Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Cindy Chung
Nominee to be United States Circuit Judge for the Third Circuit
September 14, 2022

1. **As United States Attorney, you have focused your office's resources on combating violent crime. You have also emphasized the importance of state and local partnerships in efforts to tackle violent crime.**

   Response: As a currently-serving United States Attorney, I must be mindful not to disclose non-public information about the work of the office, not to touch upon matters that may involve the deliberative process, and to be careful in remarks involving pending matters. The following information is publicly available.

   a. **Please provide examples of initiatives that your office has undertaken and other ways that you have made the prosecution of violent crime a top priority.**

      Response: The office continues to hold monthly LEAD (Law Enforcement Agency Directors) meetings which brings together the agency heads of local, state, and federal law enforcement agencies. In addition, the office is actively engaged in our Project Safe Neighborhood Initiative which involves the cooperation of community partners, who are engaged in disruption and prevention, and law enforcement to strategically address violent crime. I and/or members of the office are members of various working groups at the local and national level to address terrorism, domestic violence, juvenile violence, and human trafficking. I regularly attend anti-violence events and meetings with our prevention partners, as well as local officials, foundations, and non-profits who work to reduce violent crime. The office worked with Lawrence County District Attorney to become the most recent county in our district to be designated a High-Intensity Drug Trafficking Area and accordingly receive additional federal resources. Of course, the office continues to prosecute drug trafficking organizations and violent criminals through Title III wiretap, gun, robbery, child sex abuse, human trafficking, threats, and other criminal cases.

   b. **Please detail steps that you have taken to bolster cooperation with state and local partners, including law enforcement and community groups.**

      Response: Please see my answer to Question 1(a) above. In addition, I have made, and continue to make, an effort to meet with the district attorneys, local chiefs, PSP barracks, Pennsylvania Attorney General agents, victim groups, and re-entry groups in the 25 counties that constitute the Western District of Pennsylvania, as well as take time to recognize the achievements of local law enforcement in their successful efforts to make our communities safer. The office also holds informational meeting with community stakeholders after critical events like the mass shooting in Buffalo, New York and the office also has taken proactive steps to convene partners such as

hosting a northwestern Pennsylvania drug summit for law enforcement and the community.

2. **For your entire legal career, you have served as an advocate for the federal government. But if confirmed to the Third Circuit, you will occupy a very different role.**

   How do you conceive of the difference between serving as a federal prosecutor and serving as a Third Circuit judge?

   Response: The role of a federal prosecutor is very different from that of a judge. A federal prosecutor's role is to uphold the rule of law, including ensuring that justice is done in every case and that the defendant's constitutional rights are upheld, while also acting as a zealous advocate for the interests of the government. As a judge, I will not be an advocate, but an adjudicator who starts at a neutral position without favor to any party, including the government. Instead of advancing an argument of my own, I will carefully listen to the arguments of the parties, consider the record, and engage in thoughtful discussion with my colleagues to arrive at the correct decision by applying relevant Supreme Court and Third Circuit precedent.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Cindy K. Chung
Judicial Nominee to the U.S. Court of Appeals for the Third Circuit

1. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: If I were faced with a claim that a previously unenumerated "fundamental" right is protected by the Due Process Clause, I would consider the factors set forth in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted): whether the asserted right in question is one that is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed." *Id.*

2. **Should you be confirmed, what specific factors will you take into consideration when deciding whether to overturn circuit precedent?**

   Response: Precedential decisions of a panel are binding on subsequent panels. Federal Rule of Appellate Procedure 35 provides for *en banc* rehearing when a split exists within the Circuit or when the case involves "a question of exceptional importance." Fed. R. App. Proc. 35(a).

3. **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 that statement. If I am confirmed, as a judge, it will be my duty to apply the law fairly and neutrally without regard to my personal opinions and I will not hesitate to uphold my duty.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). If I am confirmed, I will apply relevant Supreme Court and Third Circuit precedent, and the interpretative method used therein, to the case before me.

5. **Do you think that election integrity is a problem in this country? Please explain.**

   Response: Generally speaking, issues ensuring the integrity of our elections are questions for policymakers to consider. The Constitution protects the right to vote and states that this right cannot be abridged on the basis of race, sex, or age for individuals eighteen and older. U.S. Const. Amends. 15, 17, and 19. States control the time, manner,

and place of elections. U.S. Const. art. I, § 4. In my role as United States Attorney, it is important to be mindful of the limited role that the federal government has in elections and to remain committed to enforcing the election-related law in this limited federal area.

6. **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 familiar with Justice Brown Jackson's 2013 statement. The Supreme Court recently stated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."

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

   Response: I would not characterize a specific Supreme Court decision as most exemplifying my judicial philosophy. If confirmed, I will follow Supreme Court precedent and the method of interpretation used in such precedent, regardless of whether it exemplifies my judicial philosophy.

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

   Response: I would not characterize a specific Third Circuit decision as most exemplifying my judicial philosophy. If confirmed, I will follow Third Court precedent and the method of interpretation used in such precedent, regardless of whether it exemplifies my judicial philosophy.

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

   Response: Generally speaking, questions related to the proper level of funding local governments should provide for law enforcement are questions best left to policymakers. However, I would note that in my roles as United States Attorney and Project Safe Neighborhood coordinator, I have worked to connect local law enforcement agencies with federal resources.

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

    Response: The First Amendment provides that "Congress shall make no law abridging ... the right of the people to ... to petition the government for a redress of grievances."

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

    Response: A judge's duty is to apply the law fairly and neutrally without regard to

improper considerations such as personal opinions or sympathy.

12. Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?

Response: The Constitution does not require the appointment of counsel in a civil case.

