Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Todd E. Edelman
Judicial Nominee to the United States District Court for the District of Columbia

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

   Response: I do not agree with this statement. Judges must interpret the Constitution based on its text and the binding precedents of the Supreme Court and the Circuit Courts of Appeal, rather than on their "independent value judgments."

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: No. Lower court judges are bound to accept and apply applicable Supreme Court precedents.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary (11th ed. 2019) defines the doctrine of "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values."

4. **Do you agree with then-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 in which Justice Brown Jackson made this statement. To the extent that Justice Brown Jackson was expressing that the Constitution has a fixed meaning that can only be changed through the Article V amendment process, I agree with her statement.

5. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: As a trial judge, my judicial philosophy stems from my oath to decide cases and issues fairly and impartially, and to treat the parties who come before me equally and with respect. From that philosophy derives obligations to treat each case and issue with an open mind, unburdened by preconceptions or personal or policy preferences; to allow all parties to fully present their case on the merits; to neutrally apply the law to the facts,

faithfully applying all binding precedents; and to issue opinions that are detailed and thorough enough to make the bases of my decisions transparent to the parties and the public. Although I have not studied all opinions issued by the Supreme Court over the past 50 years, I am not aware of any opinion that exemplifies this philosophy more than any other.

6. **Please identify a D.C. Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: As a trial judge, my judicial philosophy stems from my oath to decide cases and issues fairly and impartially, and to treat the parties who come before me equally and with respect. From that philosophy derives obligations to treat each case and issue with an open mind, unburdened by preconceptions or personal or policy preferences; to allow all parties to fully present their case on the merits; to neutrally apply the law to the facts, faithfully applying all binding precedents; and to issue opinions that are detailed and thorough enough to make the bases of my decisions transparent to the parties and the public. Although I have not studied all opinions issued by the D.C. Circuit over the past 50 years, I am not aware of any opinion that exemplifies this philosophy more than any other.

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

   Response: The allocation of funds for police and other services is a policy issue to be resolved by the legislative branch. As a sitting judge and as a nominee for another judicial position it would be inappropriate for me to express an opinion as to this issue.

8. **What role should empathy play in sentencing defendants?**

   Response: Congress has instructed that a sentencing judge must consider a variety of factors at sentencing (including factors relating to a defendant's background). Judges should render sentences according to those statutory factors and any applicable sentencing guidelines, and not based on empathy or other emotions.

9. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

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

      Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. However, there are certain Supreme Court decisions that are foundational to our system of justice, and that turn on issues extremely unlikely to be posed to me in any future case. Because *Brown v. Board of Education* is one such case, I am comfortable stating that it was correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. However, there are certain Supreme Court decisions that are foundational to our system of justice, and that turn on issues extremely unlikely to be posed to me in any future case. Because *Loving v. Virginia* is one such case, I am comfortable stating that it was correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. The Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022). If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. The Supreme Court overruled *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022). If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

i. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

j. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

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

Response: Depending on the facts of a specific case, threatening Supreme Court Justices or other judges or public officials could violate a number of local and federal statutes, including 18 U.S.C. § 115.

11. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 makes it unlawful to picket, parade, or demonstrate "in or near" a court building or the residence of a judge, juror, witness, or court officer if the person involved in picketing, parading, or demonstrating does so "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty."

12. **Under Supreme Court precedent, is 18 USC § 1507 or a state analog statute constitutional on its face?**

    Response: I am not aware of any Supreme Court precedent addressing the constitutionally of 18 U.S.C. § 1507 or a state analog statute. Because the issue of the constitutionality of such statutes may be posed to me in litigation in my current position as an Associate Judge of the Superior Court of the District of Columbia or, if confirmed, as a United States District Judge, it would be inappropriate for me to comment on this issue. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

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

    Response: In *Cohen v. California,* 403 U.S. 15, 20 (1971), the Supreme Court held that states can prohibit the use of "fighting words," defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."

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

    Response: Where a speaker intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the speaker's statement does not constitute protected free speech under the true threats doctrine. *Virginia v. Black,* 538 U.S. 343, 359 (2003).

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

    Response: If I am confirmed and a case concerning the difference between criticism of a judge and an "attack" on a judge comes before me, I will apply all Supreme Court and D.C. Circuit precedents that bear on this issue.

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

    Response: The question of whether the Supreme Court should be expanded is a matter for the political branches of government to decide. As a sitting judge and a judicial nominee, it would not be appropriate for me to comment on this issue.

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

Response: While elements of a defendant's background (for example, his or her criminal record) may bear upon the punishment he or she receives, personal characteristics such as a defendant's race, gender, religion, or national origin are not relevant at sentencing.

18. **Is the federal judicial system systemically racist? Please explain.**

    Response: No.

    a. If you answered yes, if confirmed how will you feel comfortable working in a systemically racist system?

19. **Is the federal judiciary affected by implicit bias?**

    Response: I am not an expert in the field of implicit bias, and am not aware of any studies focusing on whether judges are more or less likely to be affected by implicit bias. It is my understanding that all people, including judges, have implicit biases that operate beneath the level of consciousness. This does not mean that these biases are invidious, or that all people are prejudiced or unfairly biased.

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

    Response: To the extent that I have considered this issue as a judge, I have done so pursuant to the District of Columbia's compassionate release statute, D.C. Code § 24-403.04. Under that statute, a judge must grant compassionate release if the judge finds that: (i) the defendant is terminally ill or is at least 60 years old and has served at least 20 years in prison, or that "[o]ther extraordinary and compelling reasons warrant such a [sentence] modification," *id.* § 24-403.04(a)(1)-(3), and (ii) the defendant "is not a danger to the safety of any other person or the community," *id.* § 24-403.04(a). In federal court, an offender may seek compassionate release under 18 U.S.C. § 3582(c)(1)(A) and the First Step Act. Under those provisions, an offender may claim that his susceptibility to COVID-19 constitutes an "extraordinary and compelling reason[]" for his release, but a judge considering such a request must consider a number of factors (including community safety) before granting or denying the motion. Under both the D.C. and federal statutes, all such determinations must be made on a case-by-case basis, considering each factor set forth in the statute.

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

    Response: In considering a challenge to a regulation or legislation under the Second Amendment, I would apply relevant Supreme Court precedent, including *District of*

Columbia v. Heller, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), as well as any applicable D.C. Circuit precedent. Specifically, I would require the government to demonstrate that the challenged regulation or statute "is consistent with the Nation's historical tradition of firearm regulation." *Bruen,* 142 S. Ct. at 2130.

22. **What is implicit bias?**

Response: I am not an expert in the field of implicit bias. It is my understanding that "implicit bias" is a psychological concept describing biases or cognitive defaults that take place beneath the level of consciousness.

