Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Shalina Kumar
Judicial Nominee to the U.S. District Court for the Eastern District of Michigan

1. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: I am not familiar with the term "super precedent." If confirmed, I will faithfully follow all Supreme Court precedent and that of the Sixth Circuit.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: I do not have an opinion on whether it would be appropriate for a law firm to prosecute criminal matters.

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

   Response: I am not aware of the context of Judge Jackson's statement. I believe the Constitution is an enduring document. If confirmed, I will faithfully follow the precedent as established by the Supreme Court and the Sixth Circuit.

4. **Should a judge yield to social pressure when deciding the outcome of cases?**

   Response: No, it would not be appropriate for a judge to yield to social pressure. A judge should follow the law and the precedent of the Supreme Court.

5. **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 do not have an opinion on whether it would be appropriate for private parties to prosecute federal crimes.

6. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

   Response: I hire law clerks based upon their knowledge and experience. I do not consider memberships in organizations.

7. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

   Response: I have no opinion on how law firms should make these types of decisions.

8. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: I have no opinion on how law firms should make these types of decisions.

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

   Response: No.

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

    Response: Judicial decisions should be based on the law and the facts of any given case.

11. **Is it ever appropriate for a judge to publicly profess political positions on campaigns and/or candidates?**

    Response: Pursuant to the Michigan Code of Judicial Conduct, Canon 7, it is not appropriate for a judge to publicly endorse partisan candidates or campaigns. It is appropriate for a judge to endorse a judicial candidate. If confirmed, I will follow the Code of Conduct for United States Judges with respect to these and all other issues.

12. **Is threatening Supreme Court Justices right or wrong?**

    Response: Yes, threating a Supreme Court Justice is wrong and interferes with the administration of justice.

13. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

    Response: There is Supreme Court precedent on this issue, and if confirmed, I would faithfully follow that precedent.

14. **Do you think the Supreme Court should be expanded?**

    Response: I have no opinion as this is a policy question for the legislature to determine.

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

Response: 18 U.S.C. § 3553(a) sets forth the factors to consider when sentencing a defendant. The "nature and circumstances of the offense and the history and characteristics of the defendant" are included in the factors to consider. Race, national origin, sex, creed, and religion are among the factors not to be considered.

16. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?

Response: It is my understanding that the issue and scope of nationwide injunctions are currently being litigated in the federal courts. If confirmed, I would faithfully follow the precedent as established by the Supreme Court and that of the Sixth Circuit.

17. 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 precedent as established by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and any precedent established by the Sixth Circuit.

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

Response: I have no opinion as this is a policy decision for the legislative branch.

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

Response: I have no opinion as this is a policy decision for the legislative branch.

20. Is climate change real?

Response: As a judicial nominee, my personal opinion on this issue is irrelevant. If confirmed, I will faithfully follow the precedent established by the Supreme Court and the Sixth Circuit.

21. Is gun violence a public-health crisis?

Response: As a judicial nominee, my personal opinion on this issue is irrelevant. If confirmed, I will faithfully follow the precedent established by the Supreme Court and the Sixth Circuit.

22. Is racism a public-health crisis?

Response: As a judicial nominee, my personal opinion on this issue is irrelevant. If confirmed, I will faithfully follow the precedent established by the Supreme Court and the Sixth Circuit.

23. Is the federal judiciary systemically racist?

Response: I have not researched this issue and have no opinion. As a sitting judge, I handle each matter on an individualized basis without regard to race.

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

Response: I have not had an opportunity to handle a case regarding this issue. If confirmed, I will faithfully follow Supreme Court and Sixth Circuit precedent.

25. Does illegal immigration impose costs on border communities?

Response: As a judicial nominee, my personal opinion on this issue is irrelevant. If confirmed, I will faithfully follow the precedent established by the Supreme Court and the Sixth Circuit.

26. When was the last time you visited the U.S.-Mexico border?

Response: I have not visited the U.S.-Mexico border.

27. When was the last time you visited the U.S.-Mexico border outside of a port of entry?

Response: I have not visited the U.S.-Mexico border.

28. Do Blaine Amendments violate the Constitution?

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment on this issue as it could potentially come before me if I were to be confirmed as a federal district court judge. I will faithfully follow the Supreme Court and Sixth Circuit precedent with respect to this issue.

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

Response: In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that a parent has a right to direct the education of one's children.

30. **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, and/or Jen Dansereau?**

       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, and/or Jen Dansereau?**

       Response: I was invited to participate in a webinar prior to the application process. Only the process was discussed. I received a congratulatory email regarding my nomination from Christopher Kang.

31. **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: Please see my response to Question 30(c).

32. **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: N/A

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.

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

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

      Response: No.

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

      Response: No.

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

      Response: No.

34. **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.

35. **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: Senator Debbie Stabenow announced an opening on the U.S. District Court for the Eastern District of Michigan and supplied an application on her website. I submitted my application in February of 2021 and was selected for an interview by the committee established by Senators Stabenow and Peters. I was interviewed by White House Counsel in April of 2021. The President announced his intent to nominate me on June 30, 2021.

36. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice? If so, what was the nature of those discussions?**

    Response: Please see my response to Question 30(c).

    a. **Did anyone do so on your behalf?**

       Response: Not to my knowledge.

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

    Response: No.

    a. **Did anyone do so on your behalf?**

Response: Not to my knowledge.

38. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? 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.

a. Did anyone do so on your behalf?

Response: Not to my knowledge.

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

Response: No.

a. Did anyone do so on your behalf?

Response: Not to my knowledge.

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

Response: My initial interview with White House Counsel was April 21, 2021. I have had additional communication with White House Counsel and Office of Legal Policy since that time, but I have no record of the dates.

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

Response: I received these questions from the Office of Legal Policy on October 14, 2021. I prepared my responses and submitted them to the Office of Legal Policy.

Senator Marsha Blackburn
Questions for the Record to Shalina D. Kumar

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

   Response: I believe it is the duty of a judge to uphold the Constitution and the laws of our country. A judge should look to the plain meaning and express language of statutes and provisions of the Constitution. A judge is bound to follow case precedent as established by the Supreme Court and the Circuit in which they sit, and to apply the law to the facts of the case in a fair and impartial manner.

2. **What approach do you take when interpreting a statute?**

   Response: I would first look to the plain meaning and express language of the statute. If the statute is unambiguous, the inquiry would stop there. If there is ambiguity, I would look to precedent as established by the Supreme Court and the Sixth Circuit. If there was no binding precedent directly on point, I would look to precedent not directly on point, but which has reasoning that is analogous. I may look to other statutes with similar language and any precedent interpreting that statute. If I am fortunate enough to be confirmed as a district court judge, I would follow Supreme Court precedent with respect to analyzing and interpreting any federal statute.

3. **Do you think it is best to start with the original meaning of the text when interpreting the Constitution?**

   Response: I would first look to the plain meaning and express language of the constitutional provision. If the constitutional provision is unambiguous, the inquiry would stop there. If there is ambiguity, I would look to precedent as established by the Supreme Court and the Sixth Circuit. If there was no binding precedent directly on point, I would look to precedent not directly on point, but which has reasoning that is analogous. I may look to other provisions of the Constitution with similar language and any precedent interpreting that language. If I am fortunate enough to be confirmed as a district court judge, I would follow Supreme Court precedent with respect to analyzing and interpreting any constitutional provision.

Nomination of Shalina D. Kumar
to be United States District Judge for the Eastern District of Michigan Questions for the Record
Submitted October 13, 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: Generally speaking, it is not appropriate for a judge to give his or her opinion about whether any specific Supreme Court case was correctly decided. I will faithfully follow all Supreme Court precedent.

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*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees an individual's right to possess and carry weapons in case of confrontation.

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

   Response: The Supreme Court held that treating "any comparable secular activity more favorably than religious exercise" must survive strict scrutiny.

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 141 S. Ct. 1858 (2021).**

   Response: The Supreme Court held that the retroactive nature established by the First Step Act was only available if the prior conviction triggered a mandatory minimum sentence.

