Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Katherine Marie Menendez
Nominee to be United States District Judge, District of Minnesota

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

Response: In general, it is inappropriate for a sitting judge or a judicial nominee to express their opinion regarding whether particular decisions of the Supreme 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. 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.

Applying this lens to the list of cases below, I believe that only two of these decisions are so well-settled that they are beyond debate or reconsideration, and I will answer the question with respect to those two.

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

Response: Yes, I believe it was.

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

Response: Yes, I believe it was.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

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

Response: See my answer to question 1, above.

2. **In speeches delivered after you took the bench, you noted that you are supposed to be "neutral" as a judge, but that you still want to find "room to work toward equal justice" and that you want to use your new role as a judge to "be an advocate for fairness while being impartial."**

a. **How will your decades of advocacy on behalf of criminal defendants influence your decision-making as a neutral arbiter?**

Response: As a judge, I must put aside my personal beliefs and apply the law fairly and impartially. I have done so as a Magistrate Judge and will continue to do so if confirmed to be a District Court Judge.

b. **How can parties appearing in front of you be assured of fair decision making, given your prior advocacy?**

Response: I have been a Magistrate Judge for more than five years. I believe that I have demonstrated fairness and impartiality from my first days on the bench. When the law requires, as it often does, I have ruled against former colleagues and against positions that benefit criminal defendants, and I will continue to do so. I believe this consistent demonstration of impartiality has given me a reputation for fairness as a judge.

3. **In another speech delivered after you took the bench you noted a challenge that you were working with: "where is there room in the job of a judge for acknowledging and working to fix flaws and unfairness in our legal system."[1] What specific actions have you taken to "fix flaws and unfairness in our legal system"?**

[1] SJQ 12(D) at 165.

Response: As a judge, it is not my job to enact legislation or policies, nor to advocate for changes in the law. However, I have worked actively on the committees of the Court to ensure equal justice for all litigants. For example, during the early days of the pandemic, I worked closely with the Chief Judge, other Magistrate Judges, the government, the public defender, the U.S. Marshal and others to ensure that defendants held in county jails continued to have access to the courts and their attorneys despite COVID. I am also the judge liaison with our district's pro se law clerks, and I work with them to ensure that pro se litigants are treated fairly and are able to access the courts despite not having counsel. I believe these are examples of how a judge, within the bounds of judicial ethics, can work to ensure "equal justice under law."

4. **What is a directed verdict, and how often did you move for a directed verdict during your career as a public defender? Please explain with specificity.**

   Response: As an Assistant Federal Defender, in every case that I tried, I orally moved the Court pursuant to Fed. R. Cr. P. 29 for a judgment of acquittal at the close of the government's case, arguing that the government had failed to meet its burden of proof. In some instances, this was done as a prophylactic move, to ensure that certain legal issues -- such as a later appellate challenge to the sufficiency of the evidence -- were not waived. I do not recall a Rule 29 motion being granted in any of my trials.

5. **Should judges consider public opinion when rendering a decision:**

   a. **About a case?**

      Response: No.

   b. **Sentencing a defendant?**

      Response: No.

6. **In what types of situation does qualified immunity not apply to a law enforcement officer in Minnesota? Please include the law of the 8th Circuit in your response.**

   Response: The Supreme Court has held that law enforcement officers and other government officials are entitled to qualified immunity unless they violated a clearly established constitutional right, which means that "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The Eighth Circuit applies this standard with little change, noting that qualified immunity requires a two-step inquiry. First, the plaintiff must show facts that demonstrate the violation of a constitutional or statutory right. Second the plaintiff must establish that the right was clearly established at the time of the alleged misconduct. In the absence of

affirmative answers to both questions, an official defendant is entitled to qualified immunity. *See Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019).

7. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

   Response: I am unaware of any basis for such private prosecution.

8. **Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?**

   Response: This is a policy decision best left to lawmakers. As a sitting judge, I apply the law to the facts of cases that arise before me, without regard to my own opinions about that law and without regard to public debate about whether those laws should be changed.

9. **Should judges consider principles of social "equity":**

   a. **When deciding a case?**

      Response: I am unsure what is meant by "social equity." However, a judge must apply the law to each case before her, regardless of his or her own personal opinions regarding social issues. A judge must treat every litigant fairly and impartially.

   b. **When sentencing a defendant?**

      Response: See my answer to question 9a, above.

10. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

    Response: Significant caselaw and 18 U.S.C. § 3553 govern a federal judge's decisions regarding sentencing. It is up to Congress to craft sentencing laws that balance the various goals of sentencing. A judge must apply those law fairly, impartially, and thoughtfully to each defendant who appears before her. If I am confirmed as a District Court Judge, I will treat the responsibility of sentencing with utmost seriousness, and will not allow my personal opinions about the purposes of sentencing generally to interfere with my application of the law.

11. In *Dimbiti v. Secretary of Homeland Security*, you ordered the government to bear the burden of proof in a bond hearing for an illegal immigrant's habeas petition, despite noting that the Board of Immigration Appeals (BIA) "has found that the alien must bear the burden of proof at such bond hearings" and that "[n]either the Supreme Court nor the Eighth Circuit [] clarified who bears the burden of proof (or what quantum of proof is required) in a case like"[2] the defendant's. The government argued that under *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), courts should defer to the findings of the BIA. Why did you choose to apply the opinion of four district courts instead of the Supreme Court in this case?

Response: In *Dimbiti,* as in all of the cases that I have considered, I applied the law to the facts to the best of my ability. Although I recommended requiring the government to bear the burden of proof at the bond hearing on remand, the district court declined to adopt that portion of my recommendation. The district court did not conclude, as the Agency advocated, that placing the burden of proof on the government was necessarily correct, nor that the Agency's policy deserved *Chevron* deference. Instead the district court found that the Agency should be allowed to consider "in the first instance" where to allocate that burden at Mr. Dimbiti's hearing. In cases decided after *Dimbiti*, once it became clear that the Agency would not reconsider its allocation of the burden of proof in any case on remand, some District Judges in the District of Minnesota have concluded that due process considerations require the burden of proof to be placed on the government under certain circumstances when a case is remanded from the federal court for a bond hearing. *See, e.g., Pedro O. v. Garland*, 2021 WL 3046799 (D. Minn. June 14, 2021) (collecting cases).