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

Response: I am not an expert in the field of implicit bias. It is my understanding that all people have implicit biases that operate beneath the level of consciousness, and I have no reason to believe that I differ from other people in this respect. This does not mean that these biases are invidious, or that I or other people are prejudiced or unfairly biased. As a judge, I focus on treating all parties equally and fairly, and on deciding issues based on their merits rather than on any preferences or preconceptions I may have; that is why I work hard to approach each case with an open mind, to allow all parties a full and fair opportunity to present their case on the merits, and to decide each case based on the facts in the record and through a neutral application of the law. If confirmed, I will continue to do so as a United States District Judge.

24. **In your career as a public defender, did you ever offer a Second Amendment defense on behalf of a client?**

Response: Yes. As a public defender in the late 1990s and early 2000s, I wrote and litigated a number of motions to dismiss firearms and ammunition possession charges filed against my clients under the Second Amendment. All of these motions were denied.

25. **Do you believe the Armed Career Criminal Act (ACCA) should be abolished?**

Response: Whether the Armed Career Criminal Act should be abolished is a policy question to be resolved by the legislative branch. If confirmed, I will faithfully apply the Armed Career Criminal Act and Supreme Court and D.C. Circuit precedents interpreting it, unless and until it is amended by Congress.

26. **Do you believe mandatory minimums should be abolished? Why or why not?**

Response: Whether mandatory minimum sentences should be abolished is a policy question to be resolved by the legislative branch. If confirmed, I will faithfully apply statutes requiring mandatory minimum sentences, including the Armed Career Criminal

Act, consistent with Supreme Court and D.C. Circuit precedents interpreting those statutes.

27. **Do you believe that the federal government should abolish mandatory minimums for any drug crimes?**

    Response: Whether the federal government should abolish mandatory minimum sentences for any drug crimes is a policy question to be resolved by the legislative branch.

28. **Do you believe that the federal government should decriminalize possession of any drugs?**

    Response: Whether the federal government should decriminalize possession of any drugs is a policy question to be resolved by the legislative branch.

29. **During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

    Response: No.

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

    Response: I have spoken with Christopher Kang, who has provided me with general information about the judicial nomination process based on his prior experience in the White House Counsel's Office.

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

    Response: No.

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

    Response: No.

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

    Response: No.

34. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: Please see my response to Question 30 regarding Christopher Kang, although I have had no conversations with him since my nomination. I am not in contact with any of the other listed individuals or anyone else associated with this organization.

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

       Response: Please see my response to Question 30 regarding Christopher Kang. I have never been in contact with any of the other listed individuals or anyone else associated with this organization.

35. **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?**

       Answer: 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: I have known Nan Aron, the former President of the Alliance for Justice, for over ten years. I have not been in contact with the listed individuals or anyone else associated with the organization.

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 35(b).

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

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

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: No.

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

Response: No.

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

Response: No.

37. **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 Foundations 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.

38. **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.

39. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the**

corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary 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 Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

   Response: No.

c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

   Response: I spoke to Jeremy Paris on one occasion several years ago. I have not been in contact with any of the other listed individuals or anyone else associated with these organizations.

40. **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: On December 15, 2021, I submitted a Judicial Candidate Questionnaire to Representative Eleanor Holmes Norton's District of Columbia Law Enforcement Nominating Commission. I met with the Commission on January 13, 2022. On June 3, 2022, I interviewed with attorneys from the White House Counsel's Office. Since June 3, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 29, 2022, the President announced his intent to nominate me, and he submitted my nomination to the Senate on September 27, 2022.

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

Response: I received these questions on November 22, 2022. I drafted my responses to the best of my ability after conducting any necessary research and reviewing personal records, including my previously-submitted Senate Judiciary Questionnaire. I received feedback on my responses from officials at the Department of Justice Office of Legal

Policy. I considered that feedback while I finalized my responses. I submitted my responses on November 28, 2022.

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

Questions for the Record for Todd Edelman, Nominee for the United States District Judge for the District of Columbia

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. **Is racial discrimination wrong?**

Response: The Supreme Court has held that racial discrimination is illegal. It has applied strict scrutiny to all race-based governmental actions, holding that such actions only pass constitutional muster if they are narrowly tailored to serve a compelling governmental interest. Congress has prohibited racial discrimination through a variety of statutes, including Title VII of the Civil Rights Act of 1964, and the District of Columbia has done so through the District of Columbia Human Rights Act and other laws.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: The Supreme Court has held that the Due Process Clause of the Constitution's Fifth and Fourteenth Amendments protects unenumerated rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Because the question of whether unenumerated rights that have not yet been identified exist may be posed to me in future litigation, as a sitting judge and a judicial nominee it is not appropriate for me to comment further as to this question. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will strictly adhere to the precedents of the Supreme Court and the D.C. Circuit as to which rights the Constitution recognizes and protects.

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

Response: As a trial judge, my judicial philosophy stems from my oath to decide cases and issues fairly and impartially, and to treat the parties who come before me equally and with respect. From that philosophy derives obligations to treat each case and issue with an open mind, unburdened by preconceptions or personal or policy preferences; to allow all parties to fully present their case on the merits; to neutrally apply the law to the facts, faithfully applying all binding precedents; and to issue opinions that are detailed and thorough enough to make the bases of my decisions transparent to the parties and the public. I have not had an opportunity to study the decisions of each Justice of the Warren, Burger, Rehnquist, and Roberts Courts to the extent necessary to determine which Justice's philosophy is most analogous to mine.

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

Response: Black's Law Dictionary (11th ed. 2019) defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted, specifically, the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I have not identified my judicial philosophy according to a particular label or developed a particular interpretative

approach. If confirmed as a federal trial judge, I will faithfully adhere to the precedents of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

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

Response: Black's Law Dictionary (11th ed. 2019) defines the doctrine of "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." While I have not identified my judicial philosophy according to a particular label or developed a particular interpretative approach, I generally believe that the Constitution has a fixed and enduring meaning that remains constant over time. If confirmed as a federal trial judge, I will faithfully adhere to the precedents of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

6. **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: In interpreting a constitutional provision, I would first examine the text of the provision and any binding precedents of the Supreme Court and the District of Columbia Circuit interpreting it. In the rare circumstances where the provision remains ambiguous after considering the text and the applicable precedent, I would look to any Supreme Court guidance as to the means by which the text should be interpreted, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision.

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

Response: The public's current understanding of the Constitution or a statute generally bears no relevance to the meaning of the Constitution or a statute, although current understanding may reflect the provision's original public meaning.