7. **Please describe what you believe to be the Supreme Court's holding in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).**

   Response: The Supreme Court upheld Arizona election policies finding that they did not violate the Voting Rights Act of 1965 and did not have a racially discriminatory purpose.

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

   Response: The Supreme Court held that detained aliens do not have the right to periodic bond hearings during the course of their detention.

9. **Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).**

   Response: The Supreme Court held that President Trump's Proclamation did not violate his statutory authority or Establishment Clause.

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

    Response: As a judicial nominee, my personal opinion about arbitration is not relevant. I will faithfully follow the law and Supreme Court precedent with respect to arbitration as an alternative to litigation.

11. **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 these questions via email and have prepared my responses.

12. **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.

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

<u>Questions for the Record for Shalina D. Kumar, Nominee for the Eastern District of Michigan</u>

I. Directions

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

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

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

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

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

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

II. Questions

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

   Response: There is Supreme Court precedent with respect to this issue, and, if confirmed, I will faithfully follow that precedent along with the Religious Freedom Restoration Act and other federal laws on this subject.

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

   Response: The Supreme Court held that the applicants were entitled to a preliminary injunction because they demonstrated a likelihood of success on the merits of their claim, that they would suffer irreparable harm, and to grant the injunction was not against the public interest.

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

   Response: Yes. The free exercise of religion is a fundamental right guaranteed by the First Amendment.

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

   Response: The executive branch has a duty to faithfully execute the laws of our country. I cannot further answer this hypothetical question without the benefit of a specific case and facts presented.

5. **Describe how you would characterize your judicial philosophy on the bench in Michigan thus far, and identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

   Response: I believe it is the duty of a judge to uphold the Constitution and the laws of our country. A judge should look to the plain meaning and express language of statutes and provisions of the Constitution. A judge is bound to follow case precedent as established by the Supreme Court and the Circuit in which they sit and apply the law to the facts of

the case in a fair and impartial manner. I do not identify with any Justice's particular philosophy.

6. Please briefly describe in your own words your understanding of the interpretative method known as originalism.

Response: When interpreting the Constitution or a statute, I would start with the plain meaning and express language of the provision or statute at issue. In addition, I would follow Supreme Court precedent with respect to the role of text and original meaning of constitutional provisions or statutes.

7. Please briefly describe in your own words your understanding of the interpretive method often referred to as living constitutionalism.

Response: I am not familiar with the term "living constitutionalism." I believe the Constitution is an enduring document and fundamental to our system of government.

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

Response: If confirmed as a district court judge, I would start with the plain meaning of the text and would follow Supreme Court precedent with respect to interpretation of the specific language.

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

Response: There is Supreme Court jurisprudence with respect to interpreting provisions of the Constitution, and I would faithfully follow the precedent as established.

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

Response: The Constitution is an enduring document and changes must follow the Article V amendment process. Additionally, if confirmed, I would follow Supreme Court precedent with respect to interpretation of constitutional provisions.

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

Response: As a judicial nominee, I do not feel it is appropriate for me to comment on this policy decision.

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

Response: The Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: The Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570 (2008). This right is a fundamental right but is not without limitation.

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

Response: As a state court judge for fourteen years, I have not had the opportunity to encounter this issue. If confirmed, I will faithfully follow the precedent as established by the Supreme Court and the Sixth Circuit.

15. If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

Response: If confirmed and if I have any role regarding U.S. District Court for the Eastern District of Michigan human resources' programs, I will confer with my colleagues on such issues if they are presented. Training for court employees must be fully consistent with federal law.

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

Response: Please see my response to Question 15(a).

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

Response: Please see my response to Question 15(a).

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

Response: Please see my response to Question 15(a).

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

Response: Please see my response to Question 15(a).

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

Response: I understand that there have been studies conducted with respect to this issue, but I have not performed my own research and have not developed an opinion. As a judge, I handle each case before me on an individualized basis.

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

Response: As a judicial nominee and sitting judge, I do not feel it is appropriate for me to opine on a policy matter or make a judgment on the constitutionality of an issue without the benefit of the specific facts of a case.

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

Response: Under current federal law, the death penalty is a legally available punishment in certain circumstances, and the Supreme Court has upheld its constitutionality. To change federal law would require legislation.

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

Response: The Supreme Court denied the application to vacate the stay in this case. The per curiam opinion did state that it agreed with the holding of the district court that the CDC had exceeded its authority when it issued the nationwide moratorium on evictions.

21. **In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the 4th Amendment 3rd Party Doctrine and those that are not?**

Response: My general understanding of this holding is that the Supreme Court found that the "third-party doctrine" does not extend to cell-site location because of the intrusive nature of this information. The "third-party doctrine" is typically applied in cases where information disclosed to a third-party carries no reasonable expectation of privacy.

22. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the**

Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: The Supreme Court held that the state action at issue could not survive strict scrutiny where the state had denied an exception to a religious organization but granted such exceptions to other non-religious organizations. *Fulton v. City of Philadelphia*, 141 S. Ct. 1968, 1878 (2021).

23. Explain the Michigan Supreme Court's holdings in *Midwest Institute of Health v. Whitmer*.

Response: The Michigan Supreme Court held that Governor Whitmer did not have the authority to issue executive orders related to the COVID-19 pandemic under the Emergency Management Act of 1976, and the Governor did not have the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945.

24. In *Americans for Prosperity Foundation v. Bonta*, the Court majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Please explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: I understand that there was disagreement in the majority on whether strict scrutiny or exacting scrutiny should apply in this case. If confirmed as a district court judge, I would be bound to follow the precedent as established by the Supreme Court and that of the Sixth Circuit.

Senator Josh Hawley
Questions for the Record

Shalina Kumar
Nominee, U.S. District Judge for the Eastern District of Michigan

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

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

      Response: It is the duty of a judge to follow the law and the precedent as established by the U.S. Supreme Court and the Circuit in which they sit. A judge's personal opinions are not relevant and should not play a role in their decisions.

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

      Response: Please see my response to Question 1(a).

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

   Response: When interpreting the Constitution, I would start with the plain meaning and express language of the provision at issue. In addition, I would follow Supreme Court precedent with respect to the role of text and original meaning of constitutional provisions when interpreting the Constitution.

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

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

      Response: When interpreting legal texts, I start with the plain meaning and express language of the text at issue. In addition, I would follow Supreme Court and Sixth Circuit precedent with respect to the interpretation of the legal text. If there was no precedent directly on point, I would look to analogous precedent interpreting, for example, a different statute that used similar or identical language. If there is ambiguity in the text and there is no precedent on point, I may look to legislative history. Some legislative history that might be persuasive would include language that was changed in a statute and statutes that were enacted in response to a court decision.

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

   Response: The U.S. Constitution is a domestic document, and it is, therefore, not appropriate to consult the laws of foreign nations when interpreting provisions of the Constitution.

4. **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: As a sitting judge and a judicial nominee, it is not appropriate for me to comment or give an opinion on an appellate court decision. If confirmed, I would follow all Supreme Court and Sixth Circuit precedent.

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

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

   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: As a state court judge for the past fourteen years, I have not encountered this issue. If confirmed, I would follow Supreme Court and Sixth Circuit precedent with respect to this subject.

5. **Do you believe America is a systemically racist country?**

   Response: I understand that there have been some studies conducted on this issue, but I have not researched this subject, nor have I encountered it as a sitting judge.

6. **Please describe your understanding of the "federal common law."**

   Response: It is my understanding that "federal common law" is a limited area of law created by the federal courts absent a controlling federal statute.

7. **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: Under current law of the Sixth Circuit, a petitioner must establish that any risk of harm was substantial when compared to a known and available alternative method of execution. They must also establish that the proposed method creates a demonstrated risk of severe pain. *Glossip v. Gross*, 576 U.S. 863 (2015).

8. **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: In *Gloss*, the Court cited *Baze v. Rees*, 553 U.S. 35 (2008), to stand for the proposition that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative.

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

   Response: In *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Court held that there was no due process right to DNA testing for a habeas petitioner post-conviction. I will faithfully follow the precedent of the Supreme Court and Sixth Circuit.