13. 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?
b. Was *Loving v. Virginia* correctly decided?
c. Was *Roe v. Wade* correctly decided?
d. Was *Planned Parenthood v. Casey* correctly decided?
e. Was *Griswold v. Connecticut* correctly decided?
f. Was *Gonzales v. Carhart* correctly decided?
g. Was *McDonald v. City of Chicago* correctly decided?
h. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
i. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
j. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*. If I am confirmed, it will be my duty to apply Supreme Court and Third Circuit precedent. Accordingly, as a judicial nominee, it is generally inappropriate for me to offer an opinion on whether these precedents are correctly decided. Consistent with prior nominees, I can say that, because the issues raised in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), are unlikely to ever come before the Third Circuit, I believe that *Brown* and *Loving* were correctly decided.

14. Is threatening Supreme Court justices right or wrong?

Response: There are several statutes which may be violated if a true threat or other improper communication is made to or about a Supreme Court Justice or their family member. These include 18 U.S.C. §§ 111, 115(a), 119, 875, and 876.

15. Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.

Response: Section 1507 states that, "[w]hoever, 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, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or

near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both."

16. Under Supreme Court precedent, is 18 U.S.C. § 1507 or a state analog statute constitutional on its face?

Response: Neither the Supreme Court, nor the Third Circuit**,** has ruled on the facial constitutionality of 18 U.S.C. § 1507, though the Supreme Court referenced it with approval in *Cox v. State of La.*, 379 U.S. 559, 562 (1965). In *Cox*, the Supreme Court found constitutional a state statute that the Court compared to section 1507; the Court overturned the challenged conviction on due process grounds. As a judicial nominee, it is generally inappropriate for me to offer an opinion on issues that may come before the courts. If confirmed and faced with this issue, I would faithfully apply relevant Supreme Court and Third Circuit precedent to resolve this issue.

17. 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 defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *See also Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). Symbolic speech does not constitute fighting words unless likely to be seen as "a direct personal insult or invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Courts must apply "careful consideration of the actual circumstances surrounding" the expression at issue, and they must ask "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Id.* at 409 (citation omitted).

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

Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that the First Amendment does not protect "true threats." *See also United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. The fact that a statement is "vehement, caustic, and sometimes unpleasantly sharp" does not make it a threat. *Watts v. United States*, 394 U.S. 705, 708 (1969).

19. What is the difference between a hate crime and a hate incident?

Response: It is not criminal to engage in speech that, though offensive, does not communicate a threat or other unprotected speech. It is criminal to engage in acts such as communicating true threats or assaulting another person. Broadly speaking, bias-

motivated non-criminal conduct is distinguished from bias-motivated criminal conduct by referring to the former conduct as a hate incident and the latter as a hate crime.

20. Did you direct your Assistants not to ask for the two-point enhancement for use of a computer in crimes involving child pornography or other kinds of cyber crimes? Please explain.

Response: As a currently-serving United States Attorney, I must be mindful not to disclose non-public information about the work of the office, not to touch upon matters that may involve the deliberative process, and to be careful in remarks involving pending matters. I can say, however, that the office takes these cases very seriously and the general position of the office is that if the facts support an enhancement, it should be applied. Publicly available information about the office's child sex abuse material cases may be found at: https://www.justice.gov/usao-wdpa/pr.

21. 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.

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

Response: No.

23. 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.

24. 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.

25. 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.

26. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

28. 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.

29. 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.

30. 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.

31. 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: No.

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

Response: On April 28, 2022, I spoke with Senator Bob Casey's staff regarding a vacancy on the United States Court of Appeals for the Third Circuit. On May 4, 2022, I interviewed with attorneys from the White House Counsel's Office. On May 17, 2022, I interviewed with Senator Casey and members of his staff. On May 18, 2022, I interviewed with Senator Pat Toomey and members of his staff. Since June 1, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 12, 2022, my nomination was submitted to the Senate.

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

Response: On September 14, 2022, I received these questions from the Office of Legal Policy. I drafted responses, received limited feedback from the Office of Legal Policy, and finalized these answers. The answers are my own.

Senator Mike Lee
Questions for the Record
Cindy Chung, Nominee to be United States Circuit Judge for the Third Circuit

1. How would you describe your judicial philosophy?

Response: If am fortunate enough to be confirmed, my judicial philosophy would be to approach each case individually, with an open mind, and without pre-prejudgment. I will listen respectfully to the parties and my fellow panelists, maintaining collegiality and respect throughout the process. I will rule on the record before me consistently with applicable Supreme Court and Third Circuit precedent and the method of interpretation used in that precedent.

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

Response: If deciding a case that turned on the interpretation of a federal statute, I would first consult the text of the statute itself and any applicable Supreme Court and Third Circuit precedent interpreting the statute. If the meaning of the text is plain, the inquiry ends. If the language of the statute is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of interpretation, and legislative history.

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

Response: If deciding a case that turned upon an interpretation of a constitutional provision, I would consult the text of the constitutional provision itself and any applicable Supreme Court or Third Circuit precedent and, if necessary, further consult applicable canons of interpretation or interpretive methodologies used by the Supreme Court and Third Circuit.

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

Response: When interpreting the Constitution, the text and original meaning play an important role. The Supreme Court recently stated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."

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

Response: Please see my response to Question 2.

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

Response: The Supreme Court has looked to the original public meaning to interpret the Constitution and statutes in multiple contexts. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). The Supreme Court has also stated that "contemporary community standards" may be relevant in some First Amendment contexts. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002); *see also, Miller v. California*, 413 U.S. 15 (1973).

6. What are the constitutional requirements for standing?

Response: In order to have standing, the constitution requires that: "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: The Necessary and Proper Clause in Article I, Section 8, is a source of authority by which Congress has implied powers to carry out its enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316 (1819). Whether Congress has such implied powers "must depend upon how far such limited power is ancillary or incidental to the power granted to Congress[.]" *Marshall v. Gordon*, 243 U.S. 521, 537 (1917).

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

Response: The Supreme Court has held that "recitals of the power which it undertakes to exercise" are not necessary to find a proper exercise of congressional power. *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012). If confirmed and faced with the question of the constitutionality of a law that does not reference a specific source of enumerated power, I will evaluate it on the record before me, fairly and impartially considering the arguments of the parties, and applying relevant Supreme Court and Third Circuit precedent.

