Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Dana Marie Douglas
Nominee to the Court of Appeals for the Fifth Circuit
August 3, 2022

1. **Last year at a Miami University Alumni Association event titled "*Celebrating Women's History Month with Women on the Judicial Bench*," you told the audience that your interest in becoming a Magistrate Judge was an outgrowth of your interest in public service, and that you had an interest in transitioning to being a "neutral" arbiter, rather than a "dogged advocate."**

   Please tell us a bit more about what you see as the difference between serving as an advocate and serving as a judge.

   Response: The role of an advocate is to zealously represent the interests of clients within the bounds of the law. The role of a judge is to neutrally apply the law to the facts of individual cases and controversies. I have had the opportunity to represent a myriad of clients as an advocate during my tenure as a lawyer. I have now been a United States Magistrate Judge since 2019. In this role, I have consciously set aside my role as an advocate to neutrally apply the law to the facts of the cases before me.

   I have enjoyed a career that has afforded me many opportunities to see the law from different vantage points—all of which are essential to the functioning of the judiciary. At the beginning of my legal career, my experience as a law clerk taught me the importance of a neutral arbiter to ensure that every litigant appearing before the court had an opportunity to have their cause heard by a judge who was fair, objective, and impartial.

   It was with that perspective that I approached my own role as a litigator during my 18 years of practice realizing the importance of zealously advocating for my clients within the parameters of the Rules of Professional Conduct. During that time, I was fortunate to represent a variety of clients—from Fortune 100 companies to small businesses, individuals, non-profit organizations, and local government entities in matters related to intellectual property, commercial litigation, products liability, and energy litigation in federal and state courts across the state of Louisiana. I also served as a Commissioner and Vice Chair of the New Orleans Civil Service Commission where I sat as a neutral arbiter over employee disciplinary appeals filed by classified employees of the City of New Orleans for almost ten years.

   Since 2019, I have been honored to serve as a United States Magistrate Judge for the Eastern District of Louisiana. Magistrate judges are often the face of the first interaction civil and criminal litigants experience within the federal court system. Notwithstanding the hundreds of cases on our dockets at any one time, it is never lost on me that each case is significant to the individuals who come before us. Consequently, I have approached each case in a manner that ensures each individual that their matter will be heard with the diligence, fairness and impartiality required by the judicial canons. In my current role, I have presided over many

civil and criminal matters and have approached each matter cognizant of the importance of the role of a neutral arbiter in the proceedings. If confirmed, I will continue to approach each matter with a keen awareness of those expectations.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Dana M. Douglas
Judicial Nominee to the U.S. Court of Appeals for the Fifth Circuit

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

   Response: Courts look to whether such rights are so "deeply rooted in the Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702 (1997). If confirmed to the United States Court of Appeals for the Fifth Circuit, I will uphold these principles.

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

   Response: The Fifth Circuit has been firm that the "court cannot overrule the decision of another panel; such panel decisions may be overruled only by a subsequent decision of the Supreme Court or by the Fifth Circuit sitting *en banc*." *Lowrey v. Texas A & M Univ. Sys.,* 117 F.3d 242, 247 (5th Cir. 1997). If confirmed to the Fifth Circuit, I would uphold this principle.

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 disagree.

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

   Response: Black's Law Dictionary defines living constitution as, "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

5. **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 unfamiliar with this statement. The United States Supreme Court recently stated that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further stated that, "[a]lthough its meaning 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." *Id*. If confirmed, I will follow United States Supreme Court and United States Court of Appeals for the Fifth Circuit precedent accordingly.

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

Response: Parents have a constitutional right to make decisions about the instruction of their children and to control their children's education. *Pierce v. Soc's of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534-35 (1925).

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

   Response: The reallocation of funds away from police is a policy decision usually addressed by local legislative bodies and is outside the ambit of my role as a sitting judge.

8. **Are law enforcement partnerships key to preventing acts of terror?**

   Response: The prevention of acts of terror involves comprehensive and strategic planning and policy decisions, generally within legislative and executive branches of government, that are outside the ambit of my judicial authority.

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

   Response: As a United States Magistrate Judge, my role in criminal proceedings is limited to pre-trial proceedings in felony cases. In that role, I have applied the factors set forth by Congress in the Bail Reform Act and CARES Act related to the release of defendants. If I am confirmed, I will evaluate all such matters pursuant to the relevant statutory authority and the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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 freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I; *see also Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 382 (2011).

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

    Response: Sentencing of defendants is governed by 18 U.S.C. § 3553 which does not list "empathy" as a factor of consideration. Instead, § 3553 requires the court to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant, (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the sentencing range available in the guidelines; (5) pertinent policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records for similar conduct; and (7) the need to provide restitution to victims of the offense.

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

    Response: I am unfamiliar with this statement or its context. There is no right to appointment of counsel in civil cases, but a federal district court may appoint counsel if

doing so, "would aid in the efficient and equitable disposition of the case." *Delaughter v. Woodall,* 909 F.3d 130, 140–41 (5th Cir. 2018).

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: As a sitting judge, it is generally inappropriate for me to comment on the "correctness" of a decision because I am bound to apply all binding Supreme Court precedents. Consistent with the responses of other nominees, I agree that there are some constitutional decisions that are foundational to our system of justice and unlikely to be relitigated such that I can state that they were correctly decided. These decisions include *Brown v. Board of Education* and *Loving v. Virginia*. The United States Supreme Court recently overruled *Roe v. Wade* and *Planned Parenthood v. Casey*. *See Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2284 (2022) (The Court overruled the decisions and returned the "authority to the people and their elected representatives."). The other referenced decisions are binding precedent. If I am confirmed, I will apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

    Response: It is illegal to threaten government officials, including Supreme Court Justices, under 18 U.S.C. § 115.