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

    a. **What do you understand this statement to mean?**

       Response: I am not familiar with the context of Justice Scalia's statement. However, a judge must always follow the law and case precedent regardless of whether they personally agree with the outcome.

11. **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: As a sitting judge and judicial nominee, it is not appropriate for me to comment on the procedure of appellate courts.

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

   Response: Please see my response to Question 11(a).

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

    Response. No. If confirmed, I will follow Supreme Court and Sixth Circuit precedent.

13. **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: Pursuant to Supreme Court precedent, a state governmental action that discriminates against a religious group or religious belief must survive strict scrutiny. Binding precedent on religious rights cases would include, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018*); Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Church of the Lukumi Babalu Aye, Inc. v. City of Haialeah*, 508 U.S. 520 (1993); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If confirmed, I would follow all Supreme Court and Sixth Circuit precedent.

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

    Response: In *New Doe Child #1 v. Congress of U.S.*, 891 F.3d 578, 586 (6th Cir. 2018) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014), the Sixth Circuit held that courts are to "determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction."

15. **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 *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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

Response: No, I have not issued any opinions adjudicating a Second Amendment or analogous claim.

16. 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: As a state court judge for the past fourteen years, I have not encountered this case or issue. My personal opinion of a Supreme Court decision is not relevant. If confirmed, I will follow Supreme Court and Sixth Circuit precedent.

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

a. If so, what are they?

Response: As a state court judge for the past fourteen years, I have not had occasion to address Supreme Court decisions that have not been formally overruled but are no longer good law.

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

Response: If confirmed, I will faithfully follow Supreme Court and Sixth Circuit precedent.

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

Response: Abstention doctrines provide that federal courts may, or in some instances shall, refrain from hearing a case if it may be resolved at the state court level. The Pullman and Younger abstention doctrines are examples of such doctrines.

19. Have you ever worked on a legal case or representation in which you opposed a party's 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.

Response: No.

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?

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

Response: A state constitution may provide more rights to its citizens, but it may not restrict a right afforded to its citizens under the U.S. Constitution. To the extent that a state constitution does not violate federal law, its provisions should be followed.

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

Response: Please see my response to Question 20(a).

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

Response: Generally speaking, it is not appropriate for a judge to give his or her opinion about whether any specific Supreme Court case was correctly decided. However, there are a few examples of decisions that are so widely accepted and not likely to come before me as a judge that they would be exceptions to this general rule. *Brown v. Board of Education* is one such example, and I believe it was correctly decided.

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

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

Response: As a state court judge for fourteen years, I have not had occasion to address the issue of nationwide injunctions. It is my understanding that this issue is currently being litigated in the federal court system. I will

faithfully follow Supreme Court and Sixth Circuit precedent with regard to this issue.

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

Response: Please see my response to Question 22(a).

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: Please see my response to Question 22(a).

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

Response: Pursuant to the Tenth Amendment, any right not specifically granted to the federal government is reserved for the states.

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

Response: Please see my response to Question 18.

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

Response: The Supreme Court has held that there are rights that are not specifically enumerated in the Constitution, including the right to marry; the right to have children; the right to marital privacy. The Supreme Court has found unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (internal quotations omitted).

27. **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 First Amendment right to free exercise of religion is a fundamental right afforded to all citizens under the U.S. Constitution. I will faithfully follow Supreme Court and Sixth Circuit precedent when presented with cases involving this fundamental right.

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

Response: The freedom to worship relates to an individual's right to hold certain beliefs and attend religious services. The free exercise of religion extends beyond the freedom to worship in that it includes the right of an individual to live their lives and make life decisions pursuant to their religious beliefs.

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: If confirmed, I will faithfully follow the Supreme Court and Sixth Circuit precedent. I will also look to the Religious Freedom Restoration Act and other similar laws.

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

Response: Please see my response to Question 27(c).

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

Response: The Religious Freedom Restoration Act sets out its relationship and interplay with other federal laws. I will faithfully follow Supreme Court and Sixth Circuit precedent with respect to this issue.

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, I have issued two opinions that relate to these issues. Please see attached opinions in the appendix.

28. 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: A reasonable doubt is a doubt based on reason and common sense. Each individual trier of fact must decide this for himself or herself.

29. 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: As a sitting judge and judicial nominee, I do not feel that it is appropriate for me to comment on a Justice's dissenting opinion.

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

Response: As a sitting judge and judicial nominee, I do not feel that it is appropriate for me to comment on whether a Supreme Court case was rightly or wrongly decided. I am aware that the Supreme Court's holding in *Lochner* was ultimately called into question by later decisions. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). It is my duty as a judge to follow binding Supreme Court precedent.

30. 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: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)), the Supreme Court held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." If a law is not applied in a neutral or generally applicable manner, it must survive strict scrutiny. *See also Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

31. 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 judicial nominee, I do not feel that it would be appropriate for me to comment on this issue as it is possible it could come before me if I am confirmed.

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: Please see my response to Question 31(a).

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

Response: Please see my response to Question 31(a).

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

Response: Unpublished decisions do not have precedential value, but they can sometimes be instructive or persuasive.

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

Response: Please see my response to Question 31(c). Additionally, I do not believe that is inconsistent with the rule of law.

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

Response: Please see my response to Question 31(c).

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: If confirmed, I would research the Federal Court Rules and discuss with my colleagues and law clerks how to approach this issue.

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: Please see my response to Question 31(f).

32. In your legal career:

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

Response: I have tried approximately 10 cases, 3 as sole counsel and 7 as associate counsel, most of those being co-counsel.

b. **How many have you tried as second chair?**

Response: Please see my response to Question 32(a).

c. **How many depositions have you taken?**

Response: I do not have an exact number, but I took and defended many depositions during my ten years of litigation experience.

d. **How many depositions have you defended?**

Response: Please see my response to Question 32(c).

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

Response: As a state court judge for the past fourteen years, I have not practiced law as an attorney. Prior to that, I did not practice before the federal appellate courts.

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

Response: As a state court judge for the past fourteen years, I have not practiced law as an attorney. Prior to that, I appeared before a state appellate court two or three times.

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

Response: To the best of my recollection, I did not appear before a federal agency as a practicing attorney.

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

Response: Prior to taking the bench, I argued numerous dispositive motions before multiple trial courts.

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

Response: Prior to taking the bench, I argued numerous evidentiary motions before multiple trial courts.

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

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

Response: As a state court judge for the past fourteen years, I have not been a practicing attorney with billable hours. During my ten years as an attorney, I spent less than one year as an attorney with billable hours, and I have no recollection of my hours billed during that time.

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

Response: I have no record of this information.

34. 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 referring to the role of a judge as applying the laws, not creating them.

b. Do you agree or disagree with this statement?

Response: Yes.

35. 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: I am not familiar with this quote or the context.

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

Response: Please see my response to Question 35(a).

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

Response: I cannot provide a response to this question in the abstract without a specific set of facts and circumstances in front of me.

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

    a. **If yes, please provide appropriate citations.**

    Response: I do not believe so.

38. **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: No.

39. **What were the last three books you read?**

Response: A biography on Queen Elizabeth the 1st, *The Second Mountain*, and *My Life*, Isadora Duncan.

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

Response: I represented a widow whose 34-year-old husband died from an undiagnosed heart condition. I developed a very close bond with my client and was very proud to have served her.

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

    a. **How did you handle the situation?**

    Response: Not that I can recall.

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

    Response: Yes.

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

Response: There are no law professors whose work I typically read. When faced with a case or issue, I research the relevant law and case precedent.

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

Response: There are no Federalist Papers that have significantly shaped my view of the law.

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

Response: I am sure that there have been such documents that have changed my mind on a certain case or issue, but I have no specific recollection of one.

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

Response: My personal belief on this issue is not relevant and would not play a role in my decision-making if I am confirmed. I will faithfully follow the precedent of the Supreme Court and the Sixth Circuit.

46. **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 believe the only time I have testified under oath was as a defendant in an automobile negligence action. *Jessica LaRiche, by and through Sheryl LaRiche Next Friend v. Shalina Kumar*, Oakland County Circuit Court Case No. 1996-527239-NI.