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

Response: The Supreme Court has recognized that the Fifth and Fourteenth Amendments protects unenumerated rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Such rights include the right to marry, to have children, and to direct the education and upbringing of one's children. *Id.* at 720.

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court held that the Constitution does not protect a right to abortion. The Supreme Court has held that the economic rights at stake in *Lochner v. New York* are not protected by the Constitution. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

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

Response: Congress's power under the Commerce Clause is generally limited to "three broad categories of activity:" 1) "the use of the channels of interstate commerce," 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and, 3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has found that a particular group is a "suspect class" when it has "immutable characteristic determined solely by the accident of birth" or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (citations and internal quotation marks omitted). The Supreme Court has recognized that race, religion, national origin, and alienage meet the criteria of a suspect class. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Checks and balances and separation of powers play a critical role in preventing any one branch of government wielding outsized power. In *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks and citation omitted), the Supreme Court recognized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

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

Response: If deciding the issue of whether one branch assumed an authority not granted it by the text of the Constitution, I would refer to the text of the Constitution, any relevant Supreme Court or Third Circuit precedent, as well as any other relevant interpretive tool.

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

Response: A judge's duty is to apply the law fairly and neutrally without regard to improper considerations such as personal opinions or sympathy.

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

Response: Both outcomes are undesirable. If I am confirmed, I will be committed to upholding the Constitution.

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

Response: My approximately two decades of experience as a prosecutor have not involved researching the many factors, during the more than two hundred years of jurisprudence, which would provide an adequate basis to answer this question. Accordingly, I am unable to provide an informed response.

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

Response: Judicial review is the authority of the judicial branch to determine the constitutionality of governmental actions. Judicial supremacy refers to the binding power of Supreme Court Constitutional interpretation on all other forums.

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

Response: I do not have a view on this question. All federal and state legislative and executive officials must take an oath to support the Constitution and are bound to follow decisions of the Supreme Court interpreting the Constitution. U.S. Const. art. VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: It is the duty of a judge to apply the law to the facts of the case before the court, without reference to any impermissible considerations such as personal opinion.

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

Response: If the precedent is applicable to the case in question, it is the duty of the lower court judge to apply it, without reference to the judge's personal view of its reasoning.

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

Response: The defendant's group identity is not a permissible factor to consider in sentencing.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons

otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019).

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

Response: Equity and equality are typically construed to have different meanings. In contrast to the definition of equity listed above in Question 24, Black's Law Dictionary defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status." *Id.*

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

Response: I am unaware of any Supreme Court or Third Circuit precedent interpreting the Fourteenth Amendment with reference to the identified quote. If I am confirmed and have a case involving the Equal Protection Clause, I will faithfully apply binding Supreme Court and Third Circuit precedent.

27. How do you define "systemic racism?"

Response: I have not studied the concept of systemic racism and do not have a definition of my own for this term.

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

Response: Black's Law Dictionary defines "critical race theory" as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th Ed. 2019).

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

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

30. On February 24, 2022 you spoke at the Allegheny County Bar Association's Homer S. Brown Division's Black History Month Celebration. In your speech you said that a rise in "extremist ideology" has led to a rise in hate speech and hate crimes, leading you to prioritize civil rights cases as the U.S. Attorney. Please list any cases you or your office has prosecuted where extremist ideology was a contributing factor to the commission of a crime.

Response: As a currently-serving United States Attorney, I must be mindful not to disclose non-public information about the work of the office, not to touch upon matters that may involve the deliberative process, and to be careful in remarks involving pending matters. Accordingly, I believe it would be inappropriate to provide a list of cases. Publicly available information about the office's work, including hate crimes, national security, and threats cases, and defendants' espousals such as having a desire to kill members of protected classes and calling them "children of satan," may be found at: https://www.justice.gov/usao-wdpa/pr.

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

Questions for the Record for Cindy K. Chung, Nominee for the Third Circuit

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 Equal Protection Clause of the Fourteenth Amendment prohibits the states from denying any person "the equal protection of the laws." U.S. Const. amend. XIV. In addition, various federal statutes prohibit racial discrimination, such as Title VI and Title VII of the Civil Rights Act of 1964. Any race-based governmental action is subject to strict scrutiny. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

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: If I were faced with a claim that a previously unenumerated right is protected by the Due Process Clause, I would consider the factors set forth in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted): whether the asserted right in question is one that is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed." *Id*.

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: If I am fortunate enough to be confirmed, my judicial philosophy would be to approach each case individually, with an open mind, and without pre-judgment. I will listen respectfully to the parties and my fellow panelists, maintaining collegiality and respect throughout the process. I will rule on the record before me consistently with applicable Supreme Court and Third Circuit precedent and the method of interpretation used in that precedent. I believe that this philosophy is consistent with the Courts listed above.

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

Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). If I am confirmed, I will apply the relevant Supreme Court and Third Circuit precedent and interpretative method used therein. For instance, the Supreme Court relied upon the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

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 defines "living constitutionalism" as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). If I am confirmed, I will apply the relevant Supreme Court and Third Circuit precedent and interpretative method used therein.

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: If confirmed and I am confronted with a rare constitutional issue of first impression, I would look to the text in question, and if necessary, interpretive methodologies the Supreme Court and Third Circuit have employed in interpreting that or analogous provisions, applicable canons of construction, or other interpretive principles. For instance, the Supreme Court has looked to the original public meaning to interpret the Second Amendment. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court recently stated that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132.

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 Supreme Court recently stated that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. The Supreme Court has also stated that "contemporary community standards" may be relevant in some First Amendment contexts. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002); *see also, Miller v. California,* 413 U.S. 15 (1973).