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

Response: I believe that the Constitution has a fixed and enduring meaning that remains constant over time. The Constitution's meaning can only change through the Article V amendment process.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is inappropriate for me to on whether the Supreme Court has correctly decided a particular issue or case. If confirmed, I will faithfully apply all binding Supreme Court precedents without regard to any personal opinions as to whether they were correctly decided.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. However, there are certain Supreme Court decisions that are foundational to our system of justice, and that turn on issues extremely unlikely to be posed to me in any future case. Because *Brown v. Board of Education* is one such case, I am comfortable stating that it was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: Under 18 U.S.C. § 3142(e)(3), the rebuttable presumption that no condition or combination of conditions can reasonably assure the safety of any other person and the community applies when a defendant is charged with (i) a drug offense carrying a maximum sentence of ten years or more of incarceration; (ii) a crime involving slavery or human trafficking; (iii) certain terrorism offenses; (iv) certain offenses involving minor victims; or (v) certain other offenses, including certain violations relating to the sale of firearms.

a. **What are the policy rationales underlying such a presumption?**

Response: I am not aware of the policy rationales underlying the presumption.

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

Response: Yes. The First Amendment to the United States Constitution provides that Congress shall "make no law . . . prohibiting the free exercise [of religion]"; the 14th Amendment applies this prohibition against the states. All laws and governmental actions burdening the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). Under strict scrutiny, a governmental action that burdens the free exercise of religion can stand only if it is narrowly tailored to serve "interests of the highest order." *Id.* at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable," thus triggering strict scrutiny review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). In addition, the Religious Freedom Restoration Act provides that other federal laws cannot substantially burden the free exercise of religion unless the government can satisfy strict scrutiny. *See* 42 U.S.C. § 2000bb-1.

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

Response: Such a governmental action would only be permissible if it survived strict scrutiny review, i.e., if the government demonstrated that it was narrowly tailored to serve a compelling state interest.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court determined that the religious entity-petitioners had established their entitlement to a preliminary injunction pending appellate review. The Court found that the petitioners had demonstrated that they were likely to prevail on the merits of their First Amendment claims because the challenged executive order applied to religious services and not to "essential services" such as garages and factories; the order was thus not neutral toward religion nor of general applicability, and did not survive strict scrutiny because, as a total ban on religious services rather than a limit on attendance, it was not narrowly tailored to serve the government's asserted interest. Applying the other factors relevant to the appropriateness of injunctive relief, the Supreme Court also found that the parishioners' inability to worship in person constituted an irreparable injury, and that the

government did not show that issuance of the injunction would harm the public.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that individuals challenging California's COVID-19 restrictions on at-home religious exercise were entitled to injunctive relief. The Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). In this case, the Court found that, because California permitted a variety of businesses to operate indoors with more people present than it allowed to be present for indoor Bible studies and communal worship, the regulations at issue were not neutral and generally applicable, and likewise failed strict scrutiny. In holding the petitioners were entitled to an injunction, the Supreme Court found that they were likely to succeed on the merits of their claims under the Free Exercise Clause of the First Amendment; that the applicants' inability to participate in religious activities constituted an irreparable harm; and that California had not shown that its public health interests could not be served by less restrictive means.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the defendant state Civil Rights Commission impermissibly violated the Free Exercise Clause by evincing hostility toward a party's sincere religious beliefs during the course of administrative hearings. After a baker cited his sincerely-held religious beliefs in refusing to bake a wedding cake for a same-sex marriage ceremony, the couple filed a complaint with the Commission, which ultimately ruled in the couple's favor. The Supreme Court held that the conduct of the Commission during the administrative hearing process demonstrated "a clear and impermissible hostility" toward the baker's sincerely-held religious beliefs. *Id.* at 1729. The Court concluded that the Commission's demonstrated hostility toward a party's religious beliefs constituted a violation of the Free Exercise clause.

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

Response: Yes. *See Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 725 (2014); *Frazee v. Ill. Dep't of Emp. Security*, 489 U.S. 829, 834 (1989).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be**

legally recognized by courts?

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on the official position of a religious entity as to a particular issue.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court applied the "ministerial exception" developed under the First Amendment's religion clauses to preclude consideration of employment discrimination lawsuits brought by two teachers at Catholic elementary schools. Focusing on the responsibilities of the teachers in praying with their students, attending Mass with them, and preparing them for other religious activities, the Supreme Court held that the teachers "performed vital religious duties," *id.* at 2066, such that the ministerial exception shielded the employment dispute from judicial intervention. The Court explained that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 2069.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), Philadelphia had refused to contract with Catholic Social Services in the placement of foster children under a non-discrimination policy because CSS, based on its religious views, would not certify same-sex couples as foster parents. The Supreme Court held that Philadelphia's policy was not generally applicable because it allowed discretionary individual exemptions. Applying strict scrutiny, the Court concluded that because Philadelphia could not show that its refusal to contract with Catholic Social Services was narrowly tailored to advance a compelling government interest, its failure to do so violated the Free Exercise Clause.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that a Maine program that provides tuition assistance for students at "nonsectarian" private schools violated the Free Exercise Clause because it barred religious school students from receiving tuition assistance solely because of the exercise of their religion.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.***

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the Free Speech and Free Exercise Clauses of the First Amendment by terminating a high school football coach who engaged in personal prayer on the field after the conclusion of games. The Supreme Court found that the school district's restriction of the coach's private speech and religious expression violated the religion clauses where "the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id.* at 2433.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch concurred with the majority's decision to grant the writ of certiorari, vacate the lower court's decision, and remand for further consideration consistent with *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In his concurrence, Justice Gorsuch expressed his view that the lower court had misapprehended the application of strict scrutiny under the Religious Land Use and Institutionalized Persons Act. He suggested that, on remand, the lower court needed to analyze whether the county had demonstrated a compelling interest in denying the petitioners an exception to the sanitation regulation at issue; consider the exceptions provided to other groups, and why those exceptions could not be provided to the petitioners; and question whether the evidence demonstrated the workability of the less restrictive proposal advanced by petitioners.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Because this issue of statutory construction may be posed to me in future litigation, as a sitting judge and a judicial nominee it is not appropriate for me to comment as to this question. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will strictly adhere to the precedents of the Supreme Court and the D.C. Circuit

in interpreting the statute.

26. **Would 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: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: I would not encourage or support such trainings.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: For the past 12 years, I have served as an Associate Judge of the Superior Court of the District of Columbia and have selected law clerks and other staff based on the merits of their applications. If confirmed, I will continue to do so.

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

Response: The political branches of government – the executive and legislative branches – have the responsibility to make political appointments and must abide by the Constitution in doing so. As a sitting judge and a judicial nominee, it is not appropriate for me to provide further comment as to the appropriateness or constitutionality of hypothetical political appointments.