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

    Response: 18 U.S.C. § 1507 provides that, "Whoever, 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."

If confirmed, I will apply the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to any such case that comes before the court.

16. **Under Supreme Court precedent, is 18 USC § 1507 constitutional on its face?**

Response: I am unaware of any United States Supreme Court or United States Fifth Circuit Court of Appeals precedent holding that 18 U.S.C. § 1507 is unconstitutional.

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

Response: The United States Supreme Court has held that states are free to ban "fighting words," or "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

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

Response: True threats encompass 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. *Virginia v. Black,* 538 U.S. 343, 359–60 (2003). The United States Supreme Court further clarified in *Virginia* that, "the speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,'" in addition to protecting people "from the possibility that the threatened violence will occur." *Id.*

19. **When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?**

Response: I approach each case with an open mind and listen intently to the arguments of the parties, and carefully review the facts of the case before me. I carefully review the record, the applicable statute and the precedent of the United States Fifth Circuit and the United States Supreme Court and apply them to the record and evidence presented by the parties. If I am confirmed, I will continue to apply the law diligently, fairly and impartially.

20. **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.

21. **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.

22. **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.

23. **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.

24. **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?**

    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?**

    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.

25. **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?**

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?**

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.

26. **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?**

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.**

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.**

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.

27. **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?**

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

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

Response: No.

28. **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?**

    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?**

    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.

29. **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?**

    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?**

    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.

30. **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 March 9, 2022, I spoke with Cedric Richmond—then Assistant to the President and Director of the White House Office of Public Engagement—about various vacancies on the federal courts in Louisiana. On March 30, 2022, I spoke with Senator Bill Cassidy about my interest in serving on the United States Court of Appeals for the Fifth Circuit. On April 8, 2022, I spoke with Senator John Kennedy about my interest in Serving on the United States Court of Appeals for the Fifth Circuit. On April 28, 2022, I

interviewed with attorneys from the White House Counsel's Office. I also spoke with various officials from the Office of Legal Policy at the United States Department of Justice prior to the submission of my June 15, 2022 nomination to the Senate.

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

    Response: I received these questions by email on Wednesday, August 3, 2022. I subsequently prepared my responses in reliance on my Senate Judiciary Questionnaire, and where appropriate, I conducted research to respond. I submitted my responses to the attorneys at the Office of Legal Policy who provided feedback. All responses are my own.

Senator Mike Lee
Questions for the Record
Dana M. Douglas, Nominee to be United States Circuit Judge for the Fifth Circuit

1. How would you describe your judicial philosophy?

Response: At the beginning of my legal career as a judicial law clerk, I was taught to listen intently to the arguments of counsel, to treat every litigant with respect, to research the law thoroughly and to apply the applicable law to the evidence and the record before me. After 18 years as an advocate, I transitioned to becoming a neutral arbiter a few years ago and I have carried this lesson from my clerkship to the bench. If I am confirmed to the United States Fifth Circuit Court of Appeals I will continue to do so.

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

Response: I would begin any case by looking to United States Supreme Court and Fifth Circuit precedent. If there was no precedent on point in a case involving statutory interpretation, I would begin with the text of the statute. If the statutory text is clear and unambiguous my inquiry would end there. If the text was ambiguous, I would consider canons of construction, persuasive precedent from other courts, and finally legislative history. The United States Fifth Circuit Court of Appeals has instructed that only, "if the statute is ambiguous, we may look to the legislative history [] for guidance." *United States v. Orellana,* 405 F.3d 360, 365 (5th Cir. 2005). Not all forms of legislative history are given equal weight. For example, the United States Supreme Court in *Garcia v. United States*, 469 U.S. 70, 76 (1984), states that committee reports are considered more authoritative than other legislative history.

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

Response: I would begin the analysis with the plain text of the constitutional provision at issue and the precedent set forth by the United States Supreme Court and the United States Court of Appeal for the Fifth Circuit. If the language of the provision is clear that would end the analysis.

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

Response: The United Stated Supreme Court has recently held that, "to the extent later history contradicts what the text says, the text controls." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2137 (2022). The Court made clear that, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id*.; *see also Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258–2259 (2020).

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: To the extent the language is unambiguous, it is to be applied as written.

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: If confirmed, I would analyze constitutional provisions and statutes pursuant to the precedent set forth by the United States Supreme Court and the United States Fifth Circuit Court of Appeals. The United States Supreme Court recently held that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further concluded that, "[a]lthough its meaning 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." *Id.*

6. What are the constitutional requirements for standing?

Response: Standing opens the front door to the federal courthouse for a plaintiff and requires that: (1) there be a concrete injury; (2) traceable to the conduct of the defendant; (3) that is likely to be redressed by a favorable ruling of the court. *Massachusetts v. E.P.A.,* 549 U.S. 497, 498 (2007).