12. In *Donavan v. Werlich*, the defendant was sentenced to a 20-year mandatory minimum prison term after pleading guilty to conspiring to distribute oxycodone and methadone and distribution of oxycodone, both of which resulted in the death of another.[3] You issued a Report and Recommendation recommending granting the defendant's 18 U.S.C. § 2241 habeas petition and vacating his conviction and sentence after concluding that the defendant did not receive notice of an essential element of the crime, specifically causation, "despite broad references to broad concepts of causation" in his plea agreement.[4] The district court reversed you, explaining that "the language in the plea agreement demonstrates that the [defendant] was on notice as to what the Government would have to prove, making his plea knowing and voluntary."[5]

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[2] SJQ 13(F) at 674.
[3] SJQ 13(F) at 558.
[4] SJQ 13(F) at 566.
[5] SJQ 13(F) at 576.

a. **In considering whether the specific language placed the defendant on notice, did you increase the specificity you required for notice because the defendant was subject to a 20-year mandatory minimum sentence, which you had strongly opposed as a public defender?**

Response: I did not base my Report and Recommendation in *Donovan v. Werlich* on any position I held as a public defender, nor on any personal beliefs. It was a complicated case with a unique and convoluted procedural history, and I did my best to apply controlling precedent to the facts of the case before me. Furthermore, the issue before me was not the length of Mr. Donovan's sentence, but the validity of his guilty plea.

b. **In recommending that the district court grant the defendant's habeas petition and vacate his conviction and sentence, did you consider the impact of your recommendation on the family of the victim, who was killed as a result of the defendant's actions?**

Response: I did not consider the impact of my recommendation on the family of the victim when addressing the legal issue before me in that case. Despite my profound sympathy for their loss, it would be inappropriate to allow such sympathies to affect my application of the law.

13. **You were a Soros Justice Fellow at the start of your legal career. Have you maintained contact with the organization since your two-year fellowship? If yes, please explain the extent of your involvement, past and current, with the organization.**

Response: I have not had contact with the Open Society Institute in many years. I believe that, shortly after my fellowship concluded, I participated in some meetings with the organization to share feedback about my experience as a fellow, and to evaluate applicants for future years of the program. To the best of my recollection, I have not engaged in even those limited communications in more than twenty years.

14. **While you worked as a Soros Justice Fellow, what project(s) did you undertake that "advance[d] reform, spur[red] debate, and catalyze[d] change on a range of issues facing the U.S. criminal justice system"?[6] Please explain with specificity.**

Response: As a Soros Justice Fellow, I worked in the Office of the Federal Defender for the District of Minnesota. In many ways, I was simply an Assistant Federal Defender in training, albeit a very inexperienced one. The focus of my fellowship was to work on criminal cases in the District of Minnesota that arose from "Indian Country." I conducted

[6] Open Society Foundations, "Soros Justice Fellowships," accessed on Oct. 28, 2021, available at: https://www.opensocietyfoundations.org/grants/soros-justice-fellowships.

in-depth research on Indian law issues as they arose in the office, and shared that research with other attorneys. I worked in one way or another on most of the Office's Red Lake cases during my time as a fellow, though never as lead counsel.

15. Is racism a public-health crisis?

Response: As a sitting judge and a judicial nominee, my personal beliefs about whether racism is a public health crisis are irrelevant. I faithfully apply the law to all cases that come before me, and treat all parties fairly regardless of race.

16. What is implicit bias?

Response: My understanding is that implicit bias refers to the idea, supported by social science research, that all people have unconscious biases or prejudices that can cause them to make decisions, particularly quick decisions, based on stereotypes.

17. Is the federal judiciary affected by implicit bias?

Response: Research suggests that all people have unconscious biases to some extent, and this would include federal judges. However, it is important that judges treat all people impartially and fairly, without regard to such biases.

18. Do you have any implicit biases? If so, what are they?

Response: I believe that I, like all people, have certain unconscious biases. As a judge, I must put aside my personal feelings and any biases and treat every person that appears before me fairly and impartially.

19. Should a defendant's personal characteristics influence the punishment he or she receives?

Response: Under 18 U.S.C. § 3553(a), which governs federal sentencing, a judge "shall consider" the "history and characteristics of the defendant" among other factors. If I am confirmed as a District Court Judge, I would apply this statute and others to the sentencing issues that arose before me.

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

Response: If confirmed, I would follow the Supreme Court's precedent from *District of Columbia v. Heller*, 554 U.S. 570 (2008), and its progeny, as well as any precedent adopted by the Eighth Circuit Court of Appeals.

21. What legal standard would you apply in evaluating whether or not the misdemeanor crime of domestic violence is considered a crime of violence?

Response: The term "crime of violence" has many meanings in many different statutory contexts. I would apply the appropriate statutory scheme to the question of whether a particular misdemeanor offense satisfies a specific definition.

22. Under Supreme Court and Eighth Circuit precedent, is the misdemeanor crime of domestic violence considered a crime of violence under the ACCA? Please explain with specificity.

Response: I engaged in substantial litigation regarding the ACCA as an Assistant Federal Defender, including litigating an ACCA case to the United States Supreme Court. That experience taught me that the question of whether any particular prior conviction qualifies as a "violent felony" under the ACCA must be answered first by reference to the text, elements, and available penalties of the specific state law at issue. Therefore, I cannot answer in the abstract whether a misdemeanor domestic violence crime would qualify as a predicate offense under the ACCA.

23. Do you believe that we should defund police departments? Please explain.

Response: This is a subject of ongoing debate nationwide and in Minnesota, where I am a Magistrate Judge. This is also a political question, left to the people and their elected representatives. Therefore, it would be inappropriate for me to answer this question.

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

Response: See my answer to question 23, above.

25. How do you understand the difference, if any, between freedom of religion and freedom of worship?

Response: I have not had this question arise in any cases before me. While both the freedom to worship and the free exercise of religion are protected by the First Amendment, the Free Exercise Clause protects more aspects of religious life and practice than simply the freedom to worship. If a case arose before me presenting this issue, I would apply controlling precedent from the Supreme Court and the Eighth Circuit.

26. Do you agree with Thomas Jefferson that the First Amendment erects "a wall of separation between Church & State"?

Response: The First Amendment states, in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Questions about the extent to which government and religion may appropriately intersect are fact dependent and I would apply binding Supreme Court and Eighth Circuit precedent to any case presenting such a question.

27. Do you believe that "[t]here is no such thing as a non-racist or race-neutral policy"?

Response: No.

28. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

Response: The First Amendment should be applied with equal force to all people, regardless of whether they can be described as "the powerful" or "the oppressed."

29. Please explain the current standard for issuing a nationwide injunction in the Eighth Circuit and discuss the Eighth Circuit's explanation for how a nationwide injunction is consistent with a court's role under Article III of the United States Constitution.

Response: No case before me has presented the question of nationwide injunctions, and I have not had occasion to closely review the relevant authority on the subject. I do not believe that the Eighth Circuit has set forth any particular standard to govern when a court should grant such an injunction.

In general, Federal Rule of Civil Procedure 65 governs injunctions. In addition, if an injunction is being sought at the outset of a case, such as through a for a preliminary injunction, must consider the factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), which include a consideration of the likelihood of success on the merits, the likelihood of irreparable harm, the balance of equities and hardships from granting or denying the injunction, and that the public interest would be served by the injunction. It is a rightly high burden for a litigant to get injunctive relief at the outset of a case.

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

a. **Under current Supreme Court and Eighth Circuit precedent, who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**

Response: RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." According to the statute, if a law or other federal government action "substantially burdens" a person's exercise of their religion, it must survive strict scrutiny, and a court must find that the law is both in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. *See, e.g., Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

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

Response: In *Hobby Lobby*, the Court found that the contraceptive mandate contained within the Affordable Care Act imposed a substantial burden on the plaintiffs, who were opposed to certain contraceptive methods on religious grounds. However, the Court did not describe or explicitly apply a test for determining whether the provision at issue imposed such a burden, instead concluding that the burden was essentially obvious. The Eighth Circuit, applying RLUIPA, a closely related statute, has held that, to be a substantial burden, a policy must (1) significantly inhibit or constrain expression that manifests some central tenet of a person's beliefs; (2) meaningfully curtail a person's ability to express adherence to his or her faith; or (3) deny a person reasonable opportunities to engage in activities fundamental to that person's religion. *See, e.g., Murphy v. Missouri Department of Corrections*, 372 F.3d 979, 988 (8th Cir. 2004).

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

Response: In *Meyer v. Nebraska*, the Supreme Court recognized that parents have a due process right to direct the education of their children. I am sure that the parameters of this right are the subject of both debate and substantial litigation, but I have not had occasion to consider the application of this precedent in cases before me.

32. 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.

33. 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.

34. 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?**

Response: No.

b. **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.**

Response: No.

c. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

35. **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: As explained above, in the answers to questions 13 and 14, I was a Soros Justice Fellow from 1997-1999. I have had no contact with the Open Society Institute or any of its affiliates for approximately twenty years.

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: Yes. Please see my answer to question 35a, and questions 13 and 14, above.

36. 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.

37. 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: I submitted an application to the Judicial Selection Committee established by Senator Amy Klobuchar in December of 2019. On September 2, 2020, I participated in an interview with the Committee. I spoke with Senators Klobuchar and Smith in December 2020 and January 2021, as well as to members of their respective staffs. At that time, I was advised that I was a finalist for the open District Court position. In January, I also spoke with an attorney from the White House Counsel's Office. In June, I was again contacted by the White House Counsel's Office and advised that I was being considered for potential nomination and instructed to begin the vetting process. Since June 10, 2021, I have been in contact with officials at the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On September 20, 2021, my nomination was submitted to the Senate.

38. Please describe the selection process that led to your nomination, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: See my answer to question 37, above.

39. 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.

40. 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. I was contacted at some point in the past 18 months by a student who, if I recall correctly, was a member of a student chapter of the American Constitution Society, and I believe she wanted to discuss whether I would be interested in submitting my name for consideration as a District Court Judge. As I recall, she seemed unaware that I had already applied for the position, and I never communicated with her further.

41. 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.

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

Response: No.

43. 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 the exact dates of communications with White House staff or the Justice Department regarding my nomination. I was in routine contact with both offices during the vetting process and in preparation for my appearance before the Senate Judiciary Committee.

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

Response: I received my questions from the Committee on November 10th and I immediately undertook research to answer them. I compiled the answers to my questions

over several days. I shared them with the Office of Legal Policy, received feedback, and then finalized my answers for submission.

Nomination of Katherine Marie Menendez
to be United States District Judge for the District of Minnesota Questions for the Record
Submitted November 10, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *District of Columbia v. Heller* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms, rejecting the argument that it is a right that only belongs to a militia.

5. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).**

   Response: *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), is the Supreme Court's most recent significant decision regarding the free exercise of religion. The Court held that

government regulations are not "neutral and generally applicable" if they "treat any comparable secular activity more favorably than religious exercise." In the face of such a law or regulation, a reviewing Court must apply strict scrutiny.

6. **Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).**

   Response: In *Jennings v. United States*, the Supreme Court held that the Immigration and Nationality Act's provisions could not be read to either place a presumptive limitation on the length of time an alien could be detained pending removal, nor to require period detention hearings. The Court rejected the lower court's application of the doctrine of constitutional avoidance, finding that it only applied when a statute has multiple plausible constructions. The Court found that the INA provisions at issue admitted of only one interpretation, and therefore the doctrine was not relevant.

7. **Please describe what you believe to be the Supreme Court's holding in *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021).**

   Response: In *Johnson v. Guzman Chavez*, the Court held that the provision of the Immigration and Nationality Act that governs the detention of aliens in the removal period applies to noncitizens seeking withholding of removal. As a result, such detainees are not entitled by statute to bond hearings.

8. **In the questionnaire that you submitted to the Judiciary Committee, you note as among your most significant work your representation of two terrorists at Guantanamo Bay. You also note that these cases were part of your work as a public defender, and that your office was appointed to those cases. Please describe how you became personally involved in these cases, including whether you volunteered for or were assigned to this representation.**

   Response: Federal Defenders offices around the country were appointed to represent detainees at Guantanamo Bay. The Acting Federal Defender for the District of Minnesota agreed that the Minnesota Office of the Federal Defender could represent two detainees. Two other attorneys were originally assigned to those cases. At some point several months into their work, I agreed to work on the cases as well. While I did not make the decision that our office would participate in Guantanamo Bay detainee representations in the first instance, I did agree to help represent these clients. I would note that the two clients I represented were never formally charged with nor found guilty of any terrorism related charges, and both were cleared for release by the executive branch without the need for a habeas hearing.

9. **What is your view of arbitration as a litigation alternative in civil cases?**

Response: In many of the cases I have handled as a Magistrate Judge, arbitration has been an issue. In some cases, the parties have voluntarily sought arbitration as a means of resolving some or all of the pending dispute. In other cases, I have been asked to interpret and apply an arbitration clause in a contract between parties. My personal view about the role of arbitration in federal court cases is irrelevant, but I have faithfully and carefully applied Supreme Court and Eighth Circuit precedent to such questions.

10. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

    Response: I received my questions from the Committee on November 10th and I immediately undertook research to answer them. I compiled the answers to my questions over several days. I shared them with the Office of Legal Policy, received feedback, and then finalized my answers for submission.

11. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed**.

    Response: No person from within or outside of the government wrote or drafted my responses to these questions.

Senator Josh Hawley
Questions for the Record

Judge Katherine Menendez
Nominee, U.S. District Court for the District of Minnesota

1. **Justice Thurgood 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 agree with that statement. As a sitting Magistrate Judge, I apply controlling precedent to the facts in cases that arise before me, without regarding to whether that results in an outcome that "I think is right."

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

      Response: I do not presume to judge whether another judge, particularly a jurist as esteemed as Justice Thurgood Marshall, violated his judicial oath. I have worked for almost six years to honor the oath I took as a Magistrate Judge, and I will continue to do so if confirmed to the District Court.

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

   Response: I have come across several kinds of abstention as a Magistrate Judge, which are briefly described below. There are other abstention doctrines that I have not yet encountered.

   Younger Abstention: This doctrine, named after *Younger v. Harris*, 401 U.S. 37 (1971), stands for the idea that federal courts should generally decline to interfere with a state's enforcement of its own laws. I have had occasion to apply this doctrine in the habeas context, when litigants who are facing criminal prosecutions in state court ask a federal court to intervene to stop the proceedings while they are still underway.

   Pullman Abstention: *Pullman* abstention is the doctrine by which a federal court should generally avoid deciding on the constitutionality of a state law before allowing the state courts to address the question. It is based on *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Although I believe this doctrine has been raised in a case before me, I do not recall the context.

   Colorado River Abstention: This type of abstention counsels against simultaneous parallel litigation in federal and state courts. It derives from *Colorado River Water*

Conservation District v. United States, 424 U.S. 800 (1976). As with *Pullman* abstention, I believe it has been raised in litigation before me, but I do not recall the context.

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

   Response: I have not worked on a case in which I opposed a religious liberty claim.

   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.**

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

   Response: I do consider legislative history when interpreting texts, but only if other methods of statutory interpretation have been unsuccessful. I first endeavor to apply the law at issue using its plain meaning, and I employ various cannons of statutory interpretation. If the statute is ambiguous, I consider things beyond its plain language, such as the language of related statutes. If there is still ambiguity, I consider legislative history.

   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: When legislative history speaks with a unified voice, suggesting that the people who adopted the law shared a common understanding regarding the law's meaning, I give it greater weight. When the legislative history supports competing interpretations with equal strength, its usefulness is circumscribed.

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

      Response: This question has not arisen in my experience, so I do not know the answer. If I were asked by a litigant to apply the law of a foreign nation in some way in a case before me, I would research precedent from the Supreme Court and the Eighth Circuit regarding what role, if any, such precedent can play.

5. **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: According to the Supreme Court, in order for a prisoner to establish that a method of execution is cruel and unusual, they must show: (1) that the method presents a risk that is very likely to cause needless suffering, and (2) that a "feasible and readily implemented alternative method of execution" exists that significantly reduces the risk of

severe pain. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *Glossip v. Gross*, 576 U.S. 863 (2015). This standard has been applied without change in the Eighth Circuit. *Johnson v. Precythe*, 954 F. 3d 1098 (8th Cir. 2020).

6. **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: See my answer to question 5, above.

7. **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: I have not had this issue arise in a case before me. In *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), the Court acknowledged that the prisoner in that case had a liberty interest in "demonstrating his innocence" under Alaska law. The Court declined to find that Alaska's framework for considering requests for retesting DNA evidence violated fundamental principles of justice. *Id*. at 69. The Court also suggested that the legislative branches of government should be allowed to address the question of testing DNA in closed cases, noting that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers…." I do not believe that the Eighth Circuit has adopted a different analysis, and it has applied the *Osborne* decision in multiple cases.

8. **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: As a Magistrate Judge, I am sworn to uphold the law and do so, regardless of my personal feelings about that law. If confirmed as a District Court judge, I will continue to do so.

9. **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 occasion to research the issue of what degree of market share constitutes a monopoly, so I do not have an opinion about Judge Hand's statement.

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

Response: I have not had occasion to research the issue of what degree of market share constitutes a monopoly, so I do not have an opinion about 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: Again, I have not had occasion to research what percentage of a market share constitutes a monopoly. I suspect it depends on a long list of factors, including the nature of the market at issue and the number of competitors within it. If a case arose before me that presented this question, I would follow the binding precedent of the Eighth Circuit and the Supreme Court.

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: *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), is the Supreme Court's most recent significant decision regarding the free exercise of religion. The Court held that government regulations are not "neutral and generally applicable" if they "treat any comparable secular activity more favorably than religious exercise." In the face of such a law or regulation, a reviewing Court must apply strict scrutiny. Because this decision is so new, I am unaware of any Eighth Circuit authority interpreting or applying it. *See also Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (finding city's practice of requiring adoption agencies to approve placement of children with same sex couples burdened the Free Exercise clause). However, if a law is in fact determined to be neutral and generally applicable, then the government need not satisfy strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). In addition, if the governmental action at issue is federal, the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, as interpreted by the Supreme Court and the Eighth Circuit, set limits for government actions that impact the free exercise of religion.

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: See response to question 10, above.

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 "religious beliefs need not be acceptable, logical, consistent or comprehensible to others" in order to be protected by the First Amendment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). In *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014), applying RFRA, the Court reminded that they have "repeatedly refused" to analyze whether sincerely held religious beliefs are "flawed." The Eighth Circuit has not articulated a different standard, but has followed *Hobby Lobby's* warning. *See, e.g. New Doe Child #1 v. United States*, 901 F.3d 1015 (8th Cir. 2018) (declining to "question the reasonableness of the Plaintiffs' belief that carrying and using cash emblazoned with the words "In God We Trust" violates their convictions).

13. 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: I am not sure what he meant by that statement, and I am unfamiliar with Mr. Herbert Spencer's Social Statistics.

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* was essentially abrogated by *West Coast Hotel v. Parrish,* and similar decisions, and in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court said that the doctrine that infused the decision "has long since been discarded." Because it is no longer good law, I would not apply it.

14. 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 believe Justice Scalia was discussing the reality that the decisions of judges cannot be based upon their personal preferences or beliefs, but must be controlled by binding authority, statutes, precedent, and the Constitution. If a judge refuses to apply such controlling law simply because it results in an outcome that is discomfiting to her, she has not done her job.

15. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I believe Justice Roberts was stating that it is not the job of the judiciary to enact laws or to enforce them, but solely to interpret them and to apply them to cases that arise before the Court.

b. Do you agree or disagree with this statement?

Response: I agree.

16. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: Judges are not supposed to decide cases to serve the outcome that they believe would be best. Instead, a judge must apply the law faithfully, regardless of whether that judge agrees with it or not. A judge must of course be free from bias and cannot show favor or preference to either side. Ideally, applying the law in this way results in a "just" outcome. But changing the laws is a matter for policy-makers and not the Court.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: I agree.

17. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: I believe that the Court meant that, although *Korematsu* had not been expressly overruled by subsequent decisions, its impact had been vitiated by the events of history and it had not since been applied in new contexts as controlling precedent.

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

Response: I cannot think of a precedent that has been "overruled in the Court of history" but still remains "good law."

a. If so, what are they?

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

Response: I commit to faithfully applying Supreme Court precedent and Eighth Circuit decisions, as I have done throughout my time as a Magistrate Judge.

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

Response: My understanding of "federal common law" is that is a narrow set of considerations borne of federal caselaw rather than statutes or the Constitution. I have not had occasion to address the reach of such common law. If a case arose before me that presented a question of federal common law, I would research the applicable precedents and apply them.

20. 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 I were required to interpret the scope of a state constitutional provision in a case that arose before me, I would look to decisions from the Supreme Court of that state interpreting the provision. The interpretation of that state's constitution would not, of course, be binding on a federal judge interpreting the United States Constitution.

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

Response: Under certain circumstances, identical textual language is given the same meaning in different contexts. However, state courts have often interpreted their own Constitutional texts differently from the way the federal courts have interpreted the United States Constitution, despite the fact that the documents contain the same words. Such differences are a key part of our federalist system of government.

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, left to the state courts. In no case, however, can a state violate a protection provided by the United States Constitution simply because its own constitution provides fewer protections to individual liberties. In this way, the United States Constitution, and particularly the Bill of Rights, sets a floor for every citizen.

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

Response: In general, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because many of those decisions, though controlling, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I can express

my thoughts on the rightness of such a decision. Applying that lens, I believe that *Brown v. Board of Education* was rightly decided. As a child raised in Topeka, Kansas, where *Brown* originated, I learned about *Brown* and its impact from a very young age.

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

Response: No case before me has presented the question of nationwide injunctions, and I have not had occasion to closely review the applicable authority on the subject. However, I know that it is a matter of current controversy, both in cases being actively litigated and in legal scholarship. If a case arose before me where a party were seeking a nationwide injunction, I would closely examine the issue, research it carefully, and apply controlling precedent to my decision.

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

Response: In general, Federal Rule of Civil Procedure 65 applies to govern injunctions. In addition, if an injunction is being sought at the outset of a case, such as through a for a preliminary injunction, a court must consider the factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), which include a consideration of the likelihood of success on the merits, the likelihood of irreparable harm, the balance of equities and hardships from granting or denying the injunction, and whether the public interest would be served by the injunction. It is a rightly high burden for a litigant to get injunctive relief at the outset of a case.

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

Response: As explained, if a litigant were to seek a nationwide injunction in a case that arose before me, I would research the issue closely, being mindful that injunctive relief, particularly early in litigation, should be rarely granted and narrowly tailored.

23. 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: If I were confronted with a case involving a request for a nationwide injunction, I would carefully review the relevant law. I do not have an opinion today about the circumstances under which such an injunction would be appropriate.

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

Response: Federalism is a bedrock principle that underpins not only our founding documents, but that continues to impact government today. The federal government is a government of limited power, as are the federal courts. The Tenth Amendment reserves

powers to the states unless specifically delegated to the federal government. Also, allowing state to enact their own laws to address societal challenges enables valuable experimentation.

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

Response: Whether a case can be resolved through the award of damages or injunctive relief is a highly fact specific question, and is governed by the law, both statutory and caselaw. In some cases, harm can be compensated adequately by monetary damages, and in other cases, injunctive relief is required to fix a harm or prevent a future harm. In a case that arose before me, I would follow applicable law for determining what sort of relief is available.

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

Response: The Supreme Court has held that there are certain "fundamental rights and liberty interests" that are not specifically set forth in the Constitution. *See 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. But the Supreme Court has admonished that the application of the doctrine of substantive due process should be very rare, and courts must "exercise the utmost care" in applying it.

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

Response: In addition to the plain text of the Constitution and precedent interpreting its provisions, the original public meaning of its provisions is often referred to, particularly by the Supreme Court, in addressing constitutional questions. In some areas, such as the Second Amendment and the Confrontation Clause of the Sixth Amendment, such meaning has been given significant weight by the Supreme Court. When a constitutional provision is at issue in cases before me, I apply binding precedent from the Eighth Circuit and the Supreme Court, including application of analysis of the original public meaning of its language where so required.

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

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

Response: The Free Exercise Clause is an important protection of religious liberties contained in the First Amendment. When First Amendment issues arise in cases before me, I faithfully apply binding precedent from the Supreme Court and the Eighth Circuit. I am not sure what is meant by the "scope" of this protection, so I cannot provide a further answer.

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

Response: I have not had this question arise in any cases before me. While both the freedom to worship and the free exercise of religion are protected by the First Amendment, the Free Exercise Clause protects more aspects of religious life and practice than simply the freedom to worship. If a case arose before me presenting this issue, I would apply controlling precedent from the Supreme Court and the Eighth Circuit.

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, above.

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: See my response to question 12, above.

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

Response: RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." According to the statute, if a law or other federal government action "substantially burdens" a person's exercise of their religion, it must survive strict scrutiny, and a court must find that the law is both in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. *See, e.g., Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

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: Yes.

Thomas v. Bzoskie, No. 15-cv-2197 (JRT/KMM), 2017 WL 4480829 (D. Minn. May 8, 2017)

Cooper v. True, No. 16-cv-2900 (MJD/KMM), 2017 WL 6375609 (D. Minn. Nov. 2, 2017)

First Lutheran Church v. City of St. Paul, No. 18-cv-954 (JRT/KMM), 2019 WL 2403200 (D. Minn. June 7, 2019)

Flores v. Moser, No. 16-cv-1860 (ADM/KMM), 2019 WL 2016789 (D. Minn. Jan. 7, 2019)

Wenthe v. Roy, No. 16-cv-3866, Doc. No. 11 (D. Minn. Dec. 11, 2017), *aff'd by* No. 16-cv-3866 (MJD/KMM), 2018 WL 1073170 (D. Minn. Feb. 27, 2018)

29. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: As a sitting Magistrate Judge, I handle a large number of habeas cases, include those filed under 28 U.S.C. § 2254. It would be inappropriate for me to discuss this issue, as it is very likely to arise before me. I would apply Supreme Court authority and controlling Eighth Circuit precedent interpreting § 2254(d), *Harrington*, and its progeny.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: As a sitting Magistrate Judge, I handle a large number of habeas cases, include those filed under 28 U.S.C. § 2254. It would be inappropriate for me to discuss this issue, as it is very likely to arise before me. I would apply Supreme Court authority and controlling Eighth Circuit precedent interpreting § 2254(d), *Harrington*, and its progeny.

c. If you disagree with either of these statements, please explain why and provide examples.

30. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: Various courts have adopted different rules regarding the precedential value of unpublished decisions. In applying precedent to my decisions, I follow those rules and laws regarding whether unpublished opinions should be given controlling weight, viewed as persuasive, or nor relied upon at all. *See, e.g.,* Eighth Circuit Court of Appeals Local Rule 32.1A.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: I do not believe that a court's issuance of unpublished opinions is inconsistent with the rule of law. It is for each court to decide whether to issue such opinions and what precedential value to give them. In the age of electronic caselaw research, the status of a particular decision as unpublished does not prevent lawyers or litigants from studying its holding and its reasoning.

c. If confirmed, would you treat unpublished decisions as precedential?

Response: I would give unpublished opinions the weight that they are afforded by the rules of the court that issued them. In general, this means I would follow Eighth Circuit Local Rule 32.1A.

d. If not, how is this consistent with the rule of law?

Response: See my answer to question 30b.

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: See my answer to question 30c.

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: See my answer to question 30c.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: See my answer to question 30c.

31. In your legal career:

a. How many cases have you tried as first chair?

Response: I believe I tried 5-7 cases as first chair, and a couple more as equal co-chair.

b. How many have you tried as second chair?

Response: I believe I tried about 4 - 6 cases as second chair. At times as second chair, I was the more experienced attorney at the table and was supporting a less experienced attorney as part of my duties as a trainer.

c. How many depositions have you taken?

Response: None.

d. How many depositions have you defended?

Response: None.

e. How many cases have you argued before a federal appellate court?

Response: I argued dozens of cases before the Eighth Circuit Court of Appeals. I argued twice to the United States Supreme Court.

f. How many cases have you argued before a state appellate court?

Response: None.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: None.

h. How many dispositive motions have you argued before trial courts?

Response: I have never argued a dispositive motion (such as a motion to dismiss or a motion for summary judgment) in a civil case.

As an Assistant Federal Defender, I argued many motions to the District Court for the District of Minnesota, including suppression motions, motions related to pretrial detention, and motions related to sentencing. Few of these were "dispositive," though many were critical to the outcome of the case. I also

handled many quasi-criminal cases, including habeas corpus cases and commitment cases, and I argued dispositive motions in those cases.

i. How many evidentiary motions have you argued before trial courts?

Response: As an Assistant Federal Defender, I argued many evidentiary motions to the district court, including motions in limine before trial, motions at the bench during testimony, evidentiary issues during suppression and sentencing hearings, and evidentiary motions during supervised release revocation proceedings.

32. If any of your previous jobs required you to track billable hours:

Response: As an Assistant Federal Defender, I had to keep track of my hours generally, but I never had to document billable hours.

a. What is the maximum number of hours that you billed in a single year?

b. What portion of these were dedicated to pro bono work?

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

Response: As an Assistant Federal Defender, I routinely argued that various provisions of criminal substantive law and sentencing law were unconstitutional. Sometimes these arguments were raised in the face of binding authority to the contrary, to preserve the issue for future appeal. I do not recall all of the occasions on which I challenged such statutes. However, two cases I specifically recall are identified below.

a. If yes, please provide appropriate citations.

Response:

Johnson v. United States, 576 U.S. 591 (2015). I was lead counsel in this case.

United States v. Tom, 565 F.3d 497 (8th Cir. 2009). I was co-counsel in this case on appeal.

34. 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: I have not deleted or attempted to delete content from my social media. I have never been active in social media. Sometime in the last year I deleted my Facebook account entirely, though it had been dormant for many years before that. I did so to preserve the privacy and safety of my family, since I am now a sitting judge and the

Marshals strongly recommend taking steps to conceal identifying information from the internet.

35. What were the last three books you read?

Response: It is hard to say which three books I "last read" because I often go back and forth and read multiple things at one time. As I often do around the holidays, I am rereading the *Harry Potter* series. In addition, I recently read *The Madness of Crowds*, by Louise Penny; *June*, by Miranda Beverly-Whittmore; and *A Memory Called Empire*, by Arkady Martine.

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

Response: Racism in America is the subject of significant debate in our society right now, and its impact on our systems is as well. I live in Minnesota, where these topics have been the subject of intense public discourse, and questions of race underly litigation currently pending in our Court. The question of the extent to which policies and laws perpetuate racial inequalities are left to policy makers and citizens to discuss. As a judge, I strive to treat all people fairly that appear before me, without regard to race.

37. 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, above.

38. What case or legal representation are you most proud of?

Response: I am proud of the work I did throughout my time in the Office of the Federal Defender. If I had to pick a single case, I was proud of myself and my cocounsel when we twice briefed and argued *Johnson v. United States* to the United States Supreme Court.

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

Response: Yes. As an Assistant Federal Defender, I was required to zealously advocate on behalf of my client within the bounds of the law and my legal ethics, regardless of my personal opinions or feelings.

a. How did you handle the situation?

Response: I did my job, and represented every client to the best of my ability.

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

Response: I have been a Magistrate Judge for more than five years. Throughout that time, I have applied the law to the cases that arise before me without regard to my personal beliefs or opinions. If confirmed as a district court judge, I would continue to do so.

40. What three law professors' works do you read most often?

Response: There are no particular law professors whose scholarship I read regularly.

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

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

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: My decisions are often impacted by close reading of precedent and, more rarely, scholarship. I cannot recall a particular instance in which a single opinion or article, on its own, changed my mind, but I am sure it has happened.

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

Response: This is an issue of intense public debate and current litigation before the Supreme Court, and lower courts throughout the country. Therefore, it would be inappropriate for me to express my personal opinion. If a case arises before me that raises this question, I will follow and apply the law, including binding Supreme Court precedent, regardless of my personal beliefs.

44. 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: In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms, rejecting the argument that it is a right that only belongs to a militia.

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: I do not recall ever issuing an opinion regarding a claim under the Second Amendment.

45. 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 do not recall ever testifying under oath.

46. 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.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: I do not recall ever authoring a brief that was filed in court without my name. However, for many years I was the most experienced appellate attorney in the Office of the Federal Defender. In that capacity, I frequently edited the drafts of less experienced colleagues.

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

49. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: I am unable to provide a numerical answer to this question, and to the best of my knowledge, neither the Supreme Court nor the Eighth Circuit has ever done so either. A jury must decide whether the government has met the high burden of proof beyond a reasonable doubt in each particular case.

50. Have you ever confessed error to a court?

Response: As a lawyer, I appeared in Court hundreds or even thousands of times. I was always candid and, if I misstated a fact or made a similar error during a proceeding or in a brief, I never concealed my mistake. However, I do not recall ever "confessing error" in any formal sense.

a. If so, please describe the circumstances.

51. 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: The Senate's role in the process of judicial appointment is enshrined in the Constitution and represents an important part of our system of checks and balances. It is the duty of a nominee to be truthful and candid in answering questions, but also to remain removed from matters of politics and policy, as those are reserved to the other branches of government. In addition, as a sitting judge, I am bound by the canons of judicial ethics not to comment on cases that are pending before me or are likely to arise. I have attempted to balance these competing considerations and have been truthful in all matters.

Questions for the Record for Katherine Menendez
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 Ben Sasse
Questions for the Record for Katherine Menendez
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 03, 2021

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

   Response: No.

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

   Response: No.

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

   Response: As a judge, I must apply the law to the facts of the cases that appear before me. I must apply binding authority, including that of the Supreme Court and the Eighth Circuit Court of Appeals, regardless of my personal beliefs. I must always behave with integrity and honesty, both on and off the bench, and must treat all persons who appear before me fairly. If I am confirmed as a District Court Judge, I would continue to do so.

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

   Response: I do not subscribe to "originalism" as a controlling judicial philosophy, as it often does not answer the questions that come before me as a Magistrate Judge or those that would come before me as a District Court Judge. However, I recognize that the plain meaning of statutes, as expressed most clearly through their text, is an essential starting point in interpreting and applying the law. With respect to Constitutional interpretation, I apply binding precedent from the Supreme Court and the Eighth Circuit, including when that interpretation relies upon a close examination of the original meaning of a constitutional provision.

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

   Response: I believe that every judge is a textualist. The starting place for considering the application of any statute is the text of that statute, in an effort to discern its plain meaning. Similarly, the starting place for applying a provision of the Constitution is the text of that document.

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

Response: I do not subscribe to "living constitutionalism" as a controlling judicial philosophy. However, I am aware that the Constitution's application changes along with the issues that come before the courts. For instance, the Supreme Court has been asked to apply the Fourth Amendment to cell phones, thermal imaging devices, and geolocation data, none of which were contemplated at the time of its adoption. With respect to Constitutional interpretation, I apply binding precedent from the Supreme Court and the Eighth Circuit, including when that interpretation relies upon a close examination of the original meaning of a constitutional provision.

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

Response: I cannot name a single Justice whose jurisprudence I admire the most. Indeed, most decisions are not the work of any single justice, but of the majority of justices who shape not only the outcome but the text of each Supreme Court opinion. I admire many justices for their well-written opinions, their wit, their role as "firsts" on the Court, the work they did before they took the bench, or their commendable judicial temperament.

8. Was Marbury v. Madison correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I believe that I can express my thoughts on the rightness of such a decision. Applying that lens, I believe *Marbury v. Madison* is not only beyond debate or dispute, but it was correctly decided.

9. Was Lochner v. New York correctly decided?

Response: *Lochner v. New York* was essentially abrogated by *West Coast Hotel v. Parrish,* and similar decisions, and in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court said that the doctrine that infused the decision "has long since been discarded." Because it is no longer good law, I would not apply it.

10. Was Brown v. Board of Education correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly settled, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I believe that I can express my thoughts on the rightness

of such a decision within the bounds of my judicial ethics. Applying that lens, I believe that *Brown v. Board of Education* was rightly decided. As a child living in Topeka, Kansas, where *Brown* originated, I learned about *Brown* and its impact from a very young age.

11. Was Bolling v. Sharpe correctly decided?

Response: As a companion case to *Brown v. Board of Education*, *Bolling v. Sharpe*, also addressed the legality of racial segregation in public schools. For the same reason that I believe it is acceptable to share my opinion regarding *Brown*, I believe I can do so for *Bolling*. And I do believe it was rightly decided.

12. Was Cooper v. Aaron correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I believe that I can express my thoughts on the rightness of such a decision. Applying that lens, I believe that *Cooper v. Aaron* was correctly decided.

13. Was Mapp v. Ohio correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, because *Mapp v. Ohio* and the exclusionary rule it created are still the subject of ongoing debate and litigation, it would be inappropriate for me to share my opinion regarding whether it was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

14. Was Gideon v. Wainwright correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly settled, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I believe that I can express my thoughts on the rightness of such a decision within the bounds of my judicial ethics. Applying that lens, I believe that *Gideon v. Wainwright* was correctly decided.

15. Was Griswold v. Connecticut correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Griswold v. Connecticut* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

16. Was South Carolina v. Katzenbach correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *South Carolina v. Katzenbach* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

17. Was Miranda v. Arizona correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Miranda v. Arizona* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

18. Was Katzenbach v. Morgan correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Because I am unaware of the extent to which *Katzenbach v. Morgan* can be described as fully settled and beyond debate, it would be inappropriate for me to share my opinion regarding whether it was correctly decided. As a Magistrate Judge, I apply all controlling Supreme

Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

19. Was Loving v. Virginia correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly settled, are still the subject of both significant societal debate and ongoing litigation. However, in certain cases, where a precedent has been shown by the passage of time to be essentially beyond debate or dispute in our society, I believe that I can express my thoughts on the rightness of such a decision within the bounds of my judicial ethics. Applying that lens, I believe that *Loving v. Virginia* was rightly decided.

20. Was Katz v. United States correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Katz v. United States* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

21. Was Roe v. Wade correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Roe v. Wade* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

22. Was Romer v. Evans correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Romer v. Evans*

was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

23. Was United States v. Virginia correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *United State v. Virginia* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

24. Was Bush v. Gore correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Bush v. Gore* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

25. Was District of Columbia v. Heller correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *District of Columbia v. Heller* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

26. Was Crawford v. Marion County Election Board correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still

the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Crawford v. Marion County Election Board* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

27. Was Boumediene v. Bush correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Boumediene v. Bush* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

28. Was Citizens United v. Federal Election Commission correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Citizens United v. Federal Election Commission* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

29. **Was Shelby County v. Holder correctly decided?**

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Shelby County v. Holder* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

30. Was United States v. Windsor correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *United States v. Windsor* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

31. Was Obergefell v. Hodges correctly decided?

Response: In general, as a sitting judge and a judicial nominee, it is not appropriate for me to express an opinion about whether certain Supreme Court cases were properly decided. This is because some of those decisions, though seemingly controlling, are still the subject of both significant societal debate and ongoing litigation. Applying this lens, it would be inappropriate for me to share my opinion regarding whether *Obergefell v. Hodges* was correctly decided. As a Magistrate Judge, I apply all controlling Supreme Court precedent faithfully to the cases that come before me regardless of my personal beliefs regarding those opinions, and I will continue to do so if confirmed as a District Court Judge.

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

Response: As a sitting Magistrate Judge, and as a District Judge if I am confirmed, I am required to follow the decisions of the Eighth Circuit Court of Appeals regardless of whether that precedent could be read as conflicting with the original public meaning of the Constitution. Although courts of appeals are bound by the doctrine of stare decisis, I am unaware of whether special considerations govern a court's reconsideration of its own precedent on the ground that it contradicts the original public meaning of the Constitution.

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

Response: As a sitting Magistrate Judge, and as a District Judge if I am confirmed, I am required to follow the decisions of the Eighth Circuit Court of Appeals, regardless of whether that precedent could be read as conflicting with the original public meaning of the text of a statute.

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

Response: The starting place for statutory interpretation is the plain language of the statute itself, as well as any binding precedent interpreting that statute. If those two tools do not squarely answer a question regarding the meaning or application of a statute, then a judge can turn to additional sources, such as the way the text at issue is used in other similar statutes. Only if a statute remains ambiguous after this analysis should legislative history be considered. Because a judge's job is to apply the law impartially, a judge should not base her interpretation of a statute on "general principles of justice," but on the plain meaning of the text.

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

Response: Every litigant, including criminal defendants, must be treated fairly and equally regardless of race or ethnicity. If I were confirmed as a District Judge, I would not base the sentence I impose in any case on the race of the defendant.

Questions from Senator Thom Tillis
for Katherine Marie Menendez
Nominee to be United States District Judge for the District of Minnesota

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

   Response: Yes.

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

   Response: I believe the term "judicial activism" refers to a judge basing her decisions on her own personal beliefs, rather than on the law and the facts of the case. I do not believe that doing so is appropriate: judges must impartially apply the law to the cases that arise before them regardless of their personal preferences and opinions.

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, it is not the job of a judge to second-guess the policy decisions of lawmakers.

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

   Response: I believe that faithfully applying the law sometimes results in a judge having to issue a decision with which they personally disagree. However, the job of a judge is not to decide cases based upon their own opinions or beliefs, but based upon application of the law to the facts before them.

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, I will apply *District of Columbia v. Heller*, and its progeny, as well as relevant Eighth Circuit precedent. All litigants who appear before me should feel confident that I will fairly and impartially apply the law to the cases that I decide.

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: I am a sitting Magistrate Judge and there are many cases in my district challenging COVID-related laws and policies. For this reason, it is not appropriate for me to answer a question about the appropriate outcome of a hypothetical case. I will apply decisions from the Supreme Court and the Eighth Circuit Court of Appeals to any similar issues that arise in cases before me.

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 has held that law enforcement officers and other government officials are entitled to qualified immunity unless they violated a clearly established constitutional right, which means that "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The Eighth Circuit applies this standard with little change, noting that qualified immunity requires a two-step inquiry. First, the plaintiff must show facts that demonstrate the violation of a constitutional or statutory right. Second the plaintiff must establish that the right was clearly established at the time of the alleged misconduct. In the absence of affirmative answers to both questions, an official defendant is entitled to qualified immunity. *See Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019). 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 split-second decisions when protecting public safety?

Response: The question of whether the doctrine of qualified immunity as interpreted by the courts is good policy is left to legislators and is not the domain of judges. As a sitting judge and nominee for the District Court, it is inappropriate for me to answer this question. However, I apply the current law governing qualified immunity to the cases that arise before me, and I will continue to do so if confirmed.

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

Response: Please see my answer to question 10, above.

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: As a sitting judge and a nominee for the District Court bench, it is not appropriate for me to debate the strengths and weaknesses of a body of Supreme Court jurisprudence. In patent litigation that arises before me, both as a Magistrate Judge and as a District Judge if confirmed, I will faithfully apply the law of the Supreme Court, the Eighth Circuit and the Federal Circuit.

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: As a sitting Magistrate Judge and a nominee to a District Court that handles a significant amount of patent litigation, it would be inappropriate for me to opine about the proper outcome in a hypothetical case. In my five years as a Magistrate Judge, I have learned that intellectual property law is both very complex and very fact-dependent. In any patent case, I would apply precedent to the unique and specific facts before me.

    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: Please see my answer to question 13a.

    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: Please see my answer to question 13a.

    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: Please see my answer to question 13a.

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: Please see my answer to question 13a.

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: Please see my answer to question 13a.

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 *BioTech Co* 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: Please see my answer to question 13a.

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: Please see my answer to question 13a.

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: Please see my answer to question 13a.

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: Please see my answer to question 13a.

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

Response: Please see my answer to question 12, above.

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: I have never litigated an intellectual property case. However, as a Magistrate Judge, I have presided over the pretrial stages of several intellectual property cases. I have managed complex pretrial schedules, resolved discovery disputes, and conducted settlement conferences.

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

Response: I do not recall any issue arising under the Digital Millennium Copyright Act in any case before me.

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

Response: I do not recall have any issues related to intermediary liability for service providers arise in a case before me.

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: As a Magistrate Judge, I have presided over several cases that raise First Amendment issues, though more of them deal with freedom of religion rather than freedom of speech. In addition, I have handled the pretrial stages of numerous intellectual property cases as a Magistrate Judge, including patent cases, trademark cases, and copyright cases. One of these cases, *Willis v. Polygroup*, is discussed in my Senate Judiciary Questionnaire at question 13(c)(3).

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: A judge tasked with interpreting and applying a statute must first examine the plain meaning of that statute and review all relevant precedent. Only if the meaning of the statute cannot be determined using tools and canons of statutory interpretation should a judge consider legislative history.

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 the Eighth Circuit have issued opinions governing the weight that a reviewing court should give to an agency determination. If confirmed to the District Court bench, I would follow and apply that law.

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 Magistrate Judge and a nominee to a District, it would be inappropriate for me to opine about the proper outcome in a hypothetical case. In my five years as a Magistrate Judge, I have learned that intellectual property law is both very complex and very fact-dependent. In any copyright case, I would apply precedent to the unique and specific facts before me

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: See my response to question 17a, above.