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

Response: Whether the criminal justice system is systemically racist is a question to be considered and dealt with by policymakers. As an Associate Judge of the Superior Court of the District of Columbia for the past 12 years, I have worked diligently to assure that all parties who come before me are treated equally and with equal dignity and respect; I believe that our court system and its processes permit the realization of "equal justice under law" in all types of cases. If confirmed, I would approach my responsibilities as a United States District Judge in the same fashion.

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

Response: The question of whether Congress should change the size of the Supreme Court is a matter for the political branches of government to decide. As a sitting judge and as a nominee, it would not be appropriate for me to comment on this issue.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: The Supreme Court has extensively analyzed the original public meaning of the Second Amendment and found that it serves to "protect an individual right to armed self-defense." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2128 (2022).

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court held that such restrictions only pass constitutional muster if the government "demonstrate(s) that the regulation is consistent with this Nation's historical tradition of firearm regulation."

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

Response: Yes.

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

Response: I am not aware of any authority suggesting that the right to own a firearm under the Second Amendment receives less protection than any other individual constitutional right.

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

Response: I am not aware of any authority suggesting that the right to own a firearm under the Second Amendment receives less protection than the right to vote.

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

Response: As a general matter, the executive branch has broad leeway in determining its policy priorities and exercising prosecutorial discretion. In general, the question of whether it is appropriate for the executive to do so is a matter of a policy to be determined by elected representatives and regulated by the political process. However, if a case came before me where the executive's refusal to enforce a law was challenged, I would faithfully consider the arguments of the parties and all binding Supreme Court and D.C. Circuit precedent relevant to the question.

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

Response: Prosecutorial discretion refers to the choices that prosecutors make in determining which cases and defendants to prosecute and how to prosecute them. It is my understanding that a substantive administrative rule change is a change governed by various procedural requirements.

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

Response: At the federal level, the death penalty is authorized by a statute, 18 U.S.C. § 228, that can only be amended or repealed through the normal legislative process. Nor does the President have authority to abolish the death penalty at the state level.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Center for Disease Control lacked the authority to impose a national eviction moratorium to protect tenants from COVID-19 and to slow the spread of the disease. Finding that the petitioners were virtually certain to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium.

42. **During the Covid-19 pandemic, you granted several compassionate release motions for defendants incarcerated for murder. For example, in *United States v. Bartrum,* you acknowledged the defendant's danger to the community but still ruled him eligible for a compassionate release. Why did you release a murderer who had previously reoffended after being paroled?**

Response: During the pandemic, I have considered over 60 written motions in which a

defendant has requested release based on the risks posed by COVID-19, and have denied relief in the vast majority of those cases. However, I have granted compassionate release motions in a handful of cases, including Mr. Bartrum's. When considering compassionate release motions, I have followed the District of Columbia's compassionate release statute, D.C. Code § 24-403.04. Under that statute, a judge must grant compassionate release upon finding that: (i) the defendant is terminally ill or is at least 60 years old and has served at least 20 years in prison, or that "[o]ther extraordinary and compelling reasons warrant such a [sentence] modification," *id.* § 24-403.04(a)(1)-(3), and (ii) the defendant "is not a danger to the safety of any other person or the community," *id.* § 24-403.04(a).

Applying these statutory factors, I granted the compassionate release motion filed by Mr. Bartrum, a cancer patient who had recently undergone radiation therapy. At the time I considered his motion, Mr. Bartrum had served over 95% of his sentence: he had been incarcerated for approximately 20 years, and was scheduled to be released to home detention in approximately one year. *United States v. Bartrum,* Case No. 1990 FEL 2059, 2020 D.C. Super. LEXIS 9, at *20-21 (D.C. Super. Ct. June 16, 2020).

I analyzed Mr. Bartrum's request for compassionate release pursuant to the factors set forth in the statute. Mr. Bartrum established "extraordinary and compelling reasons" for a sentence reduction by showing that he was acutely vulnerable to the most severe consequences of COVD-19 during the early months of the pandemic. The District of Columbia Court of Appeals has specifically found that the contention "that individuals in jails and prisons are particularly vulnerable during this pandemic, is beyond doubt and could hardly be overstated." *Mitchell v. United States*, 234 A.3d 1203, 1211 n.13 (D.C. 2020). At the time I considered Mr. Bartrum's motion in June 2020, the Bureau of Prisons generally, and the facility in which Mr. Bartrum was held in particular, were experiencing significant spread of the novel coronavirus. *Bartrum*, 2020 D.C. Super. LEXIS 9, at *16-17. Medical records and an affidavit from a physician demonstrated that Mr. Bartrum was particularly susceptible to death or severe disease should he contract COVID-19 because he suffered from cancer and had recently undergone radiation therapy. *Id.* at *19.

Respectfully, I would note that I did not grant Mr. Bartrum compassionate release having "acknowledged the defendant's danger to the community"; based on the evidence, I reached the opposite conclusion as to his dangerousness, as required by the statute in any case in which a judge grants compassionate release. Mr. Bartrum had committed the violent offense underlying the case (assault with the intent to kill) approximately thirty years earlier, when he was a teenager; he was subsequently paroled, but re-incarcerated in 2012 after committing a drug crime. *Id.* at *8-10. I based my decision that Mr. Bartrum no longer posed a danger to the community on his minimal history of disciplinary infractions while incarcerated (including no infractions of any kind for the previous 10 years); the BOP's classification of Mr. Bartrum at the "minimum" security level; his diminished physical state resulting from his cancer and radiation treatment; the passage of an extended period of time since his violent offense; the strong connections Mr. Bartrum had maintained with his wife and other family and community members; his presentation of a viable release plan, including several offers of employment upon release; substantial evidence of Mr. Bartrum's rehabilitation while incarcerated, including records showing that he had obtained his GED, maintained employment, and completed the University of the District of Columbia's dentistry training program as well as other vocational and educational programs; and letters from his prison work supervisors attesting to his reliability and work ethic. *Id.* at *11-15.

Upon the granting of Mr. Bartrum's motion, I placed him on supervised probation for a period of five years. As of the time of this writing, Mr. Bartrum has not been re-arrested or otherwise violated the terms of his probation since his June 2020 release.

43. **In a similar compassionate release case, *United States v. Mackall*, you wrote, "The simple passage of decades of time substantially erodes the presumption of dangerousness generated by a violent act in 1992." Do you believe time alone cures violent tendencies?**

Response: I do not believe that the passage of time alone provides sufficient proof that violent tendencies have been "cured." Indeed, in the next paragraph of that opinion, I explained that I "did not, of course, base [my] assessment of Mr. Mackall's present dangerousness solely on the passage of time since the offense or on these observations about the general effects of the aging process." *United States v. Mackall,* Case No. 1993 FEL 12822, 2020 D.C. Super. LEXIS 29, at *12 (D.C. Super. Ct. July 17, 2020). In this case, I based my conclusion that Mr. Mackall – a 58 year-old man with hypertension who had served 27 years of his sentence – no longer posed a danger to the community on a variety of factors beyond his age and the passage of almost three decades since his offense. Mr. Mackall had compiled a *de minimis* prison disciplinary history; had actively participated in rehabilitative and educational programs and held a job while incarcerated; enjoyed significant family and community support; was substantially physically diminished due to a variety of medical conditions and ailments; and presented a viable release plan that included information about a job offer. *Id.* at *11-17. In addition, the decedent's widow informed me through the prosecutor that, given Mr. Mackall's rehabilitation and the lengthy sentence he had already served, she did not object to his release. *Id.* at *29 n. 10. Following Mr. Mackall's release, he complied so fully with the terms of his probation that his probation officer petitioned the court for early termination of supervision, which another judge granted in April 2022.

44. **You served on the District of Columbia Courts' Standing Committee on Fairness and Access to the District of Columbia Courts, which "exists to enhance equal justice for all in the courts." The Committee released a report that noted, "Judges, senior court managers, and supervisors have participated in implicit bias training in recent years, and efforts to deliver this training to a broader based continued."**

a. **Did you participate in the implicit bias training?**

Response: To the best of my recollection, I have participated in one training on implicit bias during my tenure as a Superior Court judge: a lecture by a neuroscientist that was presented at the 2011 District of Columbia Judicial Conference.

b. **Was the implicit bias training mandatory for all D.C. Superior Court judges?**

Response: I do not recall.

c. **Who is the "broader base" described in the report?**

Response: This report was issued in June 2015 as part of a conference that I did not attend.

Although I have served on the Standing Committee, I did not draft or approve this report, and do not recall seeing it before the past several months. Neither I nor the Standing Committee have created, delivered or sponsored any implicit bias training, and I have not participated in any training other than that described in response to Question 47(a). As a result, I am unaware of the "broader base" described in the report.

d. **Will lawyers need implicit bias training to appear in D.C. courts?**

Response: No.

45. **You served on the District of Columbia Advisory Commission on Sentencing for one year, from 2003 to 2004, "as it created and promulgated the Superior Court's first Voluntary Sentencing Guidelines.**

a. **What role do sentencing guidelines serve?**

Response: As set forth in the Practice Manual issued by the Commission at the time the Guidelines were first promulgated, the District of Columbia Voluntary Sentences aim to implement "a comprehensive structured sentencing system for D.C." *District of Columbia Sentencing Commission Practice Manual for the Superior Court of the District of Columbia Voluntary Sentencing Guidelines* 1-1 (2004). The Guidelines were based on the principle that "[b]oth truth in sentencing and basic fairness require that similarly situated offenders should receive similar sentences for committing the same crime in essentially the same way and that offenders receive different sentences where either the nature of the offense or the history of the offender is different." *Id.* The Guidelines also serve to give judges, the parties, and the public "a better understanding of the likely consequences of criminal behavior and greater confidence that sentences will be predictable and consistent." *Id.* at 1-2.

b. **Is retribution a valid consideration in fashioning a federal criminal sentence?**

Response: The retributive purpose of punishment is embodied in federal law's direction that a sentencing judge should consider *inter alia* "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

Senator Josh Hawley
Questions for the Record

Todd Edelman
Nominee, District of Columbia

1. **You granted compassionate release to several violent offenders, including at least one convicted murderer, during the COVID-19 pandemic. Today, Washington, D.C., is experiencing devastating spikes in crime.**

    a. **When do you believe it is appropriate to deny a motion for compassionate release?**

    Response: Judges must deny motions for compassionate release when the defendant does not meet the criteria specified in the relevant statute. During the pandemic, I have considered over 60 written motions in which a defendant has requested release based on the risks posed by COVID-19, and have denied relief in the vast majority of those cases. Under the District of Columbia's compassionate release statute, D.C. Code § 24-403.04, a judge must grant compassionate release if the judge finds that: (i) the defendant is terminally ill or is at least 60 years old and has served at least 20 years in prison, or that "[o]ther extraordinary and compelling reasons warrant such a [sentence] modification," *id.* § 24-403.04(a)(1)-(3), and (ii) the defendant "is not a danger to the safety of any other person or the community," *id.* § 24-403.04(a). It is thus appropriate to deny a motion for a compassionate release when an applicant has not met his burden of showing his eligibility for release under the statute or of proving that his release would not pose a danger to any other person or the community.

    b. **Do you believe that all life sentences are *per se* unjust?**

    Response: No. I have sentenced defendants to prison terms that will likely amount to life sentences. In addition, I have denied motions for release filed by defendants serving life sentences. *See, e.g., United States v. Mercer,* Case No. 1996 FEL 001061, 2020 D.C. Super. LEXIS 32 (D.C. Super. Ct. September 17, 2020).

    c. **Do you believe that retribution is an important element of the criminal justice system?**

Response: The retributive purpose of punishment is embodied in federal law's direction that a sentencing judge should consider *inter alia* "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). In the context of compassionate release, however, the District of Columbia Court of Appeals has cautioned trial judges to base sentence modification determinations under D.C. Code § 24-403.04 solely upon a petitioner's statutory eligibility and present dangerousness; a judge may only consider the nature and circumstances of the offense to the extent those factors bear on the dangerousness calculus, and may not deny release if he "finds the prisoner non-dangerous but *undeserving* of early release in light of past crimes." *Bailey v. United States,* 251 A.3d 724, 733-34 (D.C. 2021) (emphasis in original).

2. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    c. **The enhancement for offenses involving the use of a computer**

    d. **The enhancements for the number of images involved**

Response: If confirmed, I will analyze each case that comes before me based upon its individual facts and circumstances. At sentencing, I will consider the binding precedent of the Supreme Court and the D.C. Circuit; the relevant sentencing factors, *see* 18 U.S.C. § 3553(a), and applicable sentencing guidelines; and the submissions of the parties, the presentence report, the victim impact statement, and any other relevant materials. As a sitting judge and a judicial nominee, it is not appropriate for me to state an opinion as to how I will rule as to a potential Guidelines enhancement in a hypothetical case. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

3. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's**

0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.

a. **Do you agree that the penalties should be aligned?**

Response: Whether the penalties for possession of child pornography should be aligned with the penalty for distribution or receipt of child pornography is a policy question to be determined by the legislative and executive branches.

b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

Response: Please see my response to Question 3(a).

c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

Response: As a sitting judge and a judicial nominee, it is not appropriate for me to state what type of sentence I will impose in hypothetical cases. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

4. **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: No.

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

Response: The judicial oath requires neutral application of binding law and precedent to the facts of the case. Adherence to precedent is essential to the fair performance of a judge's duties.

5. **Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?**

Response: Yes.

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

Based on my research, the most frequently invoked abstention doctrines include:

- *Pullman* abstention: Under the *Pullman* abstention doctrine, federal courts abstain from deciding federal constitutional questions when the case may be disposed of on state law grounds. *See Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941); *John Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 468 n.18 (D.C. Cir. 2006).

- *Rooker-Feldman* abstention: Under the *Rooker-Feldman* doctrine, federal district courts are precluded from exercising appellate jurisdiction over final judgments of state courts. *Lance v. Dennis*, 546 U.S. 459, 463 (2006). The doctrine is limited to cases brought by parties who, having lost in state court, seek a district court order overturning the state court judgment. *D.C. Healthcare Sys., Inc. v. District of Columbia*, 925 F.3d 481, 486 (D.C. Cir. 2019).

- *Younger* abstention: Under the *Younger* doctrine, federal courts refrain from granting injunctive or declaratory relief against a parallel state court proceeding. *Younger v. Harris,* 401 U.S. 37, 43-44 (1971). In the D.C. Circuit, courts should abstain from granting relief where (i) the ongoing state proceedings are judicial in nature; (ii) the state proceedings implicate important state interests; and (iii) the state proceedings provide an adequate opportunity to raise the federal claims. *Eisenberg v. W. Va. Office of Disciplinary Counsel*, 856 F. App'x 314, 315 (D.C. Cir. 2021). The doctrine does not apply when extraordinary circumstances justify equitable relief. *Trainor v. Hernandez,* 431 U.S. 434, 446 (1997).

- *Colorado River* abstention: This doctrine constitutes an exception to the general rule that federal courts should not abstain as a result of the mere existence of a parallel state proceeding, allowing a district court to abstain "due to the presence of a concurrent state proceedings" under narrow circumstances. *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 818 (1976); *Sheptock v. Fenty*, 707 F.3d 326, 332 (D.C. Cir. 2013) In applying this doctrine, the trial court must balance such factors as "which court 'first assum[ed] jurisdiction over property' involved in the case; 'the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums.'" *Sheptock,* 707 F.3d at 332. (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 818).

- The political questions doctrine: Courts should abstain from deciding quintessentially political questions pursuant to the six-factor test set forth in *Baker v. Carr,* 369 U.S. 186, 217 (1962).

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

   Response: No.

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

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

   Response: The original meaning of a constitutional provision can play a central role in interpreting the Constitution. Analysis of any constitutional provision must begin with an examination of the text and any binding interpretations of the text by the Supreme Court and relevant Circuit Court. The Supreme Court has, in a number of cases, emphasized the role of original meaning in interpreting a constitutional provision. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   If confirmed as United States District Judge, I would first look to any binding interpretation of the text by the United States Supreme Court or the United States Court of Appeals for the District of Columbia Circuit. If no binding precedent exists, I would look to the text itself; if the text is unambiguous, there would be no need for further analysis. If the text is ambiguous, I would apply the canons of statutory construction, focusing on such elements as the overall structure of the statute, the role of the provision in the overall statutory scheme, persuasive precedents from other courts, and any legislative history that contains a clear expression of legislative intent.

   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: The probative value of a certain piece or type of legislative history depends on the context of the issue at hand and the circumstances surrounding the legislative history. I would only be able to make a conclusion about the weight to be given to legislative history in the context of a particular case or issue.

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

Response: I do not believe that it is appropriate to consult the laws of foreign nations when interpreting the United States Constitution.

10. 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: To prevail on such an Eighth Amendment claim, a petitioner must show that the execution protocol creates a "substantial risk" of serious pain (beyond that of death) and identify a feasible, readily-implemented alternative method that significantly reduces the "risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015).

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

Response: Yes. Please see my answer to Question 10.

12. 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: No.

13. 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.

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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: All laws and governmental actions burdening the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). Under strict scrutiny, a

governmental action that burdens the free exercise of religion can stand only if it is narrowly tailored to serve "interests of the highest order." *Id.* at 546. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable," thus triggering strict-scrutiny review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Truly neutral, generally applicable laws are subject to rational basis review. *See Empl. Div. v. Smith*, 494 U.S. 872, 878–80 (1990).

15. 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: The legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief is strict scrutiny. In order to prevail under such a standard, the government must demonstrate that is action was narrowly tailored to serve a compelling state interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

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

Response: The D.C. Circuit follows Supreme Court precedent on this issue. In evaluating whether a person's religious belief is held sincerely, a court's narrow role is to determine only whether the "line drawn" by the person reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

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

Response: In *Heller*, the Supreme Court held that the Second Amendment protects a person's right to possess an operable firearm in the home for the purpose of self-defense.

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: Yes. *United States v. Mickle*, No. 2018 CF2 1671, 2018 D.C. Super. LEXIS 9 (D.C. Super. Ct. Oct. 28, 2019).

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

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

Response: I understand Justice Holmes's comment as a criticism of the majority opinion's use of the substantive due process doctrine to strike down as unconstitutional New York's limitations on bakers' work hours. His statement reflects his belief that constitutional judicial review should not devolve to the imposition of the Justices' policy preferences; in this vein, he further maintained that "a constitution is not intended to embody a particular economic theory." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). I agree that a judge's economic or political views should not affect interpretation of a constitutional provision.

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

Response: The Supreme Court essentially struck down *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will faithfully adhere to all binding Supreme Court and D.C. Circuit precedent, regardless of whether I believe those cases to have been correctly decided.

19. 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: No. Supreme Court opinions interpreting the Constitution remain good law unless overruled by a subsequent Supreme Court decision or a constitutional amendment.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I have no opinion as to whether Judge Hand's assessment is correct. If confirmed, I will faithfully adhere to Supreme Court and D.C. Circuit precedents on this issue.

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

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: Should I preside over a case turning on these issues, I will immerse myself in the statutes and case law, and faithfully adhere to all Supreme Court and D.C. Circuit precedents. Based on my limited research into the subject, it is my understanding that monopoly power can be inferred from control of a certain percentage of a market. In one case, the Supreme Court held that a company's control of "over two-thirds" of a market could support a finding of monopolization of a market. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (holding that market share "over two-thirds" constitutes monopoly power); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (holding that 80% market share constitutes monopoly power); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (75% constitutes monopoly power).

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

Response: "There is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Narrow bands of federal common law exist in the absence of a controlling federal statute. For example, certain aspects of admiralty law are controlled by federally-created common law.

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

Response: The interpretations of this right by the state's highest court would determine the scope of the right.

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

Response: As a general matter, I believe that identical texts should be interpreted identically. However, state courts have independent authority to interpret state constitutions, and may choose to interpret state constitutional provisions differently than identical federal constitutional provisions.

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

Response: A state constitutional provision may provide greater protections than does a provision in the federal constitution.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court has correctly decided a particular issue or case. However, there are certain Supreme Court decisions that are foundational to our system of justice, and that turn on issues extremely unlikely to be posed to me in any case. Because *Brown v. Board of Education* is one such case, I am comfortable stating that it was correctly decided.

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

Response: Response: Federal Rule of Civil Procedure 65 governs the issuance of injunctions by United States District Judges. Based on my research on this issue, the authority of federal courts to issue nationwide injunctions remains a question of considerable dispute. If I am tasked with a case involving a motion for a nationwide injunction, I would apply Supreme Court and D.C. Circuit precedent to determine whether to issue such a remedy.

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

Response: Based on my research, I am not aware of any Supreme Court or D.C. Circuit authority that establishes the source of judicial authority to issue nationwide injunctions. To the extent such authority exists, it seems to derive from the court's power under Rule 65 to provide equitable relief.

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

Response: Please see my responses to Questions 24 and 24(a).

25. 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 responses to Questions 24 and 24(a).

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

Response: Federalism – the division of power between the state and federal governments – is a key component of our constitutional structure. In the Tenth Amendment and elsewhere, the Constitution creates a federal government with enumerated powers, leaving remaining authority with the states and the people. Federalism checks the concentration of power in the federal government and serves as an important guarantor of individual freedom.

27. 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 6.

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

Response: Damages and injunctive relief are different remedies that address different types of injuries. Awards of damages are intended to make injured parties whole given the harms that they have suffered, while injunctive relief seeks to avoid further injury by compelling a party to act, or to stop acting, in a certain way. The facts and circumstances of each individual case determine the advantages and disadvantages of awarding damages and/or injunctive relief.

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

Response: The Supreme Court has held that the Due Process Clause of the Constitution's Fifth and Fourteenth Amendments protects unenumerated rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Under this standard, the Supreme Court has recognized a limited number of unenumerated rights, including *inter alia* the right to marry, *see Loving v. Virginia,* 388 U.S. 1 (1967); *Obergefell v. Hodges,* 576 U.S. 644 (2015); the right to live with one's family, *see Moore v. East Cleveland,* 431 U.S. 494 (1977); the right of parents to control their children's education, *see Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); and the right to engage in intimate relations in private, *Lawrence v. Texas,* 539 U.S. 558 (2003).

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

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

Response: Please see my response to Question 14.

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

Response: I am not aware of any Supreme Court or D.C. Circuit case law that draws a distinction between "the right to free exercise of religion" and "freedom of worship."

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

Response: Please see my response to Question 14.

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 16.

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

Response: The Religious Freedom Restoration Act (RFRA) subjects any law that substantially burdens a person's exercise of religion to strict scrutiny. It applies to all federal laws unless a law explicitly states that RFRA does not apply. *See* 42 U.S.C. § 2000bb-3.

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, pr

Response: No.

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

a. What do you understand this statement to mean?

Response: I understand Justice Scalia's statement to mean that fidelity to the law and established precedent sometimes requires judges to issue decisions that run counter to their personal or policy preferences.

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

Response: As a criminal defense lawyer in the late 1990s and early 2000s, I wrote and litigated a number of motions to dismiss firearms and ammunition charges filed against my clients under the Second Amendment. All of these motions were denied.

a. If yes, please provide appropriate citations.

Response: Unfortunately, I no longer have access to my client files from the Public Defender Service for the District of Columbia and the Georgetown University Law Center Criminal Justice Clinic, and cannot provide citations for all of the cases in which I litigated such motions. I do clearly remember, however, litigating such motions as part of the *United States v. Daron McMillian* cases described on pages 49-51 of my Senate Judiciary Committee Questionnaire.

33. 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.

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

Response: No.

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

Response: As a public defender and as a litigator in private practice, I fulfilled my responsibility to zealously represent my clients; my personal views had no bearing on the positions I took in litigation.

36. How did you handle the situation?

Response: Please see my response to Question 35.

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

Response: Yes.

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

Response 2: Federalist No. 78's explication of the structure, role, and purposes of the federal judiciary.

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

Response: In *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022), the Supreme Court did not address the question of fetal personhood. Because this question presents an issue that may be posed to me in future litigation, as a sitting judge and as a nominee it would not be appropriate for me to comment on it. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully adhere to all precedents of the Supreme Court and the D.C. Circuit that bear on this issue.

40. 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: On April 20, 2010, I testified before the Senate Committee on Homeland Security and Governmental Affairs at my confirmation hearing relating to my nomination to the Superior Court of the District of Columbia. Video of the hearing can be accessed at: http://www.hsgac.senate.gov/hearings/nominations-of-hon-dennis-walsh-to-be-chairman-special-panel-of-appeals-hon-dana-bilyeu-and-michael-kennedy-to-be-members-federal-retirement-thrift-investment-board-milton-lee-judith-smith-and-todd-edelman-to-be-associate-judges-superior-court-of-the-district-of-columbia.

41. 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.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: To my knowledge, I do not hold shares in any of the companies listed in this question. I have money invested in mutual or common

investment funds that hold securities; I am not aware of the specific securities held in these funds.

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

Response: No.

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

44. Have you ever confessed error to a court?

Response: Although I cannot recall any particular case when I did so, it is probable that, in 15 years as a trial lawyer, I made factual statements or legal arguments in good faith but later recognized those statements or arguments to be incorrect, and subsequently acknowledged those mistakes to the court.

a. If so, please describe the circumstances.

Response: Please see my response to Question 44.

45. 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: Judicial nominees are placed under oath when they testify before the Committee, and are obligated to provide complete and truthful answers to the questions posed to them to the best of their ability, consistent with the canons of judicial ethics and other professional obligations.

Questions from Senator Thom Tillis
for Todd Eric Edelman
Nominee to be United States District Judge for the District of Columbia

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

   Response: Yes.

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

   Response: I understand the term "judicial activism" to refer to the practice of issuing judicial rulings based upon a judge's policy preferences, personal opinions or beliefs, or other preconceived notions, rather than upon the neutral application of the law to the facts. I do not consider judicial activism to be appropriate.

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

   Response: I believe that impartiality is both an aspiration and 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 not do so.

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

   Response: Faithfully interpreting the law may lead to an outcome that the judge finds undesirable. It is, however, the judge's primary responsibility to so apply the law – by neutrally applying the law to the facts and adhering to all applicable precedents. In the end, the most desirable outcome is the one produced by the judge's strict adherence to the rule of law, regardless of whether he would have preferred a different result.

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

   Response: No, a judge should not do so.

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

   Response: If confirmed, I will faithfully adhere to and apply all precedents of the Supreme Court and the D.C. Circuit relating to the rights created under the Second Amendment. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller,* 554 U.S. 570 (2008).

Specifically, I will require the government to demonstrate that any regulation or statute challenged under the Second Amendment "is consistent with the Nation's historical tradition of firearm regulation." *Bruen,* 142 S. Ct. at 2129.

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: If confirmed, I will faithfully adhere to and apply all precedents of the Supreme Court and the D.C. Circuit relating to the rights created under the Second Amendment. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller,* 554 U.S. 570 (2008). Specifically, I will require the government to demonstrate that any regulation or statute challenged under the Second Amendment "is consistent with the Nation's historical tradition of firearm regulation." *Bruen,* 142 S. Ct. at 2129. I will also apply all precedents of the Supreme Court and the D.C. Circuit relating to COVID-related regulations that burden fundamental rights, including *Tandon v. Newsom,* 141 S. Ct. 1294 (2021).

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: If confirmed, I will faithfully adhere to and apply all precedents of the Supreme Court and the D.C. Circuit when considering qualified immunity cases. The Supreme Court has held that the qualified immunity doctrine shields law enforcement personnel and departments from liability unless (i) they have violated a federal statutory or constitutional right and (ii) the unlawful nature of their conduct was "clearly established at the time." *District of Columbia v. Wesby,* 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

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: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policymakers. As a sitting judge and a judicial nominee, it would not be appropriate for me to comment on this issue.

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

Response: Please see my response to Question 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: I have not had the opportunity to explore this doctrine through my work as a lawyer or judge, or through independent research. If confirmed and faced with a question relating to this area of law, I would carefully study the Supreme Court's decisions on patent eligibility, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l,* 573 U.S. 208 (2014) and *Mayo Collaborative Servs. v. Prometheus Labs, Inc.,* 566 U.S. 66 (2012). I would faithfully adhere to all Supreme Court and D.C. Circuit precedents and neutrally apply the law to the facts.

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

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

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

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

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

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

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

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should** ***BioTechCo*** **be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if** ***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?**

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

i. ***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?**

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: If confirmed and faced with issues such as those described in this question, I would carefully study the Supreme Court's decisions on patent eligibility, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l,* 573 U.S. 208 (2014) and *Mayo Collaborative Servs. v. Prometheus Labs, Inc.,* 566 U.S. 66 (2012), and faithfully

adhere to all Supreme Court and D.C. Circuit precedents. Because these hypotheticals present issues that may be posed to me in future litigation, it would be inappropriate for me to comment further on these issues. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

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: If confirmed and faced with a question stemming from this area of law, I would research the applicable law, faithfully adhere to all Supreme Court and D.C. Circuit precedent, and neutrally apply the law to the facts. As a sitting judge and a judicial nominee, it is not appropriate for me to express my belief as to whether current jurisprudence is sufficiently clear or consistent.

15. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my 15 years as an attorney and 12 years as a trial court judge, I have not had the opportunity to address copyright law issues.

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

Response: I have not had any experiences 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: I have not addressed intermediary liability for online service providers that host unlawful content posted by users.

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: I have addressed free speech issues in a number of civil cases over which I have presided, including defamation cases; requests for restraining orders

based on speech; and cases in which defendants have invoked the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501-5505. I have not addressed free speech in the context of intellectual property or copyright laws.

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

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

    Response: If confirmed as United States District Judge, I would first look to any binding interpretation of the statutory provision by the United States Supreme Court or the United States Court of Appeals for the District of Columbia Circuit. If no binding precedent exists, I would look to the text of the statute; if the text is unambiguous, there would be no need for further analysis. If the text is ambiguous, I would apply the canons of statutory construction, focusing on such elements as the overall structure of the statute, the role of the provision in the overall statutory scheme, persuasive precedents from other courts, and any legislative history that contains a clear expression of legislative intent.

    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: Under the doctrine announced in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984), courts should defer to reasonable administrative agency interpretations of applicable statutes. The D.C. Circuit has applied *Chevron* deference to formal interpretations issued by the U.S. Copyright Office. *See, e.g., SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 718 (D.C. Cir. 2017). Informal agency advice and analysis may be relied upon by courts only to the extent that such advice and analysis is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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

Response: Because this question presents an issue that may be posed to me in litigation in my current position as an Associate Judge of the Superior Court of the District of Columbia or, if confirmed, as a United States District Judge, it would be inappropriate for me to comment on these issues. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

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: Because this question presents an issue that may be posed to me in litigation in my current position as an Associate Judge of the Superior Court of the District of Columbia or, if confirmed, as a United States District Judge, it would be inappropriate for me to comment on these issues. *See* District of Columbia Code of Judicial Conduct, Rules 2.10(A) & (B) and 4.1(A)(12) & (A)(13); Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: Please see my response to Question 17(a).

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

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

Response: As described in the question, I do not think that "judge shopping" and "forum shopping" are appropriate, as they undermine the appearance of impartiality and public trust in the judiciary. The Court for which I have been nominated, the

United States District Court for the District of Columbia, is not separated into divisions, and United States District Court for the District of Columbia Rule 40.3(a) provides for the random assignment of cases to District Court judges.

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

Response: Judges should not encourage such conduct.

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

Response: No.

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

Response: I will not engage in "forum selling." United States District Court for the District of Columbia Rule 40.3(a) provides for the random assignment of cases to District Court judges.

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

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

Response: The decision about how to respond to a judge who continues to ignore binding case law should be left to the appellate court, the Chief Judge of the District in which the District Judge sits, and, if appropriate, the Judicial Conference of the United States.

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

Response: Please see my answer to Question 19(a).

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

Response: The public's perception of fairness and of the judiciary's evenhanded administration of justice turns on a number of factors. Should a jurisdiction with a concentration of a particular type of litigation nonetheless adjudicate those cases in a manner that is impartial, transparent, and faithful to the law, the concentration of the cases in that jurisdiction alone might not necessarily impact the public's perception of judicial fairness.

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

Response: Such a decision should be left to policymakers and other judicial rule-making authorities. As a sitting judge and judicial nominee, it is not appropriate for me to comment further on such a hypothetical policy change.

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

Response: Such a decision should be left to policymakers and other judicial rule-making authorities. As a sitting judge and judicial nominee, it is not appropriate for me to comment further on such a hypothetical policy change.

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

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

Response: I do not know of any particular number of reversals that would create such an inference. Such a determination would be made by the court of appeals or by the relevant oversight authority.

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

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