47. **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.

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

a. Apple?

Response: The only investments I have are through my employment 401k and a Roth IRA. I do not manage those investments and do not currently know what investments are included.

b. Amazon?

Response: Please see my response to Question 48(a).

c. Google?

Response: Please see my response to Question 48(a).

d. Facebook?

Response: Please see my response to Question 48(a).

e. Twitter?

Response: Please see my response to Question 48(a).

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

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

Response: No.

50. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

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: Nominees take an oath to swear to tell the truth and must abide by that oath.

Appendix

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SANFORD N. LAKIN and CECILIA
J. LAKIN,

Plaintiffs, Case No. 14-138683-NO
Hon. Shalina D. Kumar

v.

SR. BARBARA RUND, MSGR. ANTHONY
TOCCO, and ST. HUGO OF THE HILLS
CATHOLIC CHURCH,

Defendants.
_________________________________/

OPINION AND ORDER

At a session of said Court held in the
Courthouse, City of Pontiac, Oakland County,
Michigan, on ________________

PRESENT: THE HON. SHALINA D. KUMAR, CIRCUIT COURT JUDGE

This matter is before the Court on Defendants Sister Barbara Rund ("Sr. Barbara"), Monsignor Anthony Tocco ("Msgr. Tocco"), and St. Hugo of the Hills Catholic Church's ("St. Hugo's") (collectively, "Defendants'") "Motion for Summary Disposition" ("Motion") as to Plaintiffs Sanford N. Lakin ("Mr. Lakin") and Cecelia J. Lakin's ("Mrs. Lakin's") (collectively, "Plaintiffs'") Complaint. On April 23, 2014, the Court held a hearing regarding Defendants' Motion and took the matter under advisement.[1]

[1] The parties engaged in settlement discussions after the hearing was held.

I. Facts

On Sunday, July 21, 2013, Mr. Lakin was asked to substitute in a religious service at St. Hugo in place of an assigned Lector who failed to appear on time.[2] When the procession line was ready to move forward for the service, the Lector who arrived late approached Mr. Lakin and stated that Sr. Barbara authorized the Lector to take his position. After the service, Mr. Lakin and Sr. Barbara engaged in a discussion in the St. Hugo Gathering Space, which is a public area adjacent to the St. Hugo sanctuary. During that conversation, Mr. Lakin asked Sr. Barbara why she had authorized the tardy Lector to assume his place in the worship procession contrary to St. Hugo's established rules. Sr. Barbara told Mr. Lakin that she could do so because "it was [her] committee" and later stated to Mr. Lakin "You don't like me!" After this discussion, Sr. Barbara left for a vacation.

The following day, on July 22, 2013, Mr. Lakin asked Msgr. Tocco to schedule a meeting to discuss Sr. Barbara's attitude.[3] Msgr. Tocco stated that he would talk to Sr. Barbara when she returned from vacation. On Thursday, August 15, 2013, at 10:49pm, Mr. Lakin sent an email to Msgr. Tocco asking when he would set a date for the meeting. Msgr. Tocco responded via email, stating:

> I do not want to be in the middle of this but Sr. Barb is afraid of you….She says you put a finger in her chest and she does not want to deal with it.…(S)he is one of my most trusted advisors. Work with her or let it go. Do not put me in the middle. You and Cia [Mrs. Lakin] have had your problems with her but she is, from my point of view, a valuable asset to my staff at St. Hugo's.

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[2] Mr. Lakin is a member of St. Hugo. He also is a graduate of the Sacred Heart Major Seminary and serves as a Lector.

[3] Msgr. Tocco is the pastor of St. Hugo.

Msgr. Tocco sent another email to Mr. Lakin on August 16, 2013, at 10:52pm, stating "She does not like you…I like her a lot." On August 16, 2013, at 11:56pm, Mr. Lakin responded by email, stating:

> I NEVER TOUCHED HER, LET ALONE PUT A FINGER IN (OR ON) HER CHEST. THIS IS A LIE. You have recognized that I am a good lawyer. Do you think I would be foolish enough to touch the nun, let alone 'put a finger in her chest?' Her statement as you related it accuses me of a battery – a criminal offense. You can advise her that I demand a retraction of that statement. It is a slanderous remark for which she could be held accountable in a civil law suit. The parish could be responsible for her wrongful conduct.

As Msgr. Tocco did not want to get involved in the matter, Mr. Lakin suggested that a mutual friend, Father Jack Baker ("Fr. Jack"), act as an "arbitrator" between Sr. Barbara and Mr. Lakin. However, Msgr. Tocco did not respond to Mr. Lakin's suggestion or investigate the matter. Msgr. Tocco also did not offer, request, or agree to meet with Mr. Lakin regarding the matter.

On September 23, 2013, Mrs. Lakin learned from David Enos ("Mr. Enos"), her close friend and a St. Hugo employee, that Sr. Barbara had republished her slander to Mr. Enos and John Sittard ("Mr. Sittard"), the St. Hugo music director. That evening, Mr. Lakin called Fr. Jack and asked him to contact Msgr. Tocco to urge him to immediately instruct Sr. Barbara to cease spreading her slanderous remarks. Later that evening, Fr. Jack told Mr. Lakin that Fr. Jack had called Msgr. Tocco. However, Msgr. Tocco refused to listen to Fr. Jack. Msgr. Tocco also did not respond to Mrs. Lakin's text message wherein she asked Msgr. Tocco to contact Mr. Lakin.[4]

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[4] Plaintiffs allege that Msgr. Tocco's refusal to supervise or control Sr. Barbara's republication of her slanderous remark to St. Hugo employees, parishioners, and others was motivated by the perception that Msgr. Tocco formed of Mr. Lakin as a result of Sr. Barbara's statement.

The next day, on September 24, 2013, Mr. Lakin prepared and sent to Msgr. Tocco a "Demand for Retraction of Defamatory Statement." On October 1, 2013, Mr. Lakin learned that Msgr. Tocco had republished Sr. Barbara's slander to Paul Nine ("Mr. Nine") and Sue Nine ("Mrs. Nine").[5] On October 18, 2013, Mr. Lakin received Defense counsel's letter stating that Sr. Barbara would not retract her statement. On February 4, 2014, Plaintiffs filed their Complaint in this Court. Plaintiffs' Complaint contains three counts: Defamation of Sanford N. Lakin (Count I); Intentional Tort as to Cecilia J. Lakin (Against Sr. Barbara and St. Hugo) (Count II); and Damage to Consortium (Count III).

II. Standard of Review

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.[6] All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant.[7] A motion under MCR 2.116(C)(8) may be granted where the claims alleged are clearly unenforceable as a matter of law and no factual development could justify recovery.[8] When deciding a motion brought under this section, a court considers only the pleadings.[9]

III. Discussion

A. Defamation Per Se (Count I)

"The [C]ourt may determine, as a matter of law, whether the words in question, alleged by [the] plaintiff to be defamatory, are capable of defamatory meaning. Where the words are, as

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[5] Mr. Nine is Msgr. Tocco's attorney and Mrs. Nine is the office manager for Mr. Nine's law office. Plaintiffs allege, however, that prior to the instant litigation, Mr. and Mrs. Nine were frequent social guests and traveling companions with Msgr. Tocco. Plaintiffs also contend that Msgr. Tocco initially passed on Sr. Barbara's slander to Mr. and Mrs. Nine during a social occasion.
[6] *Maiden v Rozwood*, 461 Mich 109 (1999).
[7] *Wade v Dep't of Corrections*, 439 Mich 158, 162 (1992).
[8] *Id* at 163.
[9] MCR 2.116(G)(5).

a matter of law, not capable of carrying a defamatory meaning, summary judgment . . . is appropriate." Sawabini v Desenberg, 143 Mich App 373, 379 (1985) (citations omitted). "A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *New Franklin Enters v Sabo*, 192 Mich App 219, 221 (1991); *see also Ireland v Edwards*, 230 Mich App 607, 614 (1998). To recover, the plaintiff must show:

> (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).

New Franklin Enters, 192 Mich App at 221.[10] "Words are defamatory per se if they, 'by themselves, and as such, without reference to extrinsic proof, injure the reputation of the person to whom they are applied.'" *Id*. "Whether nominal or substantial, where there is defamation per se, the presumption of general damages is well settled." *Id* (citation omitted).

In their Complaint, Plaintiffs allege that Sr. Barbara's statement that Mr. Lakin "put a finger in [Sr. Barbara's] chest" imputes the commission of a criminal offense, which constitutes defamation per se. However, in their Motion, Defendants contend that Sr. Barbara did not state that Mr. Lakin committed a battery or willfully touched her. Therefore, Defendants state that a criminal accusation cannot necessarily be inferred from Sr. Barbara's statement. Moreover, Defendants contend that even if Plaintiffs could establish that putting a finger in someone's chest amounts to a criminal battery, such an accusation would be – at worst – a minor criminal offense for which there is no societal stigma.

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[10] "Michigan law distinguishes between defamation per se whereby a defamatory statement is actionable 'irrespective of special harm' and defamation per quod, which involves 'the existence of special harm caused by publication.'" *Yono v Carlson*, 283 Mich App 567, 571 (2009) (citation omitted).

"At common law, words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal." *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728 (2000). Under Michigan law, "[a] battery, or assault and battery, is the wilful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault." *Tinkler v Richter*, 295 Mich 396, 401 (1940); *see also Smith v Stolberg*, 231 Mich App 256, 260 (1998) (holding that battery is "the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact") (citation omitted). In addition, MCL 750.81 provides that "a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 750.81.

Pursuant to MCR 2.116(C)(8), the Court must accept all well-pleaded factual allegations in Plaintiffs' Complaint as true and construe them in a light most favorable to Plaintiffs. In their Complaint, Plaintiffs assert that Sr. Barbara stated that Mr. Lakin "put a finger in [Sr. Barbara's] chest." The Merriam-Webster Dictionary provides that synonyms for "put" include "deposit," "emplace," "set," and "stick." Therefore, by stating that Mr. Lakin "put a finger" in her chest, Sr. Barbara is asserting that Mr. Lakin willfully and offensively touched Sr. Barbara by intentionally making contact with her chest, which is a crime. *See Smith, supra*; *see also* MCL 750.5 (stating in part that "'Crime' means an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by . . . [i]mprisonment [or a] [f]ine not designated a civil fine."). As Sr. Barbara's statement describes a battery committed by Mr. Lakin, Plaintiffs have pled a claim of defamation per se. *See* MCR 2.116(C)(8).[11]

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[11] Defendants also contend that Plaintiffs' lawsuit is barred by the ecclesiastical abstention doctrine. "Under the ecclesiastical abstention doctrine, . . . civil courts may not redetermine the correctness of an interpretation of canonical text or some decision

1. The Common Interest Qualified Immunity Privilege

In their Motion, Defendants argue that the communications by Sr. Barbara to Msgr. Tocco and Mr. Enos are subject to the common interest qualified immunity privilege. "[A] qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty and embraces cases where the duty is not a legal one but is of a moral or social character of imperfect obligation." *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619 (1986).

However, there is no common interest qualified immunity privilege where a defendant acted with malice. *See Dadd v Mount Hope Church & Int'l Outreach Ministries*, 486 Mich 857 (2010) (holding that the finding of malice negates the qualified privilege that may have existed in the context of the plaintiff's claims for libel and slander). In Paragraph 21 of their Complaint, Plaintiffs include the text from Mr. Lakin's email to Msgr. Tocco wherein Mr. Lakin states: "I NEVER TOUCHED HER, LET ALONE PUT A FINGER IN (OR ON) HER CHEST. THIS IS A LIE." Pursuant to MCR 2.116(C)(8), the Court must accept Plaintiffs' allegation that Sr. Barbara lied regarding Plaintiffs' actions as true. Therefore, viewing Plaintiffs' allegation in a light most favorable to Plaintiffs, Plaintiffs have alleged that Sr. Barbara acted with malice. *See Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 693 (2006) (noting that Black's Law Dictionary (7th ed) defines actual malice in the context of defamation as "[k]nowledge (by the person who utters or publishes

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relating to government of the religious polity." *Smith v Calvary Christian Church*, 462 Mich 679, 684 (2000) (citation omitted). "Religious doctrine refers to rituals, liturgies of worship, and tenets of the faith. Polity refers to the organization and form of government of the church." *Sikh Soc'y of Mich, Inc v Singh*, 2004 Mich App LEXIS 537, *2-3 (Mich Ct App February 19, 2004). In the instant case, the parties have not argued that the substance of Defendants' alleged defamation is governed by religious doctrine. Therefore, Plaintiffs' defamation per se claim does not require an inquiry into matters of religious doctrine or polity. *See id*. Accordingly, the ecclesiastical abstention doctrine does not bar Plaintiffs' lawsuit.

a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true").[12] Accordingly, Sr. Barbara's claim that her statement is protected by the common interest qualified immunity privilege fails.

2. Msgr. Tocco's Republication of Sr. Barbara's Statement

In their Motion, Defendants contend that Plaintiffs' defamation claim fails as to Msgr. Tocco because Plaintiffs have not alleged that Msgr. Tocco republished Sr. Barbara's statement to a non-privileged third party, namely anyone other than Mr. Lakin and Msgr. Tocco's attorney. Indeed, in their Complaint, Plaintiffs state only that it is believed that, in the course of discovery, others (in addition to Mr. and Mrs. Nine) to whom Msgr. Tocco republished Sr. Barbara's slander will be revealed. However, Plaintiffs have not identified other individuals to whom Msgr. Tocco republished the slander besides his counsel, his counsel's law office manager, and Mr. Lakin. Importantly, Msgr. Tocco's communications to his counsel and his counsel's law office manager fall within the purview of the attorney-client privilege and are not actionable.[13] In addition, Msgr. Tocco's republication of Sr. Barbara's statement to Mr. Lakin is not actionable. *See Hernden v Consumers Power Co*, 72 Mich App 349, 356 (1976) (holding that "[s]ummary judgment was correctly granted. . . Plaintiff failed to allege . . . that there even was a publication to anyone other

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[12] Plaintiffs also contend that Sr. Barbara's communication to Mr. Enos is not protected by the common interest qualified immunity privilege because Mr. Enos has no administrative responsibilities at St. Hugo. *See Sias v General Motors Corp*, 372 Mich 542, 548 (1964) (holding that "in calling in fellow employees of [the] plaintiff and 'explaining' the circumstances of his separation, defendant corporation was serving its own particular interest. . .These men were not supervisors, personnel department representatives, or company officials. They were simply fellow employees in the identical work. No privilege extended to the communication to them and the trial court properly so held.").

[13] "[A]n absolutely privileged statement cannot be actionable. An absolutely privileged communication is one for which no remedy is provided for damages in a defamation action because of the occasion on which the communication is made. . . If a statement is absolutely privileged, it is not actionable even if it was false and maliciously published." *Vc, Inc v Kraft Foods Global*, 2013 Mich App LEXIS 2207, *7 (Mich Ct App December 26, 2013) (citations omitted).

than the plaintiff himself. Plaintiff's allegations thus failed to state a cause of action for libel."). Accordingly, the Court dismisses with prejudice Plaintiffs' defamation claim as to Msgr. Tocco based on Msgr. Tocco's republication of the slander to Mr. Lakin, Mr. Nine, and Mrs. Nine. *See* MCR 2.116(C)(8). However, the Court dismisses without prejudice Plaintiffs' defamation claim as to other incidents where Msgr. Tocco republished the slander that may be revealed in the course of discovery.[14]

B. Intentional Infliction of Emotional Distress (Count II)

Michigan law recognizes the tort of intentional infliction of emotional distress as a distinct and separate cause of action. *Campos v General Motors Corp*, 71 Mich App 23, 25 (1976). However, "[l]iability has been found [for intentional infliction of emotional distress] only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Ledsinger v Burmeister*, 114 Mich App 12, 18 (1982). "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id*.

Defendants maintain that Plaintiffs' allegations fall short of "outrageous conduct." The Court agrees. Importantly, "[t]he liability [for the intentional infliction of emotional distress] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id* (citation omitted). Here, Plaintiffs have pled that Defendants are liable for defamation. However, Plaintiffs have not pled facts that constitute conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *See id*. Accordingly, the

[14] If additional incidents are borne out through discovery, Plaintiffs may reassert their defamation claim as to Msgr. Tocco.

Court grants Defendants' Motion as to Plaintiffs' intentional infliction of emotional distress claim. *See* MCR 2.116(C)(8).

C. Damage to Consortium (Count III)

In their Motion, Defendants describe Count III of Plaintiffs' Complaint as relating solely to Plaintiffs' intentional infliction of emotional distress claim. However, in Count III of Plaintiffs' Complaint, Plaintiffs contend that as a result of Defendants' intentional acts and negligence alleged in Counts I and II of Plaintiffs' Complaint, Mrs. Lakin has suffered and continues to suffer a loss of and injury to her previously enjoyed degree of companionship, services, affection, and consortium. In light of the Court's rulings as to Counts I and II of Plaintiffs' Complaint, the Court grants Defendants' Motion as to Count III of Plaintiffs' Complaint with respect to Plaintiffs' intentional infliction of emotional distress claim and Plaintiffs' defamation claim as to Msgr. Tocco. However, the Court denies Defendants' Motion as to Count III of Plaintiffs' Complaint with respect to Plaintiffs' defamation claim as to Sr. Barbara and St. Hugo.

WHEREFORE IT IS HEREBY ORDERED that Defendants' "Motion for Summary Disposition" is **GRANTED IN PART** and **DENIED IN PART**. Defendants' Motion is granted as to Count I of Plaintiffs' Complaint with respect to Msgr. Tocco. Defendants' Motion is also granted as to Count II of Plaintiffs' Complaint. In addition, Defendants' Motion is granted as to Count III of Plaintiffs' Complaint with respect to Plaintiffs' intentional infliction of emotional distress claim and Plaintiffs' defamation claim as to Msgr. Tocco.

Defendants' Motion is denied as to Count I of Plaintiffs' Complaint with respect to Sr. Barbara and St. Hugo. Defendants' Motion is also denied as to Count III of Plaintiffs' Complaint with respect to Plaintiffs' defamation claim as to Sr. Barbara and St. Hugo.

IT IS FURTHER ORDERED that Plaintiffs' defamation claim as to Msgr. Tocco's republication of Sr. Barbara's statement to Mr. Lakin, Mr. Nine, and Mrs. Nine is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs' defamation claim as to Msgr. Tocco's republication of Sr. Barbara's statement to other individuals that may be revealed in the course of discovery is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the parties shall appear for a Status Conference on September 8, 2014 at 8:30am.

IT IS SO ORDERED.

THIS ORDER DOES NOT RESOLVE THE LAST PENDING CLAIM IN THIS MATTER AND DOES NOT CLOSE THE CASE.

Dated: ______ ________________________________
Hon. Shalina D. Kumar

Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by **EFILING** it to their addresses as disclosed by the pleadings of record on the ___ day of August, 2014.

/s/ Amanda Lombardo

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Ruvayn Rubinstein, et al.,

Plaintiffs, Case No. 15-149593-CZ

v Hon. Shalina Kumar

Temple Israel,

Defendant.
____/

OPINION AND ORDER
At a session of Court
Held in Pontiac, Michigan
On

____

PRESENT: THE HONORABLE SHALINA D. KUMAR, CIRCUIT JUDGE

This matter is before the Court on Defendant "Temple Israel's Motion for Summary Disposition on Remand Pursuant to MCR 2.116(C)(10)" ("Defendant's Motion") and on "Plaintiffs' Motion for Summary Disposition on Remand" under MCR 2.116(C)(10) ("Plaintiffs' Motion"). Upon review of the parties' motions and briefs, this Court dispensed with oral argument under MCR 2.119(E)(3). This Court now finds as follows.

I. FACTS

A. Background

Defendant is a private, religious institution that also operates a preschool. Defendant is licensed to do business by the State of Michigan. The State of Michigan requires children to receive certain vaccinations unless they are exempt under MCL 333.9215, which provides:

> (1) A child is exempt from the requirements of this part as to a specific immunization for any period of time as to which a physician certifies that a specific immunization is or may be detrimental to the child's health or is not appropriate.
>
> (2) A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child's school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization.

Plaintiffs enrolled their minor children at Defendant's preschool in 2014, but when Plaintiffs attempted to re-enroll their children for the 2015 school year, Defendant informed them that their children would not be enrolled because they were not fully vaccinated. In accordance with Michigan law, Plaintiffs presented Defendant with an exemption form to refrain from vaccinating their children based on their religious beliefs. Defendant, however, informed Plaintiffs that, for its own religious reasons, it was no longer recognizing non-medical exemptions to Michigan's vaccine requirements.

B. Prior Proceedings

Plaintiff filed this action against Defendant for violation of Michigan statutes and regulations requiring Defendant to recognize non-medical vaccine waivers (Count I) and violation of Plaintiffs' constitutional rights (Count II).

1. Federal court action

Defendant removed this action to federal court, where it was assigned to the Hon. John Corbett O'Meara in the United States District Court for the Eastern District of Michigan, Case No. 15-13969. Judge O'Meara issued an "Order of Partial Remand," in which he declined to exercise supplemental jurisdiction over Plaintiffs' state law claims and ordered "that Count I and all portions of Count II that do not allege a federal cause of action are **REMANDED** to the Circuit Court for the County of Oakland." The parties filed cross motions for summary judgment regarding

Plaintiffs' federal law claims, and, on July 19, 2016, Judge O'Meara issued an "Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Disposition." Judge O'Meara held that Defendant was not a state actor and, therefore, could not be liable for any alleged constitutional violations under 42 USC § 1983. Judge O'Meara further stated:

> Even if the court were to deem Defendant a state actor, Temple Israel is entitled to summary judgment under the Ecclesiastical Abstention Doctrine. The doctrine prohibits a court from resolving a dispute that is inherently religious in nature. The gravamen of Plaintiffs' complaint is that Defendant refuses to make an exception to its vaccination policy based on Plaintiffs' religious beliefs, which are in direct conflict with those of this private, religious school. Under this doctrine the court would abstain from hearing the parties' dispute.

2. State court action

Upon remand, Defendant filed its "Answer to Complaint and Special and Affirmative Defenses" in this action. Defendant asserted an affirmative defense based on its own constitutional right to freely practice its religious beliefs:

> Plaintiffs' claims to compel Temple Israel to accept Plaintiffs' immunization waivers under the Michigan Public Health Code or the Child Care Licensing Act are barred because Temple Israel as a private religious institution has a First Amendment right to determine the policies governing the admission or expulsion of students based on conformity with its religious beliefs and/or religious tenets. To compel Temple Israel to admit students with religious or philosophical based immunization waivers would violate Temple Israel's First Amendment Free Exercise rights to admit or expel students based upon conformity with its religious beliefs.

Following the federal court's opinion and order regarding the parties' cross motions for summary judgment, the parties filed cross motions for summary disposition before this Court. Plaintiffs moved under MCR 2.116(C)(9) and (C)(10), while Defendant moved under MCR

2.116(C)(10). Neither party nor the Court challenged this Court's subject matter jurisdiction to consider Plaintiffs' claims in this action. The Court heard oral argument on the motions on September 14, 2016. At the hearing, this Court referenced Judge O'Meara's finding that this dispute is religious in nature and that the Ecclesiastical Abstention Doctrine would apply. This Court held:

> [T]o this Court it certainly is instructive. And I happen to agree with him. I do find that … this dispute is religious in nature. Uhm, I do find this a dispute between a religious institution and its member, and I think, therefore, the ecclesiastical doc – abstention doctrine does apply, and I'm granting defendant's summary disposition motion.

This Court then entered an "Order Granting Defendant, Temple Israel's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Denying Plaintiffs' Ruvayn Rubinstein and Sara Rubinstein [sic] Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)."

3. The Court of Appeals' decision

Plaintiffs appealed by right this Court's order granting summary disposition in favor of Defendant. The Court of Appeals vacated this Court's order and remanded for further proceedings in light of *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327; 901 NW2d 566 (2017), which was decided after this Court issued its September 14, 2016 order.

Winkler addressed the Ecclesiastical Abstention Doctrine, stating:

> The ecclesiastical abstention doctrine arises from the Religion Clauses of the First Amendment of the United States Constitution and reflects this Court's longstanding recognition that it would be inconsistent with complete and untrammeled religious liberty for civil courts to enter into a consideration of church doctrine or church discipline, to inquire into the regularity of the proceedings of church tribunals having cognizance of such matters, or to determine whether a resolution was passed in accordance with the canon law of the church, except insofar as it may be necessary to do so, in determining whether or not it was the church that acted therein. Accordingly, we have consistently held that the court may not

> substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters, and that judicial interference in the purely ecclesiastical affairs of religious organizations is improper.
>
> The doctrine thus operates to ensure that, in adjudicating a particular case, a civil court does not infringe the religious freedoms and protections guaranteed under the First Amendment. It does not, however, purport to deprive civil courts of the right to exercise judicial power over any given class of cases.

Winkler, 901 NW2d at 573-574 (internal citations and quotations omitted). *Winkler* held that the Ecclesiastical Abstention Doctrine may affect how a civil court exercises its subject matter jurisdiction over a given claim, but it does not divest a court of jurisdiction altogether. *Id*. at 569.

> What matters instead is whether the actual adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly. The doctrine, in short, requires a case-specific inquiry that informs how a court must adjudicate certain claims within its subject matter jurisdiction; it does not determine whether the court has such jurisdiction in the first place.

Id. at 575. To the extent that prior decisions, such as *Dlaikan v Roodbeen*, 2016 Mich App 591; 522 NW2d 719 (1994), held that the Ecclesiastical Abstention Doctrine deprives a court of subject matter jurisdiction, *Winkler* overruled them.

Following *Winkler*, the Court of Appeals remanded this action to this Court for further proceedings, stating:

> In this case (and unlike in *Winkler*), the trial court did not explicitly state that its ruling was premised on subject-matter jurisdiction or that it was granting summary disposition under MCR 2.116(C)(4). Nonetheless, at the time the trial court ruled, it was bound to follow the now-overruled holding of *Dlaikan* and its progeny (i.e., that the ecclesiastical abstention doctrine implicated subject-matter jurisdiction). See MCR 7.215(C)(2). We therefore conclude that we must remand this case to the trial court to consider the merits of the parties' cross-motions for summary disposition. In light of *Winkler*, the trial court should have the opportunity, in exercising its

> jurisdiction, to adjudicate the merits of those motions while abstaining from resolving any ecclesiastical questions.

After conducting additional discovery, the parties filed cross motions for summary disposition in light of *Winkler*. Upon review of the motions and the briefs, this Court waived oral argument and now issues this "Opinion and Order."

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The Court should evaluate the motion by considering the substantively admissible evidence (pleadings, affidavits, depositions, admissions and other documentary evidence) actually proffered in opposition to the motion to determine if there are disputed issues of material fact for trial. *Id.*; *see also* MCR 2.116(G)(5). Summary disposition is proper "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). No material fact exists for trial if, in reviewing the record evidence, reasonable minds could not return a verdict in favor of the non-movant. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). The Court shall review the submitted evidence in a light most favorable to the non-moving party, and grant the benefit of any reasonable doubt to that party. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). However, a litigant's pledge to later establish an issue of fact at trial is insufficient to survive summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 121.

III. ANALYSIS

Under *Winkler*, *supra*, this Court hereby exercises subject matter jurisdiction over Plaintiffs' claims in this action. Having considered the merits of the parties' cross motions for summary disposition, this Court finds that adjudicating Plaintiffs' claims would require the resolution of ecclesiastical questions. This Court abstains from resolving such ecclesiastical questions and defers to Defendant's resolution of those questions.

On the one hand, Plaintiffs contend that Defendant should be compelled to accept Plaintiffs' vaccination exemption forms based on Plaintiffs' religious beliefs and compelled to enroll Plaintiffs' children in Defendant's preschool in accordance with Michigan's vaccination laws. Plaintiffs, therefore, contend that resolution of their claims merely requires this Court to apply secular Michigan law.[15] Defendant, on the other hand, contends that it should not be compelled to accept Plaintiffs' vaccination exemption forms or compelled to enroll Plaintiffs' children in Defendant's preschool when Defendant has religious reasons for mandating vaccinations. Defendant, therefore, contends that resolution of Plaintiffs' claims requires resolution of ecclesiastical questions. Defendant contends that, if the Court were to compel Defendant to accept Plaintiffs' vaccination exemption forms, it would be forcing Defendant to operate its private, religious preschool in violation of its own religious beliefs.

Defendant presented ample evidence showing that in Jewish law the preservation of human life overrides virtually any other religious consideration. Specifically, Defendant presented evidence that the Union for Reform Judaism issued a religious ruling on immunization waiver claims, which urged congregations and institutions to adopt polices requiring mandatory vaccinations with only medical exemptions permitted. Thus, unlike in *Winkler*, here Defendant

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[15] Notably, however, while Plaintiffs contend that they are merely seeking secular relief, they also contend that Defendant's refusal to enroll Plaintiffs' children in preschool because they are not fully vaccinated is a violation of Plaintiffs' constitutional right to freely exercise their religious beliefs.

has shown religious reasons for requiring vaccinations and for refusing to enroll Plaintiffs' children in its preschool.

Despite Plaintiffs' contention to the contrary, both parties in this action rely on their religious beliefs either in support of or against vaccinations. Plaintiffs essentially ask this Court to apply Michigan statutes to support their religious beliefs at the expense of Defendant's religious beliefs. This Court, therefore, finds that this action involves a private religious dispute. Just as Judge O'Meara held, this Court finds that "[t]he gravamen of Plaintiffs' complaint is that Defendant refuses to make an exception to its vaccination policy based on Plaintiffs' religious beliefs, which are in direct conflict with those of this private, religious school."

Thus, this Court finds that adjudication of Plaintiffs' claims for violation of Michigan statutes and regulations requiring Defendant to recognize non-medical vaccine waivers (Count I) and violation of Plaintiffs' state constitutional rights (Count II) would require the resolution of ecclesiastical questions. This Court, therefore, abstains from resolving those ecclesiastical questions, defers to Defendant's resolution of such questions, and dismisses this action with prejudice. *Winkler*, 901 NW2d at 575.

Because this Court finds that the Ecclesiastical Abstention Doctrine applies, it need not address Defendant's contention that Plaintiffs lack standing to enforce Michigan statutes in a private cause of action.

WHEREFORE, IT IS HEREBY ORDERED that Defendant "Temple Israel's Motion for Summary Disposition on Remand Pursuant to MCR 2.116(C)(10)" is **GRANTED** and "Plaintiffs' Motion for Summary Disposition on Remand" is **DENIED**. Plaintiffs' claims are dismissed with prejudice.

IT IS SO ORDERED.

THIS ORDER RESOLVES THE LAST PENDING CLAIM IN THIS MATTER AND CLOSES THE CASE.

Dated: ______________________ ____

Hon. Shalina Kumar, Circuit Judge

Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by **EFILING** it to their addresses as disclosed by the pleadings of record on the ___ day of September 2018.

/s/ Amanda Lombardo

Questions for the Record for Judge Shalina Kumar
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Shalina D. Kumar, Nominee to the United States District Court for the Eastern District of Michigan

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

   Response: I believe it is the duty of a judge to uphold the Constitution and the laws of our country. A judge should look to the plain meaning and express language of statutes and provisions of the Constitution. A judge is bound to follow case precedent as established by the Supreme Court and the Circuit in which they sit, and to apply the law to the facts of the case in a fair and impartial manner.

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

   Response: I would first look to the plain meaning and express language of the statute. If the statute is unambiguous, the inquiry would stop there. If there is ambiguity, I would look to precedent as established by the Supreme Court and the Sixth Circuit. If there was no binding precedent directly on point, I would look to precedent not directly on point, but which has reasoning that is analogous. I may look to other statutes with similar language and any precedent interpreting that statute. If I am fortunate enough to be confirmed as a district court judge, I would follow Supreme Court precedent with respect to analyzing and interpreting any federal statute.

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

   Response: I would first look to the plain meaning and express language of the constitutional provision. If the constitutional provision is unambiguous, the inquiry would stop there. If there is ambiguity, I would look to precedent as established by the Supreme Court and the Sixth Circuit. If there was no binding precedent directly on point, I would look to precedent not directly on point, but which has reasoning that is analogous. I may look to other provisions of the Constitution with similar language and any precedent interpreting that language. If I am fortunate enough to be confirmed as a district court judge, I would follow Supreme Court precedent with respect to analyzing and interpreting any constitutional provision.

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

   Response: When interpreting the Constitution, I would start with the plain meaning and express language of the provision at issue. In addition, I would follow Supreme Court precedent with respect to the role of text and original meaning of constitutional provisions when interpreting the Constitution.

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

Response: Please see response to Question No. 2.

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

Response: "Plain meaning" refers to the public understanding of the relevant language at the time of enactment.

6. **What are the constitutional requirements for standing?**

Response: Pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992), the constitutional requirements for standing are 1) the plaintiff suffered an injury that is "concrete and particularized" and "actual and imminent"; 2) there is a causal connection between that injury and the conduct complained of; and 3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

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

Response: The Supreme Court has recognized that Congress has implied powers under the Necessary and Proper Clause to carry out its enumerated powers in the Constitution. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: I would follow Supreme Court precedent and that of the Sixth Circuit with respect to analyzing the constitutionality of the law.

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

Response: The Supreme Court has held that there are rights that are not specifically enumerated in the Constitution, including the right to marry; the right to have children; the right to marital privacy. The Supreme Court has found unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (internal quotations omitted).

10. What rights are protected under substantive due process?

Response: Please see my response to Question No. 9. Additionally, there are fundamental rights that the Supreme Court has held are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

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

Response: My personal beliefs are not relevant and would play no role in my decision-making process. I would follow Supreme Court and Sixth Circuit precedent with respect to analyzing what rights are protected by substantive due process.

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

Response: The Supreme Court has held that the Commerce Clause authorizes Congress to regulate: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons, or things in interstate commerce"; and 3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has identified race, religion, national origin, and alienage as suspect classes that must survive strict scrutiny. *Johnson v. Robinson*, 415 U.S. 361 (1974).

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

Response: The separation of powers is vital to our system of government and constitutional structure. The system of checks and balances prevents power from being concentrated in one branch of government and prevents us from tyranny and abuse of power.

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

Response: I would first look to the text of the Constitution to determine the scope of the authority granted to that branch government. I would follow Supreme Court and Sixth Circuit precedent when analyzing whether that branch of government exceeded its authority.

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

Response: Empathy should play no role in a judge's consideration of a case. It is always important for a judge to exhibit patience and treat everyone equally and with respect. A judge should base his or her decision on the law and the facts of the case in an impartial manner.

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

Response: Both circumstances are equally unfavorable.

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

Response: I have no opinion with respect to the frequency with which the Supreme Court has invalidated federal statutes. I will follow Supreme Court and Sixth Circuit precedent when analyzing the constitutionality of federal statutes.

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

Response: Judicial review refers to the Supreme Court's role in determining the constitutionality of the actions of the other branches of government. Judicial Supremacy refers to the Supreme Court's role as final interpreter of the meaning of the Constitution.

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

Response: The role of the judiciary is a limited one. A judge should fairly and impartially decide the case or controversy before him or her. It is not the role of the judiciary to make or enforce laws.

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

precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: The duty of a lower court judge is to follow precedent as established by the Supreme Court and the Circuit in which they sit.

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

Response: A defendant's "group identity" should not be a part of a judge's sentencing analysis. The U.S. Sentencing Guidelines state that race, gender, nationality, sexual orientation or gender identity should play no role in sentencing. These group identities are also not factors to be considered under 18. U.S.C. § 3553(a).

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

Response: I have no opinion with respect to the Biden Administration's definition of equity.

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

Response: Equity can be defined as recognizing that each person has different needs and should have their individualized needs addressed. Equality means everyone being treated equally and given the same things.

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

Response: "Equal protection of the laws" is guaranteed by the 14th Amendment.

26. **How do you define "systemic racism?"**

Response: I understand that there has been some research in this area, but I have no specific definition of "systemic racism."

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

Response: I have no specific definition of "critical race theory." I understand that this term has been used in the area of academics.

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

Response: Please see my responses to Questions 27 and 28.

29. Is it appropriate for a federal district court judge to make contributions to political campaigns? How are the federal judicial canons regarding campaign contributions different from the canons applied to Michigan state court judges?

Response: According to the Michigan Code of Judicial Conduct and the Michigan Judicial Tenure Commission, it is ethical and not inappropriate to make campaign contributions. To the extent that the federal judicial canons differ from those of Michigan, I will faithfully follow the federal judicial canons if confirmed as a federal district court judge.

Questions from Senator Thom Tillis
for Shalina Kumar
Nominee to be United States District Judge for the Eastern District of Michigan

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: Judicial activism is defined by a judge allowing his or her personal views to impact his or her decisions. A judge must always set aside his or her personal views and make decisions based on the law and the facts of the case.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No, a judge should never be involved in policy decisions.

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

   Response: A judge should always apply the law to the facts of the case in a fair and impartial manner without regard to the outcome.

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

   Response: No.

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

   Response: I will faithfully follow the Supreme Court and Sixth Circuit precedent, including the precedent established in *Heller* and *McDonald*.

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 will faithfully follow Supreme Court and Sixth Circuit precedent, including that addressing COVID-19 restrictions affecting constitutional rights.

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: I will faithfully follow Supreme Court and Sixth Circuit precedent with respect to qualified immunity cases. As a judicial nominee, it would not be appropriate for me to opine further on how I would rule on such matters if confirmed as a district court judge.

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: As a judicial nominee, it would not be appropriate for me to opine on the quality of existing Supreme Court precedent. If confirmed, I will faithfully follow the precedent of the Supreme Court and that of the Sixth Circuit.

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

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

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

    Response: Please see my response to Question No. 10.

13. **How would you apply current patent eligibility jurisprudence to the following hypotheTticals. 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 judicial nominee, it would not be appropriate for me to offer an opinion on how I might rule on this hypothetical question as this issue may come before me if confirmed. I am aware that there is Supreme Court precedent in this area of law, and I would faithfully follow that precedent.

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

Response: Please see my response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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 response to Question 13(a).

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: As a judicial nominee, it would not be appropriate for me to opine on the quality of existing Supreme Court precedent. If confirmed, I will faithfully follow the precedent of the Supreme Court and that of the Sixth Circuit.

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: As a state court judge, I have had little to no experience handling copyright matters.

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

    Response: As a state court judge, I have not had experience handling cases involving the Digital Millennium Copyright Act.

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

    Response: As state court judge, I have not had experience in this area of the law.

    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 state court judge, I have dealt with issues involving the First Amendment, but I have not had extensive experience with intellectual property or copyright issues.

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: When interpreting legal texts, I start with the plain meaning and express language of the text at issue. In addition, I would follow Supreme Court and Sixth Circuit precedent with respect to the interpretation of the legal text. If there is ambiguity in the text and there is no precedent on point, I may look to legislative history. Some legislative history that might be persuasive would include language that was changed in a statute and statutes that were enacted in response to a court decision.

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: It is my understanding that there is Supreme Court precedent on this issue, and I will faithfully follow that precedent.

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

Response: It is my understanding that there is Supreme Court precedent on this issue, and I will faithfully follow that precedent.

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

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

Response: It is my understanding that there is Supreme Court precedent on this issue, and I will faithfully follow that precedent.

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

Response: If confirmed, I will faithfully follow Supreme Court precedent, including in the areas of changing technology.