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

Response: The Supreme Court recently stated that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. The Constitution cannot change outside of 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: If I am confirmed, it will be my duty to apply Supreme Court and Third Circuit precedent, including *Dobbs*. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether these precedents are 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: If I am confirmed, it will be my duty to apply Supreme Court and Third Circuit precedent, including *Bruen*. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether these precedents are 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: If I am confirmed, it will be my duty to apply Supreme Court and Third Circuit precedent, including *Brown*. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether these precedents are correctly decided. Consistent with prior nominees, I can say that, because the issues raised in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), are unlikely to ever come before the Third Circuit, I believe that *Brown* were correctly decided.

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

Response: Section 3142 establishes a rebuttable presumption in favor of pretrial detention for multiple offenses, including those for which the maximum sentence is life imprisonment or death, a drug offense for which the maximum sentence is 10 years or more, an offense under 18 U.S.C. §§ 924(c), 956(a), or 2332b, and certain offenses involving minors. 18 U.S.C. § 3142(e)(3)

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

Response: Section 3142 states that, where there is probable cause to believe these offenses have been committed, "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3).

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: Under the Free Exercise clause of the First Amendment, any governmental burden on the free exercise of religion must be neutral and generally applicable; if not, the governmental imposition will be subject to strict scrutiny. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). A law is not neutral and generally applicable if the circumstances show that, for example, "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Federal laws are governed by the Religious Freedom Restoration Act of 1993 (RFRA). *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Under RFRA, if any federal law places a substantial burden on a person's exercise of religion, even if the law is neutral and generally applicable, the government must show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *see City of Boerne v. Flores*, 521 U.S. 507 (1997).

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

Response: Under the Free Exercise Clause of the First Amendment, when a governmental action or law burdens the free exercise of religion, it must be neutral and generally applicable; otherwise, it may only stand if such action or law withstands strict scrutiny. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

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 held that the religious organizations were entitled to the preliminary injunction sought. In doing so, the Supreme Court found that: 1) the plaintiffs were likely to prevail on their claim that the order was not neutral towards religion and could not satisfy strict scrutiny; 2) they established that they would likely suffer irreparable harm if the restrictions were enforced; and 3) it had "not been shown that granting the applications [would] harm the public." *Id.* at 67-68.

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 where the government treats any comparable secular activity more favorably than religious activity, the law is not neutral and generally applicable and subject to strict scrutiny. 141 S. Ct. at 1296. The Court reasoned that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Using this standard to evaluate the challenged California COVID-19 restrictions, the Supreme Court found that the plaintiffs were likely to succeed in their challenge to the restrictions because the restrictions treated "comparable secular activities more favorably than at-home religious exercise." *Id.*

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 found that the challenged cease and desist order exhibited "a clear and impermissibility hostility" towards the religious belief of the plaintiff and thus was not neutral. 138 S. Ct. at 1729. Accordingly, the Supreme Court found that the action violated the free exercise rights of the plaintiff.

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: The Supreme Court has held that the sincerity of a religious belief does not hinge upon whether it is consistent with any particular faith tradition. *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989). Moreover, in considering a sincerely held religious belief, courts determine whether the belief is honestly held, not whether such beliefs are mistaken or insubstantial. *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 725 (2014).

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

Response: Please see my answer to Question 19. In addition, the Third Circuit has explained that a belief is religious as opposed to political, sociological, or philosophical by stating: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs." *Fallon v. Mercy Cath. Med. Ctr. Of SE Pa.,* 877 F.3d 487, 491 (3d Cir. 2017).

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

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

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

Response: I am not aware of the Catholic Church's position on this matter.

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 found that the teachers employed by a religious school fulfilled "vital religious duties" as "members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith." 140 S. Ct. at 2066. The teachers' employment discrimination claims thus fell under the "ministerial exception" and were barred.

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 (2020), the Supreme Court found that the challenged anti-discrimination law was not generally applicable because it allowed for exemptions to be granted to secular organizations, and not religious organizations, on an entirely discretionary basis. The law was thus subject to strict

scrutiny and the Supreme Court found that the city could not offer a compelling reason for the denial of the exemption.

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 found that the challenged law was not neutral and generally applicable in that it allowed for the use of tuition benefits at secular schools and not religious schools. The law was thus subject to strict scrutiny and the Supreme Court found that Maine did not have a compelling interest in excluding the use of benefits at religious schools because "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." 142 S. Ct. at 1997.

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 the government violated the Free Exercise and Free Speech Clauses when it fired the plaintiff for engaging in prayer after a football game, as the government's actions were not neutral and as the prayer was not governmental speech. 142 S. Ct. at 2422-24. The law was thus subject to heightened scrutiny and the Supreme Court found that the school did not have a compelling interest as students were not coerced to pray in violation of the Establishment Clause. *Id.* at 2428-29.

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 his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch stated that, in conducting strict scrutiny analysis, courts "cannot rely on broadly formulated governmental interests but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Mast*, 141 S. Ct. at 2432 (internal quotation marks, alterations, and citations omitted). Justice Gorsuch further explained that the state court had not given "due weight to exemptions other groups enjoy" but which had been denied to the religious group at issue. *Id.*

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?

Response: As a judicial nominee, it is generally inappropriate for me to offer an opinion

on issues that may come before the courts. If confirmed and faced with this issue, I would faithfully apply relevant Supreme Court and Third Circuit precedent to resolve this issue.

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: See answer to Question 26. I am unaware of any 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: I look forward, if I am confirmed, to the opportunity to select law clerks and serve as a mentor to them. I will, of course, comply with the Constitution and all applicable laws when hiring law clerks and any other staff.

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

Response: If confirmed and faced with this issue, I would carefully consider the record before me, the arguments of the parties, the governing law, and any relevant Supreme Court and Third Circuit precedent to resolve this issue.

30. Is the criminal justice system systemically racist?

Response: I am aware that many individuals have had serious experiences of racism. As a career prosecutor, I have made decisions based on the evidence and the law, without reference to any impermissible factors such as race. If I am confirmed, I will remain committed to making decisions without reference to any impermissible factors such as race. I have not studied the concept of systemic racism and do not have a definition of my own for this term.