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

Response: Yes. The United States Constitution grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. The United States Supreme Court has interpreted the Necessary and Proper Clause as granting Congress implied powers necessary to implement its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. 316 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

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 United States Supreme Court has held that the question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise. *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012). If confirmed, I will evaluate the constitutionality of federal laws under the precedent set

forth by the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response: Courts look to whether such rights are so "deeply rooted in the Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702 (1997). If confirmed to the United States Court of Appeal for the Fifth Circuit, I will uphold these principles.

10. What rights are protected under substantive due process?

Response: Substantive due process, or fundamental rights, are those rights which are deeply rooted in the nation's history and tradition. *Washington v. Glucksberg,* 521 U.S. 702 (1997). The United States Supreme Court has held that the Due Process Clause provides heightened protection against government interference with certain fundamental rights. *See e.g., Loving v. Virginia,* 388 U.S. 1 (1967) (the rights to marry); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942) (to have children); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (to direct the education and upbringing of one's children); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (to marital privacy); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (to use contraception); *Rochin v. California,* 342 U.S. 165 (1952) (to bodily integrity).

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

Response: The Supreme Court has held that the Constitution does not confer a right to abortion in the recent case of *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022). In addition, *Lochner* was largely abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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

Response: Under the Commerce Clause, Congress has the power to regulate: (1) the use of channels of interstate commerce; (2) the regulation and protection of the instrumentalities of interstate commerce, or person and things in interstate commerce; and (3) activities that, in the aggregate, have a substantial effect on interstate commerce. *United States v. Lopez,* 514 U.S. 549 (1995).

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

Response: A suspect class is one that has experienced a "history of purposeful unequal treatment or [has] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. Of Ret. v. Murgia*, 427 U.S. 307 (1976).

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

Response: The checks and balances and separation of powers are essential to our constitutional structure. The United States Supreme Court has recognized that, "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States,* 564 U.S. 211, 222 (2011).

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

Response: I would look intently at the facts and the evidence presented in the record before me. I would thoroughly research the applicable authority and apply the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to the issue.

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

Response: The Constitution requires that cases are determined objectively. In addition, the Judicial Canons require a judge to approach cases diligently, fairly, and impartially. If confirmed, I will continue to abide by these principles.

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

Response: Both scenarios pose consequences that can be detrimental to our system of laws.

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

Response: I have not researched the issue and, therefore, do not have sufficient information to respond.

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

Response: Judicial review refers to, "[a] court's power to review the actions of other branches or levels of government; especially the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). Judicial supremacy describes the doctrine that, "interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court

interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

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: Elected officials take an oath to uphold the Constitution. *See* U.S. Const., art VI, § 3. Elected officials are also bound to follow decisions of the United States Supreme Court interpreting the Constitution. *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: The judiciary is tasked with applying and interpreting laws. The judiciary does not make or enforce the law.

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: As a nominee for the United States Court of Appeals for the Fifth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would diligently seek out the law applicable to the issue at hand and faithfully and impartially apply the precedents of the Supreme Court and Fifth Circuit.

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: None.

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

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

Response: I am not familiar with the referenced statement. The term "equity" means different things to different people. The definition accorded to the term by Black's Law Dictionary is "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary defines the terms differently. Equity is defined by Black's Law Dictionary as, "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). Equality is defined by Black's Law Dictionary as, "The quality, state, or condition of being equal." Black's Law Dictionary. *Id.*

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

Response: The Equal Protection Clause of the 14th Amendment provides that, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. If such an issue were presented, I would analyze the issue under the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

27. How do you define "systemic racism?"

Response: Systemic racism is defined as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." Cambridge Dictionary (2022).

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: I have not researched the distinctions between systemic racism and critical race theory. If confirmed, I would analyze any such issue arising in a case or controversy before the court pursuant to the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Questions for the Record for Judge Dana M. Douglas, Nominee for the United States Circuit Court for the Fifth 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: Congress has passed several federal laws prohibiting racial discrimination including but not limited to Title VI and Title VII of the Civil Rights Act. Additionally, the United States Supreme Court has held that "[a]ll racial classifications imposed by government must be analyzed by a reviewing court under 'strict scrutiny,' meaning "such classifications are constitutional under equal protection clause only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger,* 539 U.S. 306 (2003).

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: Courts look to whether such rights are so "deeply rooted in the Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702 (1997). If confirmed to the United States Court of Appeals for the Fifth Circuit, I will uphold these principles.

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: At the beginning of my legal career as a judicial law clerk, I was taught to listen intently to the arguments of counsel, to treat every litigant with respect, to research the law thoroughly and to apply the applicable law to the evidence and the record before me. After 18 years as an advocate, I transitioned to becoming a neutral arbiter a few years ago and I have carried this lesson from my clerkship to the bench. If I am confirmed to the United States Fifth Circuit Court of Appeals, I will continue to do so. I have not closely studied the philosophies of the Supreme Court Justices and could not identify which is most analogous to my own.

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, "[t]he 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). I do not subscribe to any interpretative label but rather would apply the interpretative mode set forth by the United States Supreme Court and its precedent relating to the specific constitutional provision at issue.

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 a living constitution as, "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

The United States Supreme Court recently held that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises

of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further concluded that, "[a]lthough its meaning 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." *Id.*

I do not subscribe to any interpretative label but rather would apply the interpretative mode set forth by the United States Supreme Court and its precedent relating to the specific constitutional provision at issue.

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: I would look first to the binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. Should no such precedent exist, I would start with the text of the provision. To the extent the text is clear, the inquiry ends.

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: If confirmed, I would analyze constitutional provisions and statutes pursuant to the precedent set forth by the United States Supreme Court and the United States Fifth Circuit Court of Appeals. The United States Supreme Court recently held that, the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further concluded that, "[a]lthough its meaning 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." *Id.*

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

Response: The United States Supreme Court recently held that, the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further provided that, "[a]lthough its meaning 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." *Id.* If confirmed, I will follow United States Supreme Court and United States Court of Appeals precedent accordingly.

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

a. **Was it correctly decided?**

Response: *Dobbs v. Jackson Women's Health Organization* is binding precedent. Generally speaking, as a sitting judge, it is inappropriate for me to comment on the correctness of binding precedent of the United States Supreme Court. If confirmed, I will apply all precedent of the United States Supreme Court and the United States Fifth Circuit

Court of Appeals.

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

a. **Was it correctly decided?**

Response: *New York Rifle & Pistol Association v. Bruen* is binding precedent. Generally speaking, as a sitting judge, it is inappropriate for me to comment on the correctness of binding precedent of the United States Supreme Court. If confirmed, I will apply all precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

a. **Was it correctly decided?**

Response: As a sitting judge, it is generally inappropriate for me to comment on the "correctness" of a decision because I am bound to apply all binding Supreme Court precedents. Consistent with the responses of other nominees, I agree that there are some constitutional decisions that are foundational to our system of justice and unlikely to be relitigated such that I can state that they were correctly decided including *Brown v. Board of Education*.

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

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

Response: Section 3142(e) creates a rebuttable presumption in favor of pre-trial detention for certain offenses including but not limited to: crimes of violence, a violation of Section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed; an offense for which the maximum sentence is life imprisonment or death; an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46; or any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under Section 2250 of title 18, United States Code. 18 U.S.C. § 3142. The policy rationales underlying the statutes are the prerogatives of policymakers.

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: In addressing the constitutional protection for the free exercise of religion, the United States Supreme Court and the Fifth Circuit have established "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular

religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520(1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990). However, the Supreme Court has also made clear that certain government actions are not neutral and generally applicable. For example, if a law or policy treats religious activities worse than comparable secular activities that law or policy is not neutral and generally applicable. *Tandon v. Newsom,* 141 S. Ct. 1294, 1296 (2021). If a law or policy allows for individualized exemptions but does not allow an exemption for a religious entity that law or policy is likely not neutral or generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). If a law or policy was adopted with religious animus, that law or policy is also likely not neutral or generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

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

Response: See my response to Question 13.

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 United States Supreme Court enjoined the enforcement of a New York executive order placing restrictions on in-person religious services in an effort to combat the spread of COVID-19 finding that the applicants made a strong showing that the restrictions violated "the minimum requirement of neutrality" to religion. The Court concluded that although "[s]temming the spread of COVID-19 is unquestionably a compelling interest," the restrictions were not narrowly tailored and, therefore, did not pass constitutional muster. *Id.* at 67.

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

Response: The United States Supreme Court concluded that government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. *Tandon v. Newsom,* 141 S. Ct. 1294 (2021). The Court further concluded that the determination of 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.* at 1296-97. Comparability is concerned with the risks various activities pose, not the reasons why people gather. *Id.* Lastly, the Court determined that the government has the burden to establish that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. *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: The United States Supreme Court held that the Colorado Civil Rights Commission violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). The Court found that comments of the Commission expressed clear hostility to the baker's sincerely held religious belief and concluded that the administrative determination was "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732.

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?

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

Response: The United States Supreme Court has held that sincere beliefs rooted in religion are protected by the Free Exercise Clause even where such are inconsistent with the doctrines of his or her religious beliefs. *Frazee v. Illinois Dept. of Empl. Sec.,* 489 U.S. 829 (1989).

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

Response: The United States Supreme Court has been firm that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.,* 450 U.S. 707, 714 (1981).

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

Response: As a sitting judge, it is inappropriate for me to comment on the official position of any religion outside the context of an actual case or controversy before the court.

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: The United States Supreme Court held that "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Our Lady of Guad. Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The Court concluded that the "ministerial exception" applied to the employment discrimination claims brought by educators "entrusted most directly with the

responsibility of educating their students in the faith." *Id.* at 2066.

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: The United States Supreme Court held that the refusal of Philadelphia to contract with Catholic Social Services for the provision of foster care services absent agreement to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. The Court found that Philadelphia's actions burdened CSS's religious exercise by forcing it to curtail its mission or to certify same-sex couples as foster parents, in violation of its religious beliefs. The non-discrimination requirement was subject to strict scrutiny, and the Court noted that the question was not whether the City had a compelling interest in enforcing its non-discrimination policies generally, but whether it has an interest in denying an exception to CSS. The Court concluded it did not.

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: The United States Supreme Court concluded that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause. *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022). The Court held that a state cannot exclude religious observers from otherwise available public benefits. *Id.*

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

Response: The United States Supreme Court held that the Free Exercise and Free Speech Clauses of the First Amendment protect individuals engaging in a personal religious observance from government reprisal. The Court concluded that the school sought to restrict the actions because of their religious nature, thereby burdening the right to free exercise. The Supreme Court further concluded that the praying did not occur while acting within the scope of duties as a coach because it was during the postgame period when coaches were free to attend to personal matters and students engaged in other activities. The Court found that the school could not show that prohibiting the prayer served a compelling purpose nor that it was narrowly tailored to achieve that purpose.

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

Response: In *Mast v. Fillmore County*, Justice Gorsuch issued a concurring opinion reaffirming the Court's holding in *Fulton* that the Religious Land Use and Institutionalized Persons Act prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Specifically, Justice Gorsuch provided that, "[i]t is the government's burden to show this alternative won't work; not the [challenger's] to show it will." *Mast v. Fillmore Cty., Minn.*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring).

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: 18 U.S.C. § 1507 provides 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."

I am unaware of any Fifth Circuit or Supreme Court precedent considering the constitutionality of this statute. As a sitting judge, it is inappropriate for me to prejudge facts without a case and controversy before me. If confirmed, I will apply the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to any such case that came before the court.

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;**
b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**
c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**
d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response to all subparts: No.

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

Response: I am unaware of any such trainings in the Fifth Circuit Court of Appeals.

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: Yes.

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

Response: I am not aware of any precedent set forth by the United States Supreme Court

or the United States Fifth Circuit Court of Appeals addressing this issue. As a sitting judge, it would be inappropriate for me to comment on the constitutionality of an issue not presented within the context of a current case or controversy.

30. Is the criminal justice system systemically racist?

Response: I have approached each criminal matter in which I have presided without regard to race. If I am fortunate to be confirmed to the United States Court of Appeals for the Fifth Circuit I will approach matters in accordance with my ethical obligations under the judicial canons and obligation of diligence, impartiality and fairness.

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 appropriate size of the Supreme Court is a question for Congress. As a federal judge, I am bound by Supreme Court precedent regardless of the size or composition of the 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: The United States Supreme Court has provided that the Second Amendment language and historical background guarantees an "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller,* 554 U.S. 570, 592 (2008).

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 *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment (as incorporated against the states through the Fourteenth Amendment) protects an individual right to keep and bear arms for self-defense. Under *Bruen*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). As a result, in *Bruen* the Supreme Court held that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home.

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 Court held that the Second Amendment (as incorporated

against the states through the Fourteenth Amendment) protects an individual right to keep and bear arms for self-defense.

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

Response: I am not aware of any precedent of the United States Supreme Court or the United States Fifth Circuit Court of Appeals which suggests that the right to own a firearm receives less protection than any other rights specifically enumerated in the Constitution.

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

Response: I am not aware of any precedent of the United States Supreme Court or the United States Fifth Circuit Court of Appeals which suggests that the right to own a firearm receives less protection that any other rights specifically enumerated in the Constitution.

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

Response: Article II provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The United States Supreme Court has provided that, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. U.S. ex rel. Stokes,* 37 U.S. 524, 525 (1838).

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

Response: Prosecutorial discretion refers to "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Black's Law Dictionary (11th ed. 2019).

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

Response: The Federal Death Penalty Act, is codified at 18 U.S.C. § 3591 *et seq.* I am unaware of any precedent of the United States Supreme Court or the United States Court of Appeal for the Fifth Circuit granting such authority to the President. The President does not have authority with respect to the administration of state criminal laws and could not repeal the federal death penalty as set forth by federal statutes—only Congress could change the law.

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. HHS*, the United States Supreme Court concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the ... spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. *Alabama Association of Realtors v. HHS*, 142 S. Ct. 2485, 2487 (2021).

42. At your nominations hearing on July 27, 2022, you said that you "do not believe in the Constitution being a living document." You went on to clarfy that you always start by "reviewing the text." Would you classify yourself as a texualist?

Response: Generally speaking, I do not subscribe to any interpretative label but rather would apply the interpretative mode set forth by the United States Supreme Court and its precedent relating to the specific constitutional provision at issue. If confirmed, I will follow United States Supreme Court and United States Fifth Circuit Court of Appeals precedent with respect to interpreting constitutional and statutory provisions. As a federal judge, when I have confronted questions of statutory interpretation, I have begun my analysis by looking at binding precedent and the text of the statute.

43. Judge Douglas, in 2017 you noted that an increased focus on diversity in the legal profession would help "judges and juries fulfill their sworn duties free of the implicit bias that can skew results or destroy lives needlessly."

a. **Can you define implicit bias?**

b. **Does everyone have implicit bias?**

Response: Merriam Webster defines implicit bias as, "a bias or prejudice that is present but not consciously held or recognized."

44. You introduced Assistant Attorney General Kenneth A. Polite, Jr. at a panel regarding the 2017 criminal justice reform package. Do you share his views on the need for community policing, consent decrees, and eliminating money bail?

Response: The need for community policing, consent decrees, and eliminating bail are policy issues which fall outside the ambit of my duties. As a sitting judge, it is inappropriate for me weigh in on these policy considerations.

45. In 2015, you delivered a speech in which you urged legal professionals, administrators, and law professors to bring "diversity and inclusion into the office" and "embrace a cultural shift" in work environments. If confirmed, do you plan to make race a consideration when making hiring decisions regarding clerks or other court staff?

Response: If I am confirmed to the United States Court of Appeals for the Fifth Circuit, I will continue to hire qualified clerks and court staff, irrespective of their race.

Senator Ben Sasse
Questions for the Record for Dana M. Douglas
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 27, 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: At the beginning of my legal career as a judicial law clerk, I was taught to listen intently to the arguments of counsel, to treat every litigant with respect, to research the law thoroughly and to apply the applicable law to the evidence and the record before me. After 18 years as an advocate, I transitioned to becoming a neutral arbiter a few years ago and I have carried this lesson from my clerkship to the bench. If I am confirmed to the United States Fifth Circuit Court of Appeals I will continue to do so.

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

   Response: Black's Law Dictionary defines originalism as, "[t]he 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). I do not subscribe to any label of interpretation. If confirmed, I will follow United States Supreme Court and United States Court of Appeals precedent accordingly.

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

   Response: Generally speaking, I do not subscribe to any interpretative label. If confirmed, I will follow United States Supreme Court and United States Fifth Circuit Court of Appeals with respect to interpreting constitutional and statutory provisions. As a federal judge, when I have confronted questions of statutory interpretation, I have begun my analysis by looking at binding precedent and the text of the statute.

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

   Response: Black's Law Dictionary defines living constitution as, "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

   The United States Supreme Court recently held that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various

crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further concluded that, "[a]lthough its meaning 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." *Id.*

I do not subscribe to any label of interpretation. If confirmed, I will follow United States Supreme Court and United States Court of Appeals precedent accordingly.

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

Response: I have not studied the jurisprudence of any particular Supreme Court Justice. If confirmed, I intend to follow all binding precedent of the United States Supreme Court.

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: The Fifth Circuit has been firm that, "[i]t is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Grabowski v. Jackson County Pub. Defenders Office,* 47 F.3d 1386, 1400 n. 4 (5th Cir. 1995) (Smith, J., concurring in part and dissenting in part), *vacated for reh'g en banc, id.* at 1403, *district court judgment aff'd,* 79 F.3d 478 (5th Cir. 1996) (en banc). If confirmed, I will follow the precedent set forth by the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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: 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: In every case involving statutory construction, the starting point is the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc*., 437 U.S. 322, 330 (1978). If the statutory words are clear, there is neither need nor warrant to look elsewhere. *Glenn v. United States*, 571 F.2d 270, 271 (5th Cir. 1978). Consequently, "a court should depart from the official text of the statute and seek extrinsic aids to its meaning only if the language is not clear." *United States v. Missouri Pac. R.R. Co*., 278 U.S. 269, 278 (1929); *see also Am. Trucking Associations, Inc. v. I. C. C.,* 659 F.2d 452, 458–59 (5th Cir. 1981), *opinion clarified*, 666 F.2d 167 (5th Cir. 1982).

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: Sentencing is governed by 18 U.S.C. Section § 3553. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is a consideration under 3553(a)(6).

Senator Josh Hawley
Questions for the Record

Dana Douglas
Nominee, Fifth Circuit

1. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**
    a. **Do you agree with that philosophy?**
    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

    Response: The judicial oath requires that justice be administered without respect to persons, to do equal right to the poor and the rich, and to discharge and perform all the duties incumbent under the Constitution and laws of the United States faithfully and impartially. I do not have sufficient information to address part (b) and it would not be appropriate for me to opine in the abstract. If confirmed to the United States Court of Appeals to the Fifth Circuit, I will discharge these duties faithfully.

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

    Response: *Dobbs* v. *Jackson Women's Health Organization* is the binding precedent of the United States Supreme Court. If confirmed, I will apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

    Response: *Colorado River* Abstention- The Fifth Circuit has recognized that, the United States Supreme Court "has not prescribed a 'hard and fast rule' governing the appropriateness of *Colorado River* abstention." The court has recognized, however, that the Court has set forth six factors that may be considered and weighed in determining whether exceptional circumstances exist that would permit a district court to decline exercising jurisdiction and uses the following factors in consideration of abstention: (1) assumption by either court of jurisdiction over a res; (2) the relative inconvenience of the forums; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. *Black Sea Inv., Ltd. v. United Heritage Corp.,* 204 F.3d 647, 650 (5th

Cir. 2000). In assessing the propriety of abstention according to these factors, a federal court must keep in mind that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction." *Id.*

Burford Abstention—The United States Court of Appeal for the Fifth Circuit has considered five factors to analyze whether *Burford* abstention is warranted. *Grace Ranch, L.L.C. v. BP Am. Prod. Co.,* 989 F.3d 301, 313–14 (5th Cir. 2021), as revised (Feb. 26, 2021 *citing Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993)). These factors are: (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review. *Aransas Proj. v. Shaw*, 775 F.3d 641, 649 (5th Cir. 2014) (quoting *Wilson*, 8 F.3d at 314). The court also considers that "*Burford* abstention is disfavored as an abdication of federal jurisdiction." *Id.* at 653.

Pullman Abstention—The Fifth Circuit has recognized the United States Supreme Court holding that, "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Texas Ent. Ass'n, Inc. v. Hegar,* 10 F.4th 495, 508 (5th Cir. 2021), *cert. denied,* 142 S. Ct. 2852 (2022) *citing Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). The Court further recognizes that, "*Pullman* abstention is limited to *uncertain questions of state law* because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Id.*

The Court also recognized that the *Younger* abstention doctrine counsels that federal courts should abstain from interfering with states' enforcement of their laws and judicial functions. But "[c]ircumstances fitting within the *Younger* doctrine, [the Supreme Court has] stressed, are 'exceptional' ...." *Texas Ent. Ass'n, Inc. v. Hegar,* 10 F.4th at 508 *citing Sprint*, 571 U.S. at 73. *Younger* abstention is appropriate only "in three types of proceedings": (1) ongoing state criminal prosecutions, (2) "certain 'civil enforcement proceedings' " that are "in aid of and closely related to [the State's] criminal statutes," and (3) "pending 'civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Id.*

Ecclesiastical abstention doctrine recognizes that the Establishment Clause of the First Amendment precludes judicial review of claims that require resolution of "strictly and purely ecclesiastical" questions. *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.,* 966 F.3d 346, 348 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2852 (2021) c*iting Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 713 (1976).

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

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

Response: I have not litigated a legal case or worked on a representation in opposition to a religious liberty claim.

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

Response: If confirmed I will follow Supreme Court and Fifth Circuit precedent including precedents regarding the method of constitutional interpretation of a particular provision. For example, the Supreme Court has looked to the original public meaning of the Second Amendment in cases implicating that provision. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022); *see also District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

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

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

Response: I would begin any case by looking to United States Supreme Court and Fifth Circuit precedent. If there was no precedent on point in a case involving statutory interpretation, I would begin with the text of the statute. If the statutory text is clear and unambiguous my inquiry would end there. If the text was ambiguous, I would consider canons of construction, persuasive precedent from other courts, and finally legislative history. The United States Fifth Circuit Court of Appeals has instructed that only, "if the statute is ambiguous, we may look to the legislative history [] for guidance." *United States v. Orellana,* 405 F.3d 360, 365 (5th Cir. 2005). Not all forms of legislative history are given equal weight. For example, the United States Supreme Court in *Garcia v. United States*, 469 U.S. 70, 76 (1984), states that committee reports are considered more authoritative than other legislative history.

   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 as a circuit judge, I will follow the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response: Prisoners cannot successfully challenge a state's method of execution under the Eighth Amendment's prohibition of cruel and unusual punishment merely by showing a slightly or marginally safer alternative; instead, the prisoners must identify an alternative that is feasible and readily implemented, and that in fact significantly reduces

a substantial risk of severe pain. *Glossip v. Gross*, 576 U.S. 863 (2015). In addition, the United States Fifth Circuit Court of Appeals has used the same elements when reviewing whether a plaintiff has sufficiently pled a method-of-execution claim. *See Whitaker v. Collier*, 862 F.3d 490, 497 (5th Cir. 2017).

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

   Response: Please see my response to Question 7.

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

   Response: In *Dist. of Attorney Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009), the United States Supreme Court reversed a finding that a defendant possessed a right under the Due Process Clause to obtain postconviction access to the state's evidence for DNA testing and held, "that there is no such substantive due process right." *Id.* The United States Fifth Circuit Court of Appeals has also provided that, "[t]here is no freestanding, substantive due process right to access DNA evidence at the post-conviction stage." *Moon v. City of El Paso*, 906 F.3d 352, 359 (5th Cir. 2018).

10. **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.

11. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

    Response: In addressing the constitutional protection for free exercise of religion, the United States Supreme Court and the Fifth Circuit have established "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990). However, the Supreme Court has also made clear that certain government actions are not neutral and generally applicable. For example, if a law or

policy treats religious activities worse than comparable secular activities that law or policy is not neutral and generally applicable. *Tandon v. Newsom,* 141 S. Ct. 1294, 1296 (2021). If a law or policy or law allows for individualized exemptions but does not allow for an exemption for a religious entity that law or policy is likely not neutral or generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). If a law or policy was adopted with religious animus, that law or policy is also likely not neutral or generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

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 state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law that discriminates against a religious group or a religious belief must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

13. 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 United States Court of Appeals for the Fifth Circuit has held that, "[i]t does not matter whether a religious belief itself is central to the religion, but only that 'the adherent [ ] have an honest belief that the practice is important to his free exercise of religion.'" *Moussazadeh v. Texas Dep't of Crim. Just.,* 703 F.3d 781, 790–91 (5th Cir. 2012), *as corrected* (Feb. 20, 2013); *Sossamon v. Lone Star State of Tex.,* 560 F.3d 316, 332 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas,* 131 S. Ct. 1651 (2011).

14. 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)?

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

for self-defense. I have not issued any judicial opinions, orders or other decisions concerning the Second Amendment or any analogous state law.

15. 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?

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

Response: Justice Holmes went further to say that, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* is no longer good law. It was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

16. 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?

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

Response: No. If confirmed, I will faithfully and impartially apply all Supreme Court precedent.

17. 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?

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

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

Response: A nonconclusory allegation that a defendant holds a predominant share of the relevant market will usually satisfy the monopoly power element of a monopolization claim. *United States v. Grinnell,* 384 U.S. at 563, 571 (1966). The precise market share a defendant must control before it has monopoly power remains undefined, but the case law supports the conclusion that a market share of more than 70 percent is generally sufficient to support an inference of monopoly power. *See,*

e.g., Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 481 (1992); *Heatransfer Corp. v. Volkswagenwerk, A.G.,* 553 F.2d 964, 981 (5th Cir. 1977) (71–76 percent share sufficient).

In contrast, courts almost never find monopoly power when market share is less than about 50 percent. *American Telephone & Telegraph Co. v. Delta Commc'ns Corp.,* 408 F. Supp. 1075, 1107 (S.D. Miss. 1976), *aff'd per curiam,* 579 F.2d 972 (5th Cir. 1978) (adopting district court opinion), *modified on other grounds,* 590 F.2d 100 (5th Cir. 1979) (41% share of local prime time television market insufficient to subject television network to Section 2 monopolization scrutiny). The Fifth Circuit adheres to Judge Learned Hand's widely accepted rule of thumb that "while a 90 percent market share definitely is enough to constitute monopolization, 'it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not.'" *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.,* 732 F.2d 480, 489 (5th Cir. 1984) (citing *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), *approved and adopted, American Tobacco Co. v. United States,* 328 U.S. 781, 811–14 (1946)).

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

Response: Federal courts are not general common-law courts. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981). The United States Supreme Court has found it necessary, in a "few and restricted" instances, to develop federal common law. *Id. citing Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

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

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

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

Response: The United States Supreme Court has stated that, "[it] is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. Nat'l Tea Co.,* 309 U.S. 551, 557 (1940). If confirmed, I will uphold these principles.

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

Response: As a sitting judge, it is generally inappropriate for me to comment on the "correctness" of a decision because I am bound to apply all binding Supreme Court precedents. Consistent with the responses of other nominees, I agree that there are some

constitutional decisions, including *Brown v. Board of Education,* that are foundational to our system of justice and unlikely to be relitigated such that I can state that they were correctly decided.

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

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

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

Response: Rule 65 of the Federal Rules of Civil Procedure governs the issuance of injunctions. Both the United States Supreme Court and the Fifth Circuit Court of Appeals have concluded that, "[s]uch injunctions at times can constitute 'rushed, high-stake, low-information decisions,' while more limited equitable relief can be beneficial." *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) *quoting Dep't of Homeland Sec. v. New_York,* 140 S. Ct. 599, 600 (2020) (Gorsuch J., concurring in the grant of a stay.)

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

Response: Please see my response to Question 21. As a United States Magistrate Judge, I have not issued a nationwide injunction. If confirmed, I would uphold the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response**: "**Federalism [] tempers the doctrine of comity and envisions a balancing of state and federal interests to determine the proper roles of the state and federal courts." *DeSpain v. Johnston*, 731 F.2d 1171, 1176 (5th Cir. 1984).

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

Response: Please see my response to Question 3.

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

Response: The advantages and disadvantages of awarding damages versus injunctive relief may vary depending on the facts of the case before the court. If confirmed and presented with such an issue, I will follow the precedents of the United States Supreme Court and the Fifth Circuit Court of Appeals to evaluate the remedies available to the litigants.

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

Response: Courts look to whether such rights are so "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702 (1997). The United States Supreme Court has held that the Due Process Clause provides heightened protection against government interference with certain fundamental rights. *See e.g., Loving v. Virginia,* 388 U.S. 1 (1967) (the rights to marry); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942) (to have children); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (to direct the education and upbringing of one's children); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (to marital privacy); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (to use contraception); *Rochin v. California,* 342 U.S. 165 (1952) (to bodily integrity).

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

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

Response: As stated aptly by the United States Supreme Court in *Employment Div., Dep't of Human Res. of Ore. v. Smith*, the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 484 U.S. 872, 877 (1990). The scope of the First Amendment's right to free exercise has been clarified by recent United States Supreme Court decisions, in particular *Kennedy v. Bremerton School District* and *Fulton v. City of Philadelphia*. Although the Court has previously determined that neutral, generally applicable laws may incidentally burden religion, *see Smith*, 494 U.S. at 872, a plaintiff satisfies his burden by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022). It is then that a governmental entity must satisfy at least strict scrutiny showing that its restrictions on a plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. In many cases, the scope of the Free Exercise Clause is considered alongside the Establishment Clause. In *Kennedy*, the Supreme Court put to rest the *Lemon* and endorsement tests, instead embracing a test instructing the Establishment Clause be interpreted by "reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2411.

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 *Cantwell v. State of Connecticut*, the United States Supreme Court stated that the First Amendment has a "double aspect." 310 U.S. 296, 303 (1940). On the one hand, "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Id*. On the other hand, "it safeguards the free exercise of the chosen form of religion." *Id*. Accordingly, the First Amendment embraces both the freedom to believe and the freedom to act.

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion? Under the Religious Freedom Restoration Act, federal laws and policies that substantially burden religion are subject to strict scrutiny even if they are neutral and generally applicable.

Response: I would apply the tests set out by the United States Supreme Court and the United States Fifth Circuit Court of Appeals. The Religious Freedom Restoration Act ("RFRA") prohibits the government from substantially burdening free exercise of religion even if the laws are neutral and generally applicable. When implicating a federal law, the government is required to show that the burden of the law is in furtherance of a compelling interest and is the least restrictive means of furthering that interest, or strict scrutiny.

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: As stated by Justice Douglas in *United States v. Ballard*, 322 U.S. 78, 86, (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." While the "truth" of a belief is not open to question by a Court in any circumstances, a federal court may question whether it is "truly held." *See U.S. v. Seeger*, 380 U.S. 163 (1965). This threshold question of sincerity is a question of fact that turns largely on credibility. The Fifth Circuit has cautioned courts to approach the question of sincerity "with a light touch" or "judicial shyness." *Tagore v. U.S.*, 735 F.3d 324, 328 (5th Cir. 2013).

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

Response: The Supreme Court spoke directly to this issue in *Burwell v. Hobby Lobby Stores, Inc.*, in which it indicated that Title VII and other similar laws indicate that Congress "speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations." 573 U.S. 682 (2014). In *Hobby Lobby*, the Supreme Court applied the RFRA's free exercise protections to for-profