the question poses, binding precedent from the Supreme Court or the Fourth Circuit did not exist, I would look for Supreme Court and Fourth Circuit precedent in analogous cases, as well as persuasive precedent from other circuit courts of appeal that might guide my interpretational approach. I would also seek out Supreme Court and Fourth Circuit precedent on the particular section or amendment of the Constitution to determine what method of interpretation has previously been implemented by these higher courts. For example, if the Supreme Court had previously utilized originalism to construe that portion of the Constitution according to its original public meaning, as in the case of the Second Amendment, I would utilize the same approach.

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: Supreme Court precedent demonstrates that the Constitution shall be read, considered and applied depending on the nature of the issue raised by a given set of circumstances. For example, in considering the meaning and application of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted and applied the Constitution according to its original public meaning. Were I confirmed to the District Court, I would faithfully apply Supreme Court and Fourth Circuit precedent in all cases.

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

Response: The Constitution is an enduring document that has met the changing circumstances and needs of our country and its citizens since its drafting, and may only be changed through the process set forth in Article V. The Supreme Court has over time applied the Constitution's protections to circumstances not in existence at the time of the framers, but in doing so has endeavored to remain faithful to the principles embodied in the Constitution as enacted. *See, e.g., Carpenter v. United States*, 138 S. Ct. 2206 (2018) (concluding that the core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials," and applying that core principle to search of cellular service location information); *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786 (2011) (applying First Amendment free speech and press principles to laws regulating violent imagery in video games).

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: The Religious Freedom Restoration Act ("RFRA") does not apply to states or localities; rather, it applies only to federal government action. Where the RFRA does apply, it prohibits the "Government from substantially burdening a person's exercise of

religion, even if that burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." According to Fourth Circuit precedent (citing the Supreme Court), a substantial burden means "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 99–100 (4th Cir. 2013) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 718 (1981)). As an initial matter, a plaintiff bears the burden of proving that the challenged law or policy imposes the requisite substantial burden. If the challenged law or policy does implicate a plaintiff's religious exercise per the substantial burden test, the court will impose a strict scrutiny standard of review to determine whether the law or policy is constitutional, *i.e.,* the government will bear the burden to demonstrate that the challenged law or policy promotes a compelling state interest and that the law or policy is narrowly drawn and poses the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014); *see also Tandon v. Newsom,* 141 S. Ct. 1294 (2021) (applying strict scrutiny standard of review in non-RFRA case pertaining to state action bearing upon Free Exercise Clause of the First Amendment).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* a non-RFRA case bearing on Free Exercise-related action by a locality, the Court held that where the challenged law is not neutral and generally applied, the law must withstand strict scrutiny review, and facial neutrality does not conclude the analysis in determining if a law is neutral. 508 U.S. 520 (1993). A court must assess whether the purpose or intent of the law is to infringe upon or restrict religious practices based on religious motivation. If so, the law is not neutral no matter its facially neutral quality. Similarly, as in the case of *Fulton v. Philadelphia,* 141 S. Ct. 1868 (2021), the Supreme Court held that where a restriction burdens religious liberty, the restriction is not generally applicable if it authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty. Here again, strict scrutiny applies. The Supreme Court's ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018), further instructs that enforcement of a neutral law of general applicability by the government in a way that evinces hostility to religion undermines and vitiates its neutrality. In the context of employment, the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020), that the First Amendment bars enforcement of certain employment discrimination laws when doing so would interfere with the employment relationship between a religious institution and one of its ministers, or where "internal management" decisions central to the mission of the institution are impaired or interfered with as a result of the law's application.

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

Response: The Religious Freedom Restoration Act ("RFRA") does not apply to states or localities; rather, it applies only to federal government action. Where the RFRA does apply, it prohibits the "Government from substantially burdening a person's exercise of

religion, even if that burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." According to Fourth Circuit precedent (citing the Supreme Court), a substantial burden means "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 99–100 (4th Cir. 2013) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 718 (1981)). As an initial matter, a plaintiff bears the burden of proving that the challenged law or policy imposes the requisite substantial burden. If the challenged law or policy does implicate a plaintiff's religious exercise per the substantial burden test, the court will impose a strict scrutiny standard of review to determine whether the law or policy is constitutional, *i.e.,* the government will bear the burden to demonstrate that the challenged law or policy promotes a compelling state interest and that the law or policy is narrowly drawn and poses the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014); *see also Tandon v. Newsom,* 141 S. Ct. 1294 (2021) (applying strict scrutiny standard of review in non-RFRA case pertaining to state action bearing upon Free Exercise clause of the First Amendment).

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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 (2020), the Supreme Court held that the petitioners satisfied all factors to be considered in determining whether to issue a preliminary injunction: petitioners showed their First Amendment claims are likely to prevail, that non-issuance of the injunction would result in irreparable harm, and that issuance of the injunction would not damage the public interest. Specifically, the Court found the petitioners had made a "strong" showing that the challenged restrictions violated a "minimum requirement of neutrality" because the law identified religious entities as subject to restrictions while characterizing non-religious or secular businesses categorized as "essential." The Court also observed that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." The Court found that the state failed to demonstrate that the requested injunctive relief would cause harm to the public noting that the state did not assert that attendance at petitioners' religious services resulted in spread of the virus. The Supreme Court therefore enjoined New York from enforcing fixed numerical restrictions on religious service occupancy against the petitioners.

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 federal district court denied a petition for preliminary injunction to enjoin enforcement of California's COVID-19-related restrictions on indoor private gatherings. The Ninth Circuit denied petitioners' petition for emergency preliminary injunctive relief pending appeal of the district court's ruling. The Supreme Court reversed the Ninth Circuit and held that the state's COVID-based restrictions on private gatherings allowed for several exceptions for secular activities that were comparable to religious gatherings, thus triggering strict scrutiny judicial review for First Amendment Free Exercise violation claims. The Supreme Court held that California's restrictions on indoor gatherings were not neutral and generally applicable on the basis that the restrictions treated secular activities more favorably than comparable gatherings for religious exercise.

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

Response: Generally speaking, 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 religious and philosophical objections to gay marriage are protected views and in some instances may amount to protected forms of expression under the First Amendment. There, the law at issue required a baker to use his artistic talent to express a message that ran contrary to his religious beliefs and objection

to gay marriage; and, in this manner, requiring the baker to create an expression violated his First Amendment right to choose not to speak (or express himself). This holding also instructs that while religious objections do not generally entitle business owners (or others in commerce) to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law, when providing equal access requires expression, it bears upon the First Amendment. The Supreme Court also held that the Colorado Civil Rights Commission adjudicated the baker's Free Exercise defense to application of the law (which required him to create and sell a cake in violation of his religious beliefs) in a manner the evinced hostility to religion, thereby undermining the Constitution's requirement of religious neutrality.

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 whether a person's religious belief is sincerely held is not determined by examination of whether a person conforms to the tenets or commands of a particular religion. Rather, the test is a subjective determination of whether a person's professed religious belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). However, a court may conclude that a person's asserted belief is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee*, 489 U.S. at 834, n.2 (citing *Thomas v. Review Bd. Of Indiana Employment Security Div*., 450 U.S. 707, 715 (1981)). In the context of the religious beliefs of a business entity (as held by way of those who own and control its operations, like officers, shareholders and the like), the Supreme Court has held that "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 717, n.28 (2014).

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

Response: I understand this question to ask whether there are limits to what a court may recognize as religious and/or church doctrine for purposes of the Free Exercise clause. The Supreme Court has held that whether a person's religious belief is sincerely held is not determined by examination of whether a person conforms to the tenets or commands of a particular religion. Rather, the test is a subjective determination of whether a person's professed religious belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). However, a court may conclude that a person's asserted belief is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee*, 489 U.S. at 834, n.2 (citing *Thomas v. Review Bd. Of Indiana Employment Security Div*., 450 U.S. 707, 715 (1981)). In the context of employment, the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020), that the First Amendment bars enforcement of certain

employment discrimination laws when doing so would interfere with the employment relationship between a religious institution and one of its ministers, or where "internal management" decisions essential to the central mission of the institution are impaired or interfered with as a result of the law's application. Were I confirmed to serve on the district court, I would faithfully apply Supreme Court and Fourth Circuit precedent in all cases.

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

Response: I understand this question to ask whether there are limits to what a court may recognize as an acceptable view or interpretation of religious and/or church doctrine for purposes of the Free Exercise clause. The Supreme Court has held that whether a person's religious belief is sincerely held is not determined by examination of whether a person conforms to the tenets or commands of a particular religion. Rather, the test is a subjective determination of whether a person's professed religious belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). However, a court may conclude that a person's asserted belief is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee*, 489 U.S. at 834, n.2 (citing *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981)). In the context of employment, the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020), that the First Amendment bars enforcement of certain employment discrimination laws when doing so would interfere with the employment relationship between a religious institution and one of its ministers, or where "internal management" decisions essential to the central mission of the institution are impaired or interfered with as a result of the law's application.

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

Response: I am unfamiliar with any official position of the Catholic Church.

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. Morrisey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the First Amendment protects the right of religious institutions to decide matters of "church government," faith, and doctrine without government interference; and that religious institutions do not enjoy "general immunity from secular laws" (here, the Age Discrimination in Employment Act and the Americans

with Disabilities Act) however the First Amendment protects their "autonomy" with respect to "internal management" decisions essential to the central mission of the institution. The Court observed that there is no rigid formula applicable to cases raising such claims; instead, the inquiry is fact-specific as to the role of the employee within the institution.

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 held that Philadelphia's regulation-based refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents was a violation of CSS' First Amendment right to Free Exercise because the city's position required CSS either to abandon its mission or to act in violation of its religious beliefs. The Court held that Philadelphia's regulation was not neutral and generally applicable because it afforded the Commissioner sole discretion to make exceptions to the anti-discrimination requirement, and that CSS was not a provider of public accommodation because its activities as a certification of foster parents was not a service generally "made available to the public." The Court therefore held the city to a strict scrutiny standard of review where the government interest at issue was not enforcement of anti-discrimination policies but rather the city's denial of CSS' request that an exception be made in view of CSS' religious views. The Court held that the city had not met its burden to show such an interest is compelling; therefore the city did not survive a strict scrutiny standard of review.

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

Response: Justice Gorsuch concurred in the Supreme Court majority's decision to grant *certiorari*, vacate the judgment below, and remand the action to the Court of Appeals of Minnesota for further consideration in light of the Court's holding in *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021). In his opinion, Justice Gorsuch directed his attention to matters and issues he suggested the state court "may wish to consider on remand." Included among those matters, Justice Gorsuch brought attention to record evidence of alternatives to the septic system required by the county, state-level exceptions to gray water regulations granted to outdoorspeople to "hand carry" gray water for disposal of same, as well as what Justice Gorsuch viewed as overly aggressive and hostile pretrial litigation pursued by the county to gather "evidence" of technology use by Swartzentruber Amish to thwart their argument that installation of septic systems as a modern technology was a violation of their religious practices. Justice Gorsuch criticized the lower court's failure to apply strict scrutiny with sufficient rigor or correctly at all inasmuch as the government interest, particularly in view of *Fulton v. City of*

Philadelphia, was not the county's general interest in sanitation, but rather its denial of an exception to the gray water regulation on account of petitioners' religious faith. Further, Justice Gorsuch specifically pointed to the gray water "carrying" exceptions and alternative filtration methods unexplored by the lower court as important considerations in the strict scrutiny analysis to be undertaken on remand. Finally, Justice Gorsuch criticized the county's "bureaucratic inflexibility" and what he described as attacks and threats on the Amish in connection with their faith in contravention of the Religious Land Use and Institutionalized Persons Act.

17. **If you are to join the district court, and supervise along with your colleagues the court's human resources programs, will it be 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;**

Response: I do not know what role, if any, judges play in district court "human resources programs" or "employee trainings." It would not be appropriate for the court to conduct programs or trainings inconsistent with the law. The principle that "one race or sex is inherently superior to another race or sex" is not appropriate employment or human resources policy.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: I do not know what role, if any, judges play in district court "human resources programs" or "employee trainings." It would not be appropriate for the court to conduct programs or trainings inconsistent with the law. The principle that "[a]n individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive" is not appropriate employment or human resources policy.

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

Response: I do not know what role, if any, judges play in district court "human resources programs" or "employee trainings." It would not be appropriate for the court to conduct programs or trainings inconsistent with the law. The principle that "[a]n individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex" is not appropriate employment or human resources policy.

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

Response: I do not know what role, if any, judges play in district court "human resources programs" or "employee trainings." It would not be appropriate for the court to conduct programs or trainings inconsistent with the law. I am uncertain what

is meant by the question's premise that a program or policy would instruct that a "value" is "racist or sexist." I commit that were I to conduct workplace training, I would comply with the law.

18. **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: I do not know what role, if any, judges play in "trainings." It would not be appropriate for the court to conduct trainings inconsistent with the law. I am uncertain what is meant by the question's premise that a "training would teach" that a "value" is "racist or sexist." I commit that were I to conduct any sort of training as a district judge, I would comply with the law.

19. **Is the criminal justice system systemically racist?**

Response: As a sitting judge and a judicial nominee, I am mindful that this is a policy subject of national discussion and debate, and bears upon cases brought in the court in which I currently sit and which therefore may come before me as a judge. Since I became a trial judge in January 2013, I have strived to ensure that my courtroom is free from bias on any basis, including race, and will continue to do so if I am confirmed to serve as a judge on the United States District Court for the District of Maryland. Were a case involving race-based treatment to come before me as a district judge, if I am confirmed, I would apply controlling law to the case.

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

Response: Were I confirmed as a district judge and a case came before me challenging a political appointment on the basis of race or gender, I would consider the evidence and apply controlling Supreme Court and Fourth Circuit law.

21. **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 the subject of ongoing and public and political discussion and debate. As a sitting judge and a judicial nominee, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue, and, if so, what that belief or opinion is.

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

Response: The Supreme Court's holding in *Heller* recognizes an individual right to keep and bear arms outside of the militia context (*i.e.,* the Second Amendment's prefatory clause is separate from its operative clause) in a ready-to-use state for traditionally lawful

purposes like self-defense from confrontation within the home. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

23. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: The Supreme Court has not issued an opinion specifically articulating which standard of constitutional review applies to cases raising claims of Second Amendment violation of the right articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In 2017, the Fourth Circuit in *Kolbe v. Hogan* affirmed the district court's application of intermediate scrutiny to a Second Amendment challenge to a state ban on assault style weapons and large capacity magazines. *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017).

24. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: The Supreme Court has not issued an opinion specifically articulating which standard of constitutional review applies to cases raising claims of Second Amendment violation of the right articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In 2017, the Fourth Circuit in *Kolbe v. Hogan* affirmed the district court's application of intermediate scrutiny to a Second Amendment challenge to a state ban on assault style weapons and large capacity magazines. *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017).

25. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: The executive branch has general responsibility for enforcing federal laws and has broad discretion regarding whom to prosecute. Where a prosecutor has probable cause to believe that an accused has committed a statutory criminal offence, whether or not to prosecute, and what charge to file or bring before a grand jury, is generally within the prosecutor's discretion pursuant to *Wayte v. U.S.*, 470 U.S. 598 (1985). The question whether the executive may adopt a policy of declining to prosecute a category of cases in a given context is an issue of current discussion and debate in political, legal and scholarly arenas. As a sitting judge and a nominee for the federal district court, it would therefore be inappropriate for me to address the question as posed.

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

Response: The executive branch has general responsibility for enforcing federal laws and has broad discretion regarding whom to prosecute. Where a prosecutor has probable cause to believe that an accused has committed a statutory criminal offence, whether or not to prosecute, and what charge to file or bring before a grand jury, is generally within the prosecutor's discretion pursuant to *Wayte v. U.S.*, 470 U.S. 598 (1985). The question of what distinguishes prosecutorial discretion from administrative rule change, *e.g.,* a decision not to enforce laws on a case-by-case basis or based on a certain categorization or

status of offender versus a whole-sale agency or branch directive or policy of non-prosecution or non-enforcement, is the subject of current intense policy and political discussion and debate. As a sitting judge and a nominee for the federal district court, it would therefore be inappropriate for me to address the question as posed.

27. **Does the President have the authority to abolish the death penalty?**

Response: The federal death penalty is a creature of statute, codified at 18 U.S.C. § 3591, and is subject to congressional repeal.

28. **Does a federal judge have authority to not apply the death penalty if it appropriately requested by a prosecutor?**

Response: Federal judges do not apply the death penalty. In death-eligible cases where the government seeks the death penalty, the jury determines whether to impose the death penalty.

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

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), associations of real estate agents and rental property managers brought action against the Department of Health and Human Services challenging the lawfulness of the COVID-related nationwide eviction moratorium issued by the Centers for Disease Control and Prevention. The district court entered summary judgment in favor of the Association (and its co-plaintiffs) and stayed the judgment pending the government's appeal. The Court of Appeals for the D.C. Circuit denied the petitioners motion to vacate the stay pending appeal, and the petitioners appealed the issue of the stay to the Supreme Court. The Supreme Court vacated the stay (thereby rendering the judgment enforceable) concluding that the petitioners demonstrated a substantial likelihood of success on the merits of the appeal, specifically as to the assertion that the CDC had exceeded its authority in issuing the moratorium, and that a balancing of the equities as to staying or not staying the district court's judgment pending appeal weighed against staying the judgment pending appeal.

Senator Josh Hawley
Questions for the Record

Julie Rubin
Nominee, U.S. District Court for the District of Maryland

1. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

    a. **Do you agree with that philosophy?**

    Response: I do not.

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

    Response: Federal judges are duty bound to uphold the Constitution and to apply controlling precedent to the facts of the case before the court without regard to personal opinion as to whether the outcome is "right" or "wrong."

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

Response: The *Younger* abstention doctrine, articulated by the Supreme Court in *Younger v. Harris,* 401 U.S. 37 (1971), stands for the principle that federal courts should generally decline to hear civil rights tort claims brought by a person currently being prosecuted for a matter arising from that claim in state court.

The *Pullman* abstention doctrine, articulated by the Supreme Court in *Railroad Commission v. Pullman,* 312 U.S. 496 (1941), stands for the principle that federal courts should generally decline to adjudicate the constitutionality of state enactments that are open to interpretation until a state court has had a reasonable chance to pass on them. *Pullman* abstention permits a federal court to stay a plaintiff's claim that a state law violates the Constitution until state courts have had a reasonable chance to apply the law to the plaintiff's case.

The *Colorado River* abstention doctrine, articulated by the Supreme Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), stands for the principle that federal courts should seek to avoid simultaneous parallel state and federal litigation in order to avoid wasteful duplication of litigation.

The *Burford* abstention doctrine, articulated by the Supreme Court in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), allows a federal court to remand or dismiss a case seeking equitable relief (not damages) where it presents complex questions of state policy of substantial public importance beyond the case at bar, or if the federal court's adjudication of the case would interfere with or disrupt a state's effort to establish policy on the matter of public importance. *Burford* abstention is to be

applied in rare circumstances as an exception to a federal court's obligation to resolve the cases properly brought before it for resolution.

The *Thibodaux* abstention doctrine, articulated by the Supreme Court in *Louisiana Power & Light Co v. City of Thibodaux,* 360 U.S. 25 (1949), is similar in concept to *Burford* abstention, and stands for the principle that a federal court sitting in diversity jurisdiction may abstain from adjudicating a case in favor of allowing a state to decide issues of state law that are of great public importance to that state. Like Burford abstention, it is to be applied in rare circumstances as an exception to a federal court's obligation to resolve the cases properly brought before it for resolution.

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

   Response: No.

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

      Response: Please refer to my answer to question 3.

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

   Response: Supreme Court precedent demonstrates that the Constitution shall be read, considered and applied depending on the nature of the issue raised by a given set of circumstances. For example, in considering the meaning and application of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted and applied the Constitution according to its original public meaning. If I am confirmed to the District Court, I will faithfully apply Supreme Court and Fourth Circuit precedent in all cases, including precedent regarding the appropriate mode of constitutional interpretation.

5. **Do you consider legislative history when interpreting legal texts?**

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

      Response: If I am confirmed to serve as a judge of the United States District Court for the District of Maryland, in all cases that come before me, I would be bound by Supreme Court and Fourth Circuit precedent regarding a statute's meaning and application. If, however, a case were to involve application of a statute and there were no binding precedent regarding its interpretation, interpretation of its meaning would begin with a reading of the text. If the plain meaning of the statute is clear and unambiguous based on a reading of its text, my inquiry would end there. If no such case law is available and a reading of the

plain text did not conclude the interpretational question, I would marshal a host of tools traditionally accepted as a means of understanding statutory language, including reviewing cases on analogous or similar statutory provisions and frameworks; considering relevant canons of statutory interpretation; I might employ a basic dictionary if the meaning of a particular word figured materially into the question and was not defined in the statute itself; I would consider the statute as a whole to determine if the interpretational question is resolved in whole or part by the statutory context of the particular provision at issue among other portions or sections of the statute; I would consider whether the statute contains a stated legislative purpose in the introductory portions of the statute, as some statutes do; I would also consider whether legislative history is available and, if so, the quality and nature of same (*e.g.,* whether the legislative history provides a broad view of the legislative process and purpose versus merely one isolated statement of a legislator). Some types of legislative history are more probative than others. For example, legislative history that provides insight into the context of a statute's proposal and enactment can be instructive, as can circumstances where a legislative body amends a pre-existing statute to clarify or modify its meaning and application. Similarly, legislative history regarding proposed but rejected language can be instructive in demonstrating what the statute is not intended to mean or to appreciate the legislature's intended limits or parameters of a statute's application. Legislative history as to statements of legislative purpose can be helpful, but should be approached with caution and consideration of whether such statements are the voice of an individual legislator or, instead, provide a broader, more holistic, appreciation of the intended purpose of the legislative body.

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

Response: I do not believe it is appropriate to consider the laws of a foreign nation when interpreting the provisions of the United States Constitution unless and except where binding Supreme Court or Fourth Circuit precedent expressly relies upon a foreign law in its analysis of the constitutional provision's meaning and application. I am unaware of a Supreme Court or Fourth Circuit authority engaging in this approach in matters of interpretation of the United States Constitution.

6. 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: In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Supreme Court reaffirmed *Glossip v. Gross,* 576 U.S. 863 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008), and held that the *Baze-Glossip* test applies to all challenges to a state's execution protocol under the Eighth Amendment's prohibition of cruel and unusual punishment. Specifically, to establish that a state's execution method "superadds"

pain to the death sentence (as forbidden by the Eighth Amendment), a petitioner bears the burden to demonstrate the existence of a "feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."

7. **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: Please see my answer to question 6.

8. **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 v. Osborne*, 557 U.S. 52 (2009), the Supreme Court recognized that the prisoner petitioner had a liberty interest in "demonstrating his innocence" under Alaska's statute and declined to establish a "freestanding right to access DNA evidence" for habeas corpus purposes on grounds that doing so would render the Court a policymaker, which is the proper role of a legislative body. While not controlling precedent because it is an unpublished decision, I would note that in *LaMar v. Ebert,* 756 Fed. Appx. 245 (2018), the Fourth Circuit reviewed a district court's disposal (first by dismissal and, later on remand, by entry of summary judgment in favor of the Commonwealth) of a prisoner's 1983 complaint that Virginia's DNA Statute violated his due process rights by entitling a convicted felon to seek "new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction" under certain limited circumstances enumerated in the statute. In reversing the district court's entry of summary judgment in favor of the Commonwealth, the Fourth Circuit determined that the district court had applied the wrong standard, and instructed as follows: "In *Osborne*, the Supreme Court explained that William Osborne, who was convicted of kidnapping, assault, and sexual assault and sought DNA testing of crime scene evidence, had 'a liberty interest in demonstrating his innocence with new evidence under state law,' because Alaska law provided that those who use newly discovered evidence to establish they are innocent may obtain vacatur of their conviction. … Further, the Court recognized this 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" The Fourth Circuit agreed with the prisoner appellant that the district court failed (1) to determine whether Virginia's DNA Statute grants a convicted felon a liberty interest in testing potentially exonerating DNA and (2) what "other rights to procedures essential to the realization of th[at]" alleged liberty interest must flow from the DNA Statute" as acknowledged by the Supreme Court in *Osborne*.

   At bottom, the Supreme Court and the Fourth Circuit do not appear to have recognized a right to DNA evidence for habeas corpus purposes as the question

inquires. However, the Supreme Court and the Fourth Circuit acknowledge that an applicable state statute may create such a right (as a liberty interest), and direct the trial court presented with such a case to make that determination and, if the state law does create such a right, the trial court must also consider whether other procedural rights arise therefrom so that the liberty interest may be realized.

9. 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. As a sitting trial court judge since January 2013, I have no doubt that were I to be confirmed I would continue to fulfill my duty to uphold and apply the law fairly and objectively regardless of my personal opinions or beliefs, including in cases involving imposition of, or relief from, the death penalty.

10. 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 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: The Religious Freedom Restoration Act ("RFRA") does not apply to states or localities; rather, it applies only to federal government action. Where the RFRA does apply, it prohibits the "Government from substantially burdening a person's exercise of religion, even if that burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." According to Fourth Circuit precedent (citing the Supreme Court), a substantial burden means "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 99-100 (4th Cir. 2013) (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 718 (1981)). As an initial matter, a plaintiff bears the burden of proving that the challenged law or policy imposes the requisite substantial burden. If the challenged law or policy does implicate a plaintiff's religious exercise per the substantial burden test, the court will impose a strict scrutiny standard of review to determine whether the law or policy is constitutional, *i.e.,* the government will bear the burden to demonstrate that the challenged law or policy promotes a compelling state interest and that the law or policy is narrowly drawn and poses the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014); *see also Tandon v. Newsom,* 141 S. Ct. 1294 (2021) (applying strict scrutiny standard of review in non-RFRA case pertaining to state action bearing upon Free Exercise clause of the First Amendment). If a plaintiff does not demonstrate a substantial burden on his exercise of religion and the law at issue is in fact determined to be neutral and generally applicable, the government need not satisfy the strict scrutiny standard of judicial review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993) (a non-RFRA case bearing on Free Exercise-related action by a locality instructing that Supreme Court jurisprudence establishes "the general proposition that a law that is

neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

11. 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 answer to question 10.

12. 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: The Supreme Court has held that whether a person's religious belief is sincerely held is not determined by examination of whether a person conforms to the tenets or commands of a particular religion. Rather, the test is a subjective determination of whether a person's professed religious belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). However, a court may conclude that a person's asserted belief may be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee*, 489 U.S. at 834, n.2 (citing *Thomas v. Review Bd. Of Indiana Employment Security Div*., 450 U.S. 707, 715 (1981)). In the context of the religious beliefs of a business entity (as held by way of its individual officers, shareholders and the like), the Supreme Court has held that "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 717, n.28 (2014).

13. The Second Amendment provides that, "A well regulated Militia, being necessary to the 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 Supreme Court's holding in *Heller* recognizes an individual right to keep and bear arms outside of the militia context (*i.e.,* the Second Amendment's prefatory clause is separate from its operative clause) in a ready-to-use state for traditionally lawful purposes like self-defense from confrontation within the home. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Citing its precedent of *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court in *Heller* reiterated that the types of arms to which the right pertains are those "in common use for lawful purposes." The Court further recognized that the individual right to keep and bear arms, as with most constitutional rights, is not unlimited. Although the *Heller* decision does not articulate what standard of scrutiny shall be applied to cases arising

from claims of government interference with an individual right to keep and bear arms under the Second Amendment, the Court found that the law at issue (a District of Columbia handgun ban and trigger lock requirement) would fail under even the rational basis standard.

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

Response: No.

14. 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: My basic understanding of Justice Holmes' remark is that he disagreed with what he viewed as the majority's interpretation of the Fourteenth Amendment through the lens of, or in accordance with, a particular economic policy or theory. I believe that interpretation of the Constitution should not be based on economic theory or policy.

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

Response: *Lochner v. New York,* 198 U.S. 45 (1905), was *de facto* abrogated by *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). Further, the Supreme Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), unanimously remarked "the doctrine that prevailed in *Lochner* . . . – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded." The Supreme Court has effectively held that *Lochner* is no longer good law. Therefore, I would not apply it.

15. 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?

Response: I am unable to think of a particular Supreme Court opinion that while not effectively or expressly overruled, or abrogated by statute, is not binding precedent because it is "no longer good law."

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

Response: I commit to faithfully applying all Supreme Court precedent and Fourth Circuit precedent if I am confirmed to serve as a judge of the District Court.

16. 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*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I have not had a case come before me raising issues regarding market share and monopolies, and have not had other occasion to research the issue. Therefore, I do not have an opinion as to Judge Hand's statement.

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

Response: I have not had a case come before me raising issues regarding market share and monopolies, and have not had other occasion to research the issue. Therefore, I do not have an opinion as to Judge Hand's statement.

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

Response: I have not had a case come before me raising issues regarding market share and monopolies, and have not had other occasion to research the issue. Therefore, I do not have an understanding as to what minimum percentage of market share might constitute a monopoly. Were I confirmed as a District Court judge and a case arose on such issues, I would research the applicable law and apply it to the evidence.

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

Response: My understanding of "federal common law" begins with the Erie Doctrine. Under the Erie Doctrine, federal courts sitting in diversity apply the substantive law of the state in which the court sits. On subjects the state law does not address, what is referred to as "federal common law" might develop to address the area or areas that the state law does not address but which are essential or necessary to resolution of the case. Because federal district courts are not general common law courts, as state trial courts are, the subject of federal common law (whether it is to be avoided; whether it exists at all, etc.) is the subject of scholarly legal debate and discussion.

18. 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: If called upon to interpret the scope of a state constitutional right (in my instance, the state of Maryland), I would look to the text of the state constitution and decisions from the Maryland Court of Appeals interpreting the constitutional provision.

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

Response: Under certain circumstances, identical textual language is given the same meaning. State courts, however, have interpreted their own constitutions differently than the way the federal courts have interpreted the United States Constitution even in instances where the documents may contain the same language or identical phraseology. In instances where a state's highest court has ruled that the United States Constitution is coterminous with the state's constitution, or, similarly, that federal law is persuasive as to the meaning of a state constitutional provision worded identically to its federal counterpart, the identical texts may result in identical interpretation.

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

Response: The United States Constitution, as interpreted by the Supreme Court and the lower courts, applies in all states. Whether an individual state's constitution provides greater protection is a matter of state law, which is the province of state courts. However, states may not violate, impair or diminish any right or protection provided by the United States Constitution by virtue of a state constitution that provides fewer or lesser individual liberties, rights or protections of same. In this way, the United States Constitution can be viewed as setting a floor of liberties, rights and protection to citizens nationwide.

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

Response: In general, it is inappropriate for a sitting judge and a judicial nominee to express an opinion as to whether a Supreme Court opinion was rightly or wrongly decided. However, in certain rare cases where the passage of time, national consensus, and significant subsequent caselaw have established a decision as well beyond debate and not subject to serious question or revisitation, it can be acceptable for a judge to express such an opinion. Against this backdrop, I can state that I believe *Brown v. Board of Education* was correctly decided.

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

Response: I have not had occasion to address a case in which the question of issuance of a nationwide injunction has been raised; nor have I had occasion to research applicable authority on the subject. However, I am aware that the question of whether nationwide injunctions are a proper exercise of authority is a matter of scholarly legal debate and current litigation. If I were appointed to serve as a federal district judge and a case arose

before me involving the possible issuance of a nationwide injunction, I would research the controlling precedent and it faithfully to the case.

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

Response: Please see my answer to question 20, above. Further, in addition to application of Federal Rule of Civil Procedure 65 on injunctions, a petitioner seeking an injunction bears the burden to persuade the court that all four factors to be considered when determining whether to issue a preliminary injunctions favor issuance of the injunction – including demonstration of a likelihood of success on the merits, the likelihood of irreparable harm to the petitioner were the court not to issue an injunction, a balancing of the parties' respective hardships (and equities) were the injunction to be issued or not to be issued, as well consideration of the public interest(s) to be affected by issuance or non-issuance of the injunction. *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

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

Response: Please see my answer to question 20, above. Further, before a litigant is entitled to a preliminary injunction, nationwide or otherwise, each of the four factors set forth in answer 20(a) must be considered. Because of the extraordinary nature of relief afforded by a preliminary injunction, none shall be issued of any sort unless a court is persuaded that all four factors weigh in favor issuing an injunction.

21. 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 answers to questions 20, 20(a) and 20(b).

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

Response: Federalism is the beating heart of our country's founding documents and is the foundational principle on which our country's interwoven national and state governments were established and continue to operate. Public and political discussion and debate as to the balance and allocation of power and as between the federal government on the one hand and the individual states on the other is a material, and in my opinion, valuable feature of our country's history and surely its future. In significant measure, such discourse and exchange as to the proper balance of power stands as a seminal example of our democracy at work.

23. 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 answer to question 2.

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

Response: As a sitting state trial judge, I do not approach the question or issue of remedies through the lens of relative or comparative advantages and disadvantages. I approach each case based on the facts and evidence presented against the backdrop of the nature of the claims at issue. In some cases, money damages will make a prevailing plaintiff whole. In some cases, money damages are insufficient or inadequate to redress the particular injury or harm at issue. Where money damages cannot address the harm, issuance of an injunction as a form of final relief may be appropriate. In each case that has come before me where I have been called on to consider whether money damages or some form of injunctive relief is the appropriate remedy, I have carefully considered and applied controlling law, including law pertaining to available remedies. Were I confirmed to serve as a judge on the District Court, I would continue to commit myself to this process of careful individualized case treatment.

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

Response: The Supreme Court has held that citizens have certain "fundamental rights and liberty interests" not expressly set forth in the Constitution based on their condition of being "deeply rooted in this Nation's history and traditions" and "implicit in the concept of an ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Supreme Court has specifically included the right to marry, the right to have children and direct their upbringing, the right to marital privacy, the right to contraception and the right to abortion among these rights. The Supreme Court has taken care to caution that identification of protected rights by way of substantive due process must be undertaken with "the utmost care" and very rarely at that.

26. 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: Please see my answer to question 10.

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

Response: Please see my answer to question 10.

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: Please see my answer to question 10.

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: In *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021), the Supreme Court held that "religious beliefs need not be acceptable, logical, consistent or comprehensible to others" in order to be protected by the First Amendment. In *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), in applying the RFRA, the Supreme Court remarked that the Court has "repeatedly refused" to analyze whether sincerely held religious beliefs are "flawed."

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: Please see my answer to question 10.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and 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.

27. 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 understand this statement to mean that judges who faithfully discharge their judicial duties and oath of office are likely called upon to issue rulings we do not like or with which we do not personally agree.

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

Response: As a private citizen, I have never taken the position in litigation or a publication that a federal or state statute was unconstitutional. As a practicing attorney from 1998 to 2013, I do not believe I ever took a position on behalf of a client that a federal or state statute was unconstitutional. In my capacity as a state trial judge since 2013, I do not believe I have determined or ruled that a federal or state statute was unconstitutional.

a. If yes, please provide appropriate citations.

Response: Please see my answer to question 28.

29. 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: Since being informed by Senator Cardin that my application for appointment was being forwarded to the White House for consideration for this nomination, I have not engaged in social media, including deletion of content I previously posted on social media.

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

Response: I am unaware of a prevailing definition of systemic racism. However, the subject of racism in our country is a matter of significant public and political discussion and debate, as well as litigation at all court levels, including the state trial court in which I serve. I have served in Baltimore City, Maryland as a sitting trial judge since January 2013, and have always done my best to ensure that my courtroom is free of racism and that I treat all people who come before me fairly and with dignity and respect.

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

Response: As an attorney in private practice from 1998 to 2013, I do not recall an occasion in which I took a position in litigation that conflicted with my personal views in the vein of religion or other important personal matter of a similar ilk. Although I do not recall any specific instance, I imagine over the years of my practice, I may have been called upon to take a position in litigation that conflicted with my personal view as to the preferred legal position or legal strategy to pursue in deference to a client's wishes or instruction. As a sitting judge since January 2013, although I cannot recall any specific instance or case, my judicial duties have occasionally contrasted with my personal view wherein application of the law has resulted in an outcome inconsistent with my personal view or opinion.

32. How did you handle the situation?

Response: In each instance described in my answer to question 31, whether as an attorney or a judge, I fulfilled my duty, which is to say that as an attorney I represented my client to the best of my ability and faithfully fulfilled my fiduciary duty to serve my client's best interests, and, as a judge, I listened to and considered the evidence of each case before me and applied the law without consideration of my personal views.

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

Response: Yes.

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

Response: No one Federalist Paper has shaped my view of the law.

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

Response: The question of whether an unborn child is a human being has been the subject of religious, scientific and philosophical discussion and debate since time immemorial. Further, this issue figures prominently in pending litigation within our country's courts at the state and federal levels. As a sitting judge and a judicial nominee, therefore, it would be inappropriate for me to express whether I have a personal belief or opinion on the issue, and, if so, what that belief or opinion is. If I am confirmed to the District Court, I will faithfully apply controlling Supreme Court and Fourth Circuit precedent to all cases that come before me bearing on this and all other issues.

36. 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: I have testified under oath at two depositions in two separate cases in which I was not a party, but rather subpoenaed as a fact witness. I recall one other occasion on which I testified in a state district court (small claims court) as a co-plaintiff in a small claims court case my husband and I pursued against a home security alarm company prior to my service as a judge. I have no records of any of these deposition or court proceedings in any format and am unaware as to the existence or location of any records of my testimony in any format.

37. 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.

38. Do you currently hold any shares in the following companies:

a. Apple?

Response: Please refer to my confidential financial disclosure report which sets forth all assets I hold and have held during the applicable reporting period. Were I confirmed to serve as a judge on the District Court, I would carefully comply with the canons of judicial ethics and laws pertaining to conflicts of interest.

b. Amazon

Response: Please refer to my confidential financial disclosure report which sets forth all assets I hold and have held during the applicable reporting period. Were I confirmed to serve as a judge on the District Court, I would carefully comply with the canons of judicial ethics and laws pertaining to conflicts of interest.

c. Google?

Response: Please refer to my confidential financial disclosure report which sets forth all assets I hold and have held during the applicable reporting period. Were I confirmed to serve as a judge on the District Court, I would carefully comply with the canons of judicial ethics and laws pertaining to conflicts of interest.

d. Facebook?

Response: Please refer to my confidential financial disclosure report which sets forth all assets I hold and have held during the applicable reporting period. Were I confirmed to serve as a judge on the District Court, I would carefully comply with the canons of judicial ethics and laws pertaining to conflicts of interest.

e. Twitter?

Response: Please refer to my confidential financial disclosure report which sets forth all assets I hold and have held during the applicable reporting period. Were I confirmed to serve as a judge on the District Court, I would carefully comply with the canons of judicial ethics and laws pertaining to conflicts of interest.

39. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: I have never authored a brief that was filed in court without my name on the brief. When I was in private practice (from 1998 to January 2013), I am certain I had occasion to review and offer editorial feedback on draft memoranda of law to be

filed in support of motions that were principally drafted by another attorney with whom I practiced in my firm, but I have no memory of any case or occasion in particular in which I provided such assistance. I do not believe I ever reviewed and provided editorial feedback on appellate briefs filed in a court without my name on the brief.

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

Response**:** Please see my response to question 39.

40. Have you ever confessed error to a court?

Response: When I was a practicing attorney, I was never presented with a case calling for confession of error, so I have never confessed error to a court.

a. If so, please describe the circumstances.

Response: Please see my answer to question 40.

41. 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: It is the duty of a nominee to be candid and honest in answering questions posed by the Senate Judiciary Committee in order that the Committee may thoroughly examine and consider a nominee's qualifications to serve. In answering questions of the Senate Judiciary Committee, a nominee should ensure that he or she maintains a respectful distance from matters reserved to the other branches of government, like matters of politics and policy. Further, a nominee's expression of personal opinion in areas reserved for the legislative and executive branches may endanger or diminish the public's faith in the judiciary and proper expectation that a judge must at all times be fair, neutral and unbiased. In addition, as a sitting trial judge, I am bound by the canons of judicial ethics not to comment on cases that are pending before me or may reasonably be expected to arise. As a judicial nominee and a sitting trial judge, I have earnestly and thoughtfully sought to balance these considerations. My answers to questions posed by the Senate Judiciary Committee have always been truthful to the best of my personal knowledge.

Questions for the Record for Julie Rebecca Rubin
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 sexual favors, 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
Julie Rubin, Nominee to the District Court for the District of Maryland

1. How would you describe your judicial philosophy?

Response: As a sitting trial judge since January 2013, my judicial philosophy has been grounded in approaching every case with a strong work ethic, an open mind to listen and learn, and to conduct myself and my courtroom with professionalism. My principles of professionalism as a judge are rooted in the particular objectives of fairness in fact and in perception. This requires that I conduct myself to ensure all parties and lawyers are treated fairly and with respect, that I listen actively and openly to testimony and oral argument, that I take the time and devote my energy to consider carefully the evidence of each case and to identify and apply the relevant law. When a case requires a written memorandum opinion, I am particularly mindful of balancing promptness with thoroughness and quality. Having been a practicing litigator for fifteen years prior to my service as a judge, I very much appreciate the frustration that can attend waiting for judges to rule and the need for opinions that provide a clear and complete explanation of the court's ruling and its bases. I take great pride in making every effort to ensure that all parties, especially non-prevailing parties, feel confident that the judicial process and the outcome of their case were rooted in fairness and the highest degree of workmanship.

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

Response: If I am confirmed to serve as a judge of the United States District Court for the District of Maryland, in all cases that come before me, I would be bound by Supreme Court and Fourth Circuit precedent regarding a statute's meaning and application. If, however, a case were to involve application of a statute and there were no binding precedent regarding its interpretation, interpretation of its meaning would begin with a reading of the text. If the plain meaning of the statute is clear and unambiguous based on a reading of its text, my inquiry would end there. If no such case law is available and a reading of the plain text did not conclude the interpretational question, I would marshal a host of tools traditionally accepted as a means of understanding statutory language, including reviewing cases on analogous or similar statutory provisions and frameworks; considering relevant canons of statutory interpretation; I might employ a basic dictionary if the meaning of a particular word figured materially into the question and was not defined in the statute itself; I would consider the statute as a whole to determine if the interpretational question is resolved in whole or part by the statutory context of the particular provision at issue among other portions or sections of the statute; I would consider whether the statute contains a stated legislative purpose in the introductory portions of the statute, as some statutes do; I would also consider whether legislative history is available and, if so, the quality and nature of same (*e.g.,* whether the legislative history provides a broad view of the legislative process and purpose versus merely one isolated statement of a legislator). Some types of legislative history are more

probative than others. For example, legislative history that provides insight into the context of a statute's proposal and enactment can be instructive, as can circumstances where a legislative body amends a pre-existing statute to clarify or modify its meaning and application. Similarly, legislative history regarding proposed but rejected language can be instructive in demonstrating what the statute is not intended to mean or to appreciate the legislature's intended limits or parameters of a statute's application. Legislative history as to statements of legislative purpose can be helpful, but should be approached with caution and consideration of whether such statements are the voice of an individual legislator or, instead, provide a broader, more holistic, appreciation of the intended purpose of the legislative body.

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

Response: Supreme Court precedent demonstrates that the Constitution shall be read, considered and applied depending on the nature of the issue raised by a given set of circumstances. For example, in considering the meaning and application of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted and applied the Constitution according to its original public meaning. If I am confirmed to the District Court, I will faithfully apply Supreme Court and Fourth Circuit precedent in all cases, including precedent regarding the appropriate mode of constitutional interpretation.

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

Response: Please see my answer to question 3.

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: Please see my answer to question 2.

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: A statutory purpose or legislative intent underpinning a statute is fixed and does not change as social norms and linguistic conventions evolve. The same is true for constitutional provisions. However, a statute or portion of the constitution may be applied today in factual circumstances not envisioned (or in existence) at the time of its framing or enactment. The Supreme Court has utilized different approaches to constitutional interpretation and application depending on the nature of the issue raised by the particular case and its circumstances. Please see my answers to questions 2 and 3.

6. What are the constitutional requirements for standing?

Response: Article III of the Constitution extends judicial power to "cases" and "controversies." The Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), held that standing is an "essential and unchanging part of the case-or-controversy requirement of Article" and reaffirmed the following essential elements of standing: 1) injury in fact (*i.e.*, invasion of a legally protected interest, which is concrete, actual, or imminent, and not hypothetical or conjectural); 2) causal connection between the injury and the complained-of conduct; and 3) redressability, which is to say a favorable decision by the court would resolve the matter.

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

Response: Article I of the Constitution extends Congress the authority to "make all laws . . . necessary and proper" for carrying out its powers set forth in the Constitution. In *McCulloch v. Maryland,* 17 U.S. 316 (1819), the Supreme Court concluded that Congress may take "appropriate" means to pursue its "legitimate" ends or functions as set forth in Article I.

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

Response: First, I would determine if there is binding Supreme Court or Fourth Circuit precedent addressing Congress's power to enact such a law specifically, the extent and limits of Congress' law-making power generally, and whether Congress's Article I powers include the subject area about which the law pertains. As in every case, I would consider all sources of authority submitted for the court's consideration by counsel for the government and other parties. In the absence of binding Supreme Court or Fourth Circuit precedent, I would consider the text of the constitutional provision on which the government basis its authority and proceed in accordance with my answer to question 3 to determine the scope of Congressional authority as to the enacted law.

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

Response: Yes. The Supreme Court has recognized several "unenumerated" rights not expressly set forth in the Constitution, including the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); the right to travel, *Kent v. Dulles,* 357 U.S. 116 (1958); the right to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); the right to reproductive and sexual privacy, *Eisenstadt v. Baird,* 405 U.S. 438, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, *Lawrence v. Texas,* 539 U.S. 558 (2003); freedom of association, see, e.g., *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449 (1958); the right to have children, *Skinner v. Oklahoma,* 316 U.S. 535; and the right to direct the upbringing of one's children, see *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of the Sisters,* 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the Supreme Court explained that the Fourteenth Amendment protects as fundamental those rights and liberties that are "deeply rooted in this Nation's history and tradition." Please see my answer to question 9, which identifies specific unenumerated rights protected under the Fourteenth Amendment.

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: The Supreme Court has recognized a distinction between these categories of rights. *Lochner v. New York,* 198 U.S. 45 (1905), was *de facto* abrogated by *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). Further, the Supreme Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), unanimously remarked "the doctrine that prevailed in *Lochner* . . . – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded." The Supreme Court has effectively held that *Lochner* is no longer good law. Further, in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955), the Supreme Court held that "the guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards." If confirmed to serve as a district judge, I would faithfully apply all Supreme Court precedent, including that pertaining to the scope of constitutional substantive due process protections and any distinctions among them.

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

Response: The Supreme Court held in *U.S. v. Lopez*, 514 U.S. 549 (1995), that under the Commerce Clause, "Congress may regulate the use of the channels of interstate commerce . . . may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . and [may] regulate those activities having a substantial relation to interstate commerce" but may not regulate activities that, on the whole, do not substantially affect interstate commerce. More recently, in *National Federation of Independent Business v. Sebelius,* 567 U.S. 519 (2012), the Supreme Court held that the Commerce Clause does not authorize Congress to compel individuals to become active in commerce (as opposed to regulating existing commercial activity).

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

Response: The Supreme Court has articulated several factors to consider in determining whether a group qualifies as a "suspect class," including whether the members of the class constitute a "discrete and insular minority"; whether the group has been subjected to historical discrimination; and whether the group has "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Graham v. Richardson,* 403 U.S. 365 (1971); *Lyng v. Castillo,* 477 U.S. 635, (1986). In *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), the Supreme Court described a suspect class as "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Examples of suspect classifications the Supreme Court has identified include race, national origin, religion and alienage.

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

Response: Separation of powers among the executive, legislative and judicial branches of government ensures that each branch will not encroach upon the authorities and core functions of any other; and that power is not concentrated in any one branch. As a result, each branch acts and serves to "check and balance" the comparative powers and reaches of the other branches. The separation of powers, which is the bedrock of our government's construction, further serves to enhance and strengthen the durability and longevity of our democracy by guarding against the dangers of a tyrannical government present when power is concentrated in too few hands.

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: Please see my answer to question 8.

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

Response: The role of a judge is to apply the facts of a case to the applicable law in a fair and neutral manner, and to treat all people who come before the court respectfully and with professionalism. As a sitting trial court judge since January 2013, I have faithfully abided these core principles, and will continue to do so if I am confirmed to serve as a judge on the United States District Court for the District of Maryland.

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

Response: In the sense that either outcome posed by the question is contrary to the objectives of a judge, neither outcome is empirically worse or better than the other. Absent a factual example, I am unable to evaluate the comparative effects posed by either undesirable outcome.

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 do not have a belief or understanding to explain what is described in the question. I am not certain what is meant by the phrase "aggressive exercise of judicial review," however a judiciary that approaches review of congressional authority with a pre-set expectation of invalidation of congressional exercise of power is a danger to our system of government and democracy as a whole, and a derogation of the judiciary's duty to adjudicate all cases fairly, neutrally, and without bias. Similarly, a judiciary that passively undertakes review of challenges to congressional acts fails to serve in its core capacity to safeguard and protect the Constitution as a whole, including the comparative rights and protections it affords individuals on the one hand, and the duties, entitlements and authorities it conveys to Congress on the other.

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

Response: Judicial supremacy speaks to the holding of *Marbury v. Madison,* 5 U.S. 137 (1803), that the Supreme Court is the final arbiter of the meaning of the Constitution, and that its determinations of same are binding on all branches of the government. Judicial review speaks to the system of our government which provides that actions of the Executive and Legislative branches are subject to review and validation or invalidation through the judicial process (by way of a case or controversy and the attendant judicial powers set forth in Article III of the Constitution).

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: I do not perceive a necessary conflict among the duty to follow the Constitution and to respect judicial decisions (no matter their content or effect). Elected officials' duty to follow the Constitution does not constrain them from acting (within their constitutionally prescribed authority and duties) in ways unaddressed by a judicial decision or in ways not inconsistent with a judicial decision. The Constitution assigns the judiciary the power of, and duty to engage in, judicial review. In keeping with this constitutional prescription of judicial responsibility and

authority, elected officials should not discharge their duties or invoke their authority in a manner prohibited by a duly rendered judicial decision.

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 effectiveness of the Judicial branch and, therefore, the effectiveness of our system of government, depends on all citizens having respect for the rule of law and the judicial process. Said another way, the judiciary and court system is only as effective as citizens' belief and perception that the judicial process is fair, impartial and ethical. Therefore, a judge must at all times comport herself consistent with these ends.

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 precedent appears to a lower court judge not "to be rooted in constitutional text, history, or tradition" but nonetheless is dispositive of the issue before the court, the lower court judge is bound to apply it. If the precedent "does not appear to speak directly to the issue at hand," it would appear not to be dispositive of the issue and therefore not binding precedent for the case in question. The question as to whether a lower court judge should "extend the precedent [with questionable constitutional underpinnings] to cover new cases" suggests that no binding precedent from the Supreme Court or applicable circuit court of appeals exists. In such an instance, the lower court judge should consider Supreme Court and circuit court of appeals authority in analogous cases, if they exist. If the precedent in question is in fact analogous, it should be considered; if it is materially distinguishable or not analogous, it would not be appropriate to "extend the precedent."

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: 18 U.S.C. §3553(a) sets forth seven factors (with subparts) to be considered in imposition of a criminal sentence. A defendant's group identity as described in the question is not among the enumerated factors to consider. A judge should not impose a criminal sentence because of or based on a defendant's gender, race or other status set forth in the question.

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 do not have an opinion as to whether such a definition of equity is proper or correct. I believe all persons should be treated fairly, justly and impartially before the law.

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

Response: According to Merriam-Webster, equity means fairness and equality means the quality or state of being equal. I am unfamiliar with any prevailing legal meaning of these terms.

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

Response: I am unaware of any federal authority that defines or identifies "equity" as among the guaranteed protections afforded by the 14th Amendment.

27. How do you define "systemic racism?"

Response: I have not formulated my own definition of "systemic racism." The Cambridge Dictionary provides the following definition: "policies and practices that exist throughout a whole society or organization that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race."

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

Response: I have not formulated my own definition of "critical race theory." Britannica provides the following definition: "intellectual and social movement and loosely organized framework of legal analysis based on the premise that race is not a natural, biologically grounded feature of physically distinct subgroups of human beings but a socially constructed (culturally invented) category that is used to oppress and exploit people of colour."

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

Response: Critical race theory is an analytical framework or premise. Systemic racism is a term used to define a contention as to the condition of society. If I am confirmed to serve as a District Court judge and a case involving race were to come before me, for example a claim of race-based discrimination under Title VII, I would follow all binding Supreme Court and Fourth Circuit precedent on such matters.

Questions from Senator Thom Tillis for Julie Rebecca Rubin
Nominee to be United States District Judge for the District of Maryland

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

   Response: Yes. Where judges are called upon to make decisions based on the exercise of discretion, that discretion is based on application of the facts of the case before the court to the applicable legal standards and law, and not based on the personal views or beliefs of the judge.

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

   Response: Judicial activism to me means judicial decision-making based in whole or part on considerations outside of the record and applicable law to reach a preferred or desired outcome. It is not appropriate.

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

   Response: Judges are expected to be impartial.

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: As a sitting judge since January 2013, although I cannot recall any specific instance or case, my judicial duties have occasionally contrasted with my personal view wherein application of the law has resulted in an outcome inconsistent with my personal view or opinion. As a judge, I listen to and consider the evidence of each case before me and apply the law without consideration of my personal views.

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 to serve as a district judge, I will faithfully apply *District of Columbia v. Heller,* 554 U.S. 570 (2008), its progeny, and all Supreme Court and relevant

Fourth Circuit law to all cases that come before me, including those raising Second Amendment challenges.

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's constitutional rights?**

   Response: As a sitting trial court judge and a nominee to the federal bench, I am mindful that COVID-related conditions, laws, policies and restrictions are the subject of on-going political debate and court challenges at the state and federal levels. It is therefore not appropriate for me to answer a question about how I would rule on such matters in a hypothetical framework. If I were confirmed to the district court, and a case came before me raising a constitutional challenge of the sort described in the question, I would carefully consider the evidence and apply relevant Supreme Court and Fourth Circuit precedent to rule on the matter.

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: The Supreme Court held in *District of Columbia v. Wesby,* 138 S. Ct. 577 (2018), that law enforcement officers and other government officials are entitled to qualified immunity unless they violated a clearly established constitutional right, meaning 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." The Fourth Circuit applies this standard. The Fourth Circuit, in *Booker v. South Carolina Dept. of Corrections* explained that "[q]ualfied immunity protects officials 'who commit constitutional violations but who, in light of clearly established law, could reasonably believe their actions were lawful.'" *Booker v. South Carolina Dept. of Corrections,* 855 F.3d 533, 537-38 (4th Cir. 2007) (quoting *Henry v. Purnell,* 652 F.3d 524, 531 (4th Cir. 2011)). The Fourth Circuit in *Booker* reiterated the Supreme Court precedent of *Pearson v. Callahan,* 555 U.S. 223 (2009), that the doctrine of qualified immunity "weighs two important values - 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Booker,* 855 F.3d at 538. Under the Fourth Circuit precedent of *Melgar v. Greene*, 593 F.3d 348 (4th Cir. 2010), a court conducting a qualified immunity analysis must first identify the right the plaintiff contends was violated, following which the court must complete a 2-step inquiry asking "whether a constitutional violation occurred" and "whether the right violated was clearly established" at the time of the official's conduct. If confirmed, I would apply this and other relevant precedent to the cases before me that raise the question of qualified immunity.

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

Response: As a sitting judge, cases against law enforcement officers have come before me and can reasonably be expected to be brought before me again. Against this backdrop, as a sitting judge and a judicial nominee, it would be inappropriate for me to state whether I have a personal opinion on the policy question set forth in the question.

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

Response: As a sitting judge, cases against law enforcement officers have come before me and can reasonably be expected to be brought before me again. Against this backdrop, as a sitting judge and a judicial nominee, it would be inappropriate for me to state whether I have a personal opinion on the policy question set forth in the question.

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: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to express whether I have a personal opinion on the quality, strengths or weaknesses of Supreme Court precedents for several reasons, including the importance of maintaining the public's faith in the judiciary to rule on cases fairly, impartially and without bias in accordance with Supreme Court and, in my instance, relevant Fourth Circuit precedent. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

    Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or

to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct

professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

i. ***Hantson 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?**

Response: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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: When I was a practicing lawyer, I litigated intellectual property cases in federal and state courts. I have also taught intellectual property courses as an adjunct professor. Therefore, I appreciate the complexities and importance of intellectual property law. As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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: From January 2000 to January 2013, I practiced law in a law firm that provided intellectual property legal services, including copyright, trade secret, trademark, and right of publicity law. I litigated cases involving Copyright Act and Digital Millennium Copyright Act claims at both the federal trial and appellate levels. For example, as set forth in response to question 17 of my response to the Senate Judiciary Committee's Questionnaire for Judicial Nominees, from approximately 2001 to 2007, my then law firm and I represented Plaintiff DSMC, Inc., against Convera Corp., and NGT Library, Inc. In this action, DSMC alleged that Convera and NGTL misappropriated DSMC's software trade secrets, violated its copyright in its software, conspired to violate its intellectual property rights, were unjustly enriched at DSMC's expense, and that NGTL breached non-disclosure and related aspects of a contract it had with

DSMC. *DSMC, Inc. v. Convera Corp. and NGT Library, Inc.*, 273 F. Supp. 2d 14 (D.D.C. 2002); No. 02-7118, 2002 WL 31741498 (D.C. Cir. 2002); 349 F.3d 679 (D.C. Cir. 2003); *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68 (D.D.C. 2007).

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

Response: Please see my answer to question 15(a).

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

Response: Through my practice described in response to question 15(a), I am generally familiar with the laws pertaining to intermediary liability for online defamation and copyright infringement, but did not provide legal services directly to clients on these subjects.

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: Please see my answer to question 15(a).

16. **The legislative history 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 to serve as a judge of the United States District Court for the District of Maryland, in all cases that come before me, I would be bound by Supreme Court and Fourth Circuit precedent regarding a statute's meaning and application. If, however, a case were to involve application of a statute and there were no binding precedent regarding its interpretation, interpretation of its meaning would begin with a reading of the text. If the plain meaning of the statute is clear and unambiguous based on a reading of its text, my inquiry would end there. If no such case law is available and a reading of the plain text did not conclude the interpretational question, I would marshal a host of tools traditionally accepted as a

means of understanding statutory language, including reviewing cases on analogous or similar statutory provisions and frameworks; considering relevant canons of statutory interpretation; I might employ a basic dictionary if the meaning of a particular word figured materially into the question and was not defined in the statute itself; I would consider the statute as a whole to determine if the interpretational question is resolved in whole or part by the statutory context of the particular provision at issue among other portions or sections of the statute; I would consider whether the statute contains a stated legislative purpose in the introductory portions of the statute, as some statutes do; I would also consider whether legislative history is available and, if so, the quality and nature of same (*e.g.,* whether the legislative history provides a broad view of the legislative process and purpose versus merely one isolated statement of a legislator). Some types of legislative history are more probative than others. For example, legislative history that provides insight into the context of a statute's proposal and enactment can be instructive, as can circumstances where a legislative body amends a pre-existing statute to clarify or modify its meaning and application. Similarly, legislative history regarding proposed but rejected language can be instructive in demonstrating what the statute is not intended to mean or to appreciate the legislature's intended limits or parameters of a statute's application. Legislative history as to statements of legislative purpose can be helpful, but should be approached with caution and consideration of whether such statements are the voice of an individual legislator or, instead, provide a broader, more holistic appreciation of the intended purpose of the legislative body.

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: The Supreme Court and Fourth Circuit have issued precedent on the weight to be given to agency determinations of the sort described in the question. If I am confirmed, I will apply that precedent.

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 sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the outcome of a hypothetical case or to indicate how I would rule on a set of hypothetical facts. As a former lawyer who litigated intellectual property cases in federal and state courts, and as a former adjunct professor of intellectual property, I appreciate the complexities of intellectual property law. If I am confirmed and patent cases come before me, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent.

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: It is the duty of all judges to faithfully apply the law to the unique facts of the cases that arise before them. This often includes applying older statutory provisions or constitutional provisions to new technological landscapes. As a judge, if I am required to apply a law to a frontier area of technological innovation, I would work hard to understand the innovation at issue and would apply precedent to the best of my ability.

    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 answer to question 17(a).

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: Judge shopping and forum shopping are generally viewed as inappropriate and exploitative of the legal system and judicial process. I do not have experience or awareness of the prevalence or possible effects of such practices and so do not have an opinion as to whether they pose "a problem in litigation." In the United States District Court for the District of Maryland, however, judge shopping is not problematic in my opinion, as cases are randomly assigned to the judges sitting in the respective Northern and Southern Divisions in which cases are filed (with the only exception I believe of *pro se* prisoner petitions for *habeas corpus* relief).

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

Response: All judges have the responsibility and are duty-bound to abide the judicial canons of ethics and all administrative and court rules that govern the courts in which they preside.

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: I am not familiar with the phrase "forum selling" and do not know what it means. All judges have the responsibility and are duty-bound to abide the judicial canons of ethics and all administrative and court rules that govern the courts in which they preside.

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

Response: I am not familiar with the phrase "forum selling" and do not know what it means. All judges have the responsibility and are duty-bound to abide the judicial canons of ethics and all administrative and court rules that govern the courts in which they preside. I have been a sitting state trial judge since January 2013 and have always comported myself ethically and in accordance with all applicable administrative and other court rules and policies of the court in which I serve. If I am confirmed to serve as a district judge, I commit to faithfully comply with the judicial canons of ethics and all administrative and court rules that govern the United States District Court for the District of Maryland.

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 sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the merits or appropriate outcome of judicial or legal disputes, cases or the merits of operative orders. It would likewise be inappropriate for me to express an opinion as to whether a judge's actions in a case are proper or lawful. If I am confirmed, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent, and comply with applicable court rules and orders in matters pending before me.

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

Response: As a sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the merits or appropriate outcome of judicial or legal disputes, cases or the merits of operative orders. It would likewise be inappropriate for me to express an opinion as to whether a judge's actions in a case are proper or lawful. If I am confirmed, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent, and comply with applicable court rules and orders in matters pending before me.

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: I am unable to comment on others' perceptions of the fairness and evenhandedness of the administration of justice. All judges should strive to ensure that they comport themselves in a manner that promotes the public's faith and trust in the judicial process and legal system. If I am confirmed to the district court, I will approach my service and discharge my judicial duties in such a manner.

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: I am uncertain what is meant by use of the word "inquire" or by what means such an inquiry would be made or by whom. Citizens are entitled to invoke legal process in accordance with applicable law and court rules, and to the extent such a process is available to obtain the relief posited by the question, such action is appropriate.

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: Judge shopping and forum shopping are generally viewed as inappropriate and exploitative of the legal system and judicial process. I am unaware of the process by which local rules are promulgated or adopted in the United States District Court for the Division of Maryland or in any other division, or whether district judges have occasion to voice support or opposition to proposed local rule changes.

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 sitting judge and a judicial nominee to serve on the district court, it would be inappropriate for me to opine about the merits or appropriate outcome of judicial or legal disputes, cases or the merits of operative orders. It would likewise be inappropriate for me to express an opinion as to whether a judge's actions in a case are proper or lawful. If I am confirmed, I will faithfully apply Supreme Court and relevant Fourth Circuit precedent, and comply with applicable court rules and orders in matters pending before me.

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

Response: Please see my answer to question 21(a).