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 size of the Supreme Court is a decision for Congress to make. U.S. Const. art. III, § 1. As a judicial nominee, it is not appropriate for me to opine on the size of the U.S. Supreme Court. If confirmed, I will faithfully apply any binding precedent from the Supreme Court.

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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court discussed the original public meaning of the Second Amendment and recognized "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." *Bruen,* 142 S.Ct. at 2122.

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 Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that a burden on the Second Amendment should be evaluated to determine if it is consistent with the "historical tradition of firearm regulation." 142 S. Ct. at 2126.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court found that the individual right to keep and bear arms is a fundamental right.

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

Response: I am unaware of any Supreme Court or Third Circuit precedent stating that Second Amendment rights are afforded less protection than other individual rights.

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

Response: Please see my response to Question 36.

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

Response: Pursuant to Article II, the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed and faced with this issue, I would carefully consider the record before me, the arguments of the parties, the governing law, and any relevant Supreme Court and Third Circuit precedent to resolve this issue.

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

Response: The Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974). A substantive administrative rule generally refers to one that has the "force and effect of law," as distinguished from "interpretive rules," which merely "advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015)). If confirmed and faced with this issue, I would carefully consider the record before me, the arguments of the parties, the governing law, and any relevant Supreme Court and Third Circuit precedent to resolve this issue.

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

Response: Authorized penalties, including the death penalty, are established by state and federal statutes. The President does not have the authority to legislate.

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 found that the plaintiffs were likely

to prevail on their claim that the Centers for Disease Control did not have the authority to enact its nationwide moratorium on evictions and further found that the equities weighed in favor of vacating the stay.

42. Did you advise Attorney General Garland on the strategy, planning, or execution of Attorney General Garland's Operation T.E.N. (Trafficking Ends Now) initiative?

Response: No. I was not a member of the Attorney General's Advisory Committee at the time this initiative was planned or executed. Our office started its own T.E.N. initiative in 2020 and that initiative pre-dated the one referenced above.

43. As Vice Chair of Attorney General Garland's Advisory Committee, did you consider the impact the lack of immigration enforcement has on human trafficking at the southern border when advising the Attorney General?

Response: As a currently-serving United States Attorney and member of the Advisory Committee ("AGAC"), I must be mindful not to disclose non-public information about the work of the office and Department and not to touch upon matters that may involve the deliberative process. I can say that I have not personally participated in any such discussions.

44. Would vigorous enforcement of our immigration laws at the southern border decrease human trafficking?

Response: As a currently-serving United States Attorney and member of the AGAC, I must be mindful not to disclose non-public information about the work of the office and Department and not to touch upon matters that may involve the deliberative process. I can say that the statutes which address conduct referred to as human trafficking are focused on forced labor, whether sexual, agricultural, or otherwise. Publicly available information reflects that these cases can involve intrastate conduct, interstate conduct, and transnational conduct.

45. Does the Biden administration's policy of catch and release contribute to the increase we are seeing in human trafficking?

Response: Please see my answer to Question 44.

46. According to the CDC, Fentanyl is now the leading cause of death for Americans 18-45. Do you think there is a connection between the increasing amounts of fentanyl destroying our communities through mass-overdoses and the open border approach of the Biden administration?

Response: As a currently-serving United States Attorney, I must be mindful not to disclose non-public information about the work of the office and Department and not to touch upon matters that may involve the deliberative process. I can say that fentanyl is a very serious threat to the safety of our community and each fentanyl-related investigation

is conducted on an individual basis aimed at stopping the distribution of this drug within the district, without reference to a specific public policy.

47. On August 29, 2022, at a White House press briefing, White House press secretary Karine Jean-Pierre stated "it's not like somebody walks over," when discussing the border crisis. Is it a true statement that no one walks across the border?

Response: I am not familiar with this statement nor its context and am unaware if it is referring to the southern border, a specific port of entry, or illegal crossings outside ports of entry.

Senator Ben Sasse
Questions for the Record for Cindy K. Chung
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 7, 2022

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

   Response: No.

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

   Response: If am fortunate enough to be confirmed, my judicial philosophy would be to approach each case individually, with an open mind, and without pre-prejudgment. I will listen respectfully to the parties and my fellow panelists, maintaining collegiality and respect throughout the process. I will rule on the record before me consistently with applicable Supreme Court and Third Circuit precedent and the method of interpretation used in that precedent.

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

   Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). If I am confirmed, I will apply the relevant Supreme Court and Third Circuit precedent and interpretative method used therein. For instance, the Supreme Court relied upon the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

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

   Response: If confirmed, I will carefully consider the record before me, the arguments of the parties, the governing law and its text, and any relevant Supreme Court and Third Circuit precedent and the method of interpretation used in that precedent.

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

   Response: The Supreme Court recently stated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." The Constitution can only be changed through the Article V process.

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

   Response: If confirmed, I will follow any binding Supreme Court precedent and the method of interpretation used to resolve cases, regardless of which Justice authored the precedential opinion.

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

   Response: Precedential decisions of a panel are binding on subsequent panels. Federal Rule of Appellate Procedure 35 provides for the *en banc* rehearing when a split exists within the Circuit or when the case involves "a question of exceptional importance." Fed.R.App.Proc. 35(a).

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

   Response: Please see my response to Question 7.

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

   Response: If deciding a case that turned on the interpretation of a federal statute, I would first consult the text of the statute itself and any applicable Supreme Court and Third Circuit precedent interpreting the statute. If the meaning of the text is plain, the inquiry ends. If the language of the statute is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of interpretation, and legislative history. General principles of justice are not considered in statutory interpretation.

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

    Response: No. Section 3553(a) sets forth the factors relevant to sentencing. 18 U.S.C. § 3553(a). Section 3553(a)(6) provides for the consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Senator Josh Hawley
Questions for the Record

Cindy Chung
Nominee, U.S. Court of Appeals for the Third Circuit

1. **Last December, you were interviewed along with other U.S. Attorneys by MSNBC. The MSNBC correspondent later reported that "when I asked them to raise their hands and say who thinks election integrity is a problem in this country," you declined to raise your hand. Since then, several people in your home state were caught altering the vote counts in elections going as far back as 2014. As a Department of Justice press release stated, former Congressman Michael Myers "admitted in court to bribing the Judge of Elections for the 39th Ward, 36th Division in South Philadelphia, Domenick J. Demuro, in a fraudulent scheme" running all the way back to 2014. The release continued, "Myers admitted to bribing Demuro to illegally add votes for certain candidates of their mutual political party." Do you still think that election integrity is not a problem in this country?**

   Response: I currently serve as the United States Attorney for the Western District of Pennsylvania. The case your questions references appears to be a recent conviction in the Eastern District of Pennsylvania in which I played no role. As a judicial nominee, it is generally inappropriate for me to offer an opinion on issues or cases that may come before the courts. I can say that the Constitution protects the right to vote; states that the right to vote cannot be abridged on the basis of race, sex, or age for individuals eighteen and older and further; and provides that states control the time, manner, and place of elections. U.S. Const. art. I, § 4; U.S. Const. Amends. 15, 17, and 19. In my role as United States Attorney, it is important to be mindful of the limited role that the federal government has in elections and to remain committed to enforcing the election-related law in this limited federal area.

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

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

      Response: I do not agree with the idea that a judge's personal opinion has a role in decision-making. If confirmed, I will follow Supreme Court and Third Circuit precedent without reference to any improper considerations such as personal opinion.

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

      Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I will faithfully uphold my oath.

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

   Response: Yes.

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

   Response: The standards for the most common bases for abstention in the Third Circuit are described below.

   Pullman abstention may be appropriate when "(1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; (3) A federal court's erroneous construction of state law would be disruptive of important state policies." *Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 631 (3d Cir. 1991) (citations omitted). If these factors are present, the court has the discretion to determine "whether abstention is in fact appropriate under the circumstances of the particular case, based on the weight of these criteria and other relevant factors." *Id*.

   Younger abstention calls for a federal court to refrain from hear a case when "federal litigation threatens to interfere with one of three classes of cases: (1) state criminal prosecutions, (2) state civil enforcement proceedings, and (3) state civil proceedings involving orders in furtherance of the state courts' judicial function." *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014).

   Burford abstention stands for the proposition that "a federal court should refuse to exercise its jurisdiction in a manner that would interfere with a state's efforts to regulate an area of law in which state interests predominate and in which adequate and timely state review of the regulatory scheme is available." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303 (3d Cir. 2004).

   Colorado River abstention is appropriate "where the presence of concurrent state proceedings may indicate that a district court should abstain from the contemporaneous exercise of concurrent jurisdiction due to principles of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Nat'l City Mortg. Co. v. Stephen,* 647 F.3d 78, 83 (3d Cir. 2011) (cleaned up).

   Rooker-Feldman abstention instructs that federal courts should refrain from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005).

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

   Response: I cannot recall ever working on a legal case or representation in which I opposed a party's religious liberty claim.

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

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

   Response: The Supreme Court has looked to the original public meaning to interpret the Constitution in multiple cases. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court recently stated that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132.

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

   Response: When interpreting legal texts, I would first consult the text itself and any applicable Supreme Court or Third Circuit precedent interpreting the statute. If the meaning of the text is plain, the inquiry ends. If the language of the statute is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of interpretation, and legislative history.

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

      Response: The Supreme Court has recognized that some types of legislative history (e.g., committee reports) are more probative of legislative intent than others (e.g., comments made during debate). *See*, *e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

      Response: If confirmed and faced with this issue, I would faithfully apply relevant Supreme Court and Third Circuit precedent when interpreting provisions of the U.S. Constitution. I am unaware of any such precedent referring to the laws of foreign nations in doing so.

8. **Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

   Response: In *Glossip v. Gross*, 576 U.S. 863, the Supreme Court held that to prevail on such a claim, a petitioner would need to: 1) establish that the protocol presents a "substantial risk of serious harm;" and, 2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." 576 U.S. at 877; *see also Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022).

9. **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.

10. **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.

11. **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.

12. **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: Under Religious Freedom Restoration Act of 1993 (RFRA), if any federal law places a substantial burden on a person's exercise of religion, even if the law is neutral and generally applicable, the government must show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *see City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court has found that a substantial burden on free expression occurs when: 1) non-compliance would cause "severe" economic consequences for the plaintiffs; and 2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. *Burwell v. Hobby Lobby Stores,*

Inc., 573 U.S. 682, 719-726 (2014). The Third Circuit has held that "[r]eligious exercise is impermissibly burdened when government action compels individuals 'to perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 355 (3d Cir. 2017).

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

Response: Under the Free Exercise clause of the First Amendment, a governmental burden on the free exercise of religion must be neutral and generally applicable; if not, the governmental action will be subject to strict scrutiny. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). A law is not neutral and generally applicable if the circumstances show that, for example, "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Federal laws are governed by RFRA. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Please also see my answer to Question 12 for additional discussion of RFRA.

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

Response: The Third Circuit has explained that "no court should inquire into the validity or plausibility of the beliefs; instead, the task of a court 'is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in the believer's own scheme of things, religious.'" *Fallon v. Mercy Cath. Med. Ctr. Of SE Pa.,* 877 F.3d 487, 490-91 (3d Cir. 2017) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1995).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for defense inside the home.

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

Response: No.

16. 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: While I am not especially familiar with this quote, I take it to mean what he later said, which is that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905). If I am confirmed, I will faithfully uphold my oath to resolve each case neutrally and impartially.

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's holding in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), is recognized as having abrogated *Lochner.* If confirmed, I will follow all binding Supreme Court and Third Circuit precedents.

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

a. If so, what are they?

Response: I am not aware of any such opinions.

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

Response: Yes.

18. 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: The Supreme Court has cited with approval, or found adequate, market

shares ranging from 67% to 95% for purposes of evaluating the existence of a monopoly. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). If confirmed, I will follow all applicable Supreme Court and Third Circuit precedent.

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

Response: Please see my answer to Question 18(a).

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

Response: Please see my answer to Question 18(a).

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

Response: The Supreme Court has held that generally federal common law does not exist, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), except in areas of uniquely federal interest, *Cassirer v. Thyssen-Bornemisza Collection Found.,* 142 S. Ct. 1502, 1509 (2022) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 640 (1981)*)*, such as foreign relations and admiralty. *Id.; Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

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

Response: If confirmed and faced with the issue of the scope of a state constitutional right, I would follow applicable Supreme Court and Third Circuit precedent which generally instructs federal courts to decide a question of state law by applying precedents of the highest state court. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: The interpretation of identical text can be instructive in interpreting text; however, such interpretation would not be dispositive. For instance, in *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011), the Supreme Court noted that "[f]ederal and state courts, . . . can and do apply identically worded procedural provisions, in widely varying ways." In *Yates v. United States*, 574 U.S. 528, 537 (2015), the Supreme Court noted "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Id.* (collecting cases).

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

Response: States are bound to follow the United States Constitution. U.S. Const. art. VI. Thus, states may not afford less protection than those guaranteed by the federal Constitution. State courts may, however, "interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether these precedents are correctly decided. Consistent with prior nominees, however, I can say that, because the issues raised in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), are unlikely to ever come before the Third Circuit, I believe that *Brown* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 governs injunctions. "[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) (citation and internal quotation marks omitted). The Supreme Court has upheld nationwide injunctions in certain circumstances. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017). If confirmed and faced with the question of whether a nationwide injunction was properly issued, I will follow applicable Supreme Court and Third Circuit precedent.

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

Response: Please see my answer to Question 22.

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

Response: Please see my answer to Question 22.

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

Response: Please see my answer to Question 22.

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

Response: Federalism acts as a restraint on the power of the federal government. In

Alden v. Maine, 527 U.S. 706, 714 (1999), the Supreme Court explained federalism "reserves to [states] a substantial portion of the Nation's primary sovereignty" and provides states "concurrent authority over the people."

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

Response: Please see my answer to Question 4.

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

Response: Generally, damages might be sought to redress past harms while injunctive relief might be sought to address or prevent a future harm. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 2210 (2021). However, injunctive relief is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008).

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

Response: The Supreme Court has recognized that the Fifth and Fourteenth Amendments protects unenumerated rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

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

Response: If confirmed and faced with a question of the scope of the First Amendments right to free exercise of religion, I will follow applicable Supreme Court and Third Circuit precedent. Please also see my answer to Question 13.

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that, "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" 573 U.S. at 710 (quoting *Emp. Div., Dep't of Hum. Res. of*

Oregon v. Smith, 494 U.S. 872, 877 (1990)); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (same).

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

Response: Please see my answer to Question 12.

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 answer to Question 13.

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: In *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020), the Supreme Court observed that "RFRA operates as a kind of super statute, displacing the operation of other federal laws," such as those federal laws governing areas like employment and education.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not that familiar with this quote nor its context, but I take it to mean that such a judge has improperly allowed the judge's personal opinion to play a role in decision-making. If confirmed, I will follow any binding Supreme Court and Third Circuit precedent without reference to any improper considerations such as personal opinion.

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

a. If yes, please provide appropriate citations.

Response: I cannot recall ever taking the position in litigation or a publication that a federal or state statute was unconstitutional.

31. 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.

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

Response: I am aware that many individuals have had serious experiences of racism. While I have had experiences such as being subjected to racial slurs, I can still say that I am the proud embodiment of the American dream that my parents had when they came to this country. I am so honored to serve as the United State Attorney in the district that first welcomed my family to America and so honored to be considered for this judicial position. I have not studied the concept of systemic racism and do not have a definition of my own for this term.

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

Response: Yes.

34. How did you handle the situation?

Response: I fulfilled my duty to zealously advocate for my client without reference to my own personal view.

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

Response: Yes.

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

Response: I would not characterize a specific Federalist Paper as having most shaped my views of the law.

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

Response: I am not aware of Supreme Court or Third Circuit precedent on this question. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (not expressing "any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."). 142 S. Ct. at 2262, 2284.

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

Response: I testified under oath in *United States v. Nassida,* 2:14-CR-241 (W.D. Pa.) (Ambrose, J.). During the trial of that case, I observed one of the defendant's attorneys sleeping and brought it to the Court's attention and suggested a remedy. The defendant was ultimately convicted at trial and moved for a new trial based on the fact that his attorney was sleeping. The defendant's new attorney called me as a witness at the hearing on the defendant's new trial motion. I do not believe a transcript of this testimony is available.

39. 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.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: In my nearly two decades as a government prosecutor and supervisor, I have authored and edited many briefs, including by assisting other attorneys on briefs which I did not sign. I do not have a list of such briefs and identifying such matters could constitute non-public and/or deliberative process information that I am not at liberty to disclose due to my current position as United States Attorney.

42. Have you ever confessed error to a court?

Response: I do not believe that I have ever confessed error to a court.

a. If so, please describe the circumstances.

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

Response: I believe that nominees have a duty to answer the Committee's questions candidly, truthfully, and to the best of their ability, and consistently with the Code of Conduct for United States Judges as applicable to nominees.

Questions for the Record
Senator John Kennedy

Cindy Chung

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: If am fortunate enough to be confirmed, my judicial philosophy would be to approach each case individually, with an open mind, and without pre-prejudgment. I will listen respectfully to the parties and my fellow panelists, maintaining collegiality and respect throughout the process. I will rule on the record before me consistently with applicable Supreme Court and Third Circuit precedent and the method of interpretation used in that precedent.

2. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: No. If the meaning of a text is clear, the inquiry ends.

3. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: The Supreme Court has recognized that some types of legislative history (e.g. committee reports) are more probative of legislative intent than others (comments made during debate). *See, e.g., NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *Garcia v. United States*, 469 U.S. 70, 76 (1984). I am unaware of any precedent related to the consideration of presidential statements in that context.

4. **What First Amendment restrictions can the owner of a shopping center place on private property?**

   Response: As a general matter, the "Free Speech Clause does not prohibit *private* abridgement of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The Supreme Court has held, however, that state law may limit a private shopping center owner's ability to restrict speech on its own property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

5. **What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?**

   Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court has explained that "the people," as referred by the First, Second, Fourth, Ninth, and Tenth Amendments, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265.

6. **Are non-citizens unlawfully present in the United States entitled to a right of privacy?**

   Response: I am not aware of any Supreme Court or Third Circuit precedent addressing this question. The Supreme Court has stated that, "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Matthew v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted).

7. **Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?**

   Response: The Supreme Court has recognized the sovereign power of the United States to conduct searches of those crossing the border without regard to individualized suspicion. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

8. **At what point is a human life entitled to equal protection of the law under the Constitution?**

   Response: I am not aware of Supreme Court or Third Circuit precedent on this question. *See, e.g., Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2284 (2022) (not expressing "any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").

9. **Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?**

   Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld the challenged voter identification requirement and noted that such laws are not *per se* unconstitutional. If I am confirmed and faced with this issue, I will follow applicable Supreme Court and Third Circuit precedent in considering any such challenge.

Questions from Senator Thom Tillis
for Cindy Kyounga Chung
Nominee to be United States Circuit Judge
for the Third Circuit

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

   Response: Yes.

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

   Response: The term "judicial activism" is the "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I will faithfully uphold my oath and base decisions on the record before me, applying Supreme Court and Third Circuit precedent, without reference to impermissible considerations such as my personal views.

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

   Response: I believe that a judge must fulfill the expectation of impartiality.

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

   Response: No.

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

   Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I will faithfully uphold my oath and base decisions on the record before me, applying Supreme Court and Third Circuit precedent, without reference to impermissible considerations such as the "desirableness" of an outcome.

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

   Response: No.

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

   Response: If confirmed and faced with a question involving the Second Amendment, I will follow binding Supreme Court and Third Circuit precedent including *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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 I am confirmed and faced with these issues, I will evaluate these issues on the record before me and follow applicable Supreme Court and Third Circuit precedents, which may include, among others, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (discussing standard for evaluating burdens on the Second Amendment) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (evaluating burden of COVID mitigation on free exercise of religion).

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 I am confirmed and faced with a question of qualified immunity, I will evaluate the issue on the record before me and follow applicable Supreme Court and Third Circuit precedent. In *District of Columbia v. Wesby*, the Supreme Court held that "officers are entitled to qualified immunity under [42 U.S.C.] §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." 138 S. Ct. 577, 589 (2018) (internal quotation marks and citations omitted).

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

    Response: As a judicial nominee, it is generally inappropriate for me to offer an opinion on an issue, such as qualified immunity, that may come before me. If I am confirmed and faced with the question of qualified immunity, I will evaluate the issue on the record before me and follow applicable Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee, it is generally inappropriate for me to offer an opinion on an issue, such as qualified immunity, that may come before me. If I am confirmed and faced with the question of qualified immunity, I will evaluate the issue on the record before me and follow applicable Supreme Court and Third Circuit precedent.

12. 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: During my almost two decades of experience as a state and federal criminal prosecutor, I have investigated and prosecuted some cases involving allegations of criminal copyright infringement.

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

Response: I have not had experience 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 had experience addressing this issue.

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: During my almost two decades of experience as a state and federal criminal prosecutor, I have investigated and prosecuted cases involving the unlawful communication of threats, hate crimes, the theft of intellectual property, copyright infringement, and the illegal exfiltration of data. In prosecuting any such case, the elements of the crime must be met, including, for instance, that the speech constitute a "true threat" rather than protected speech.

13. 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 and deciding a case that turned on the interpretation of a federal statute, I would first consult the text of the statute itself and any applicable Supreme Court and Third Circuit precedent interpreting the statute. If the meaning of the text is plain, the inquiry ends. If the language of the statute is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court and Third Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of interpretation, and legislative history.

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

Response: The level of deference afforded an agency's interpretation of a statute depends on the circumstances surrounding such interpretation. For instance, if the statute is ambiguous regarding the area of interpretation, and the interpretation is issued through a formal process, it may be entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Agency interpretation set forth in items such as manuals and guidelines are entitled to deference "only to the extent that those interpretations have the 'power to persuade." *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: If confirmed and faced with this issue, I would follow applicable Supreme Court and Third Circuit precedent.

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

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

Response: If I am confirmed and faced with such an issue, I would carefully consider the record before me and apply the relevant Supreme Court and Third Circuit precedent to that record.

15. 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: I have not studied this issue; moreover, as a judicial nominee, it is inappropriate for me to comment on the propriety of venue rules. If confirmed, I would apply the venue rules and applicable precedents.

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

Response: Please see my response to Question 15(a). However, I can commit that if confirmed to sit on the U.S. Court of Appeals for the Third Circuit, I will not proactively take steps to attract a particular type of case or litigant.

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: Please see my response to Question 15(a). However, I can commit that if confirmed to sit on the U.S. Court of Appeals for the Third Circuit, I will not proactively take steps to attract a particular type of case or litigant.

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

Response: I have not studied this issue; moreover, as a judicial nominee, it is inappropriate for me to comment on the propriety of venue rules. If confirmed, I would apply the venue rules and applicable precedents.

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

Response: Please see my response to Question 16.

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? Should such a rule apply only where a single judge sits in a division?

Response: Please see my response to Question 16.

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

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

Response: As a judicial nominee, it is inappropriate for me to comment on this matter. If confirmed, I would faithfully adhere to my duty to apply Supreme Court and Third Circuit precedent.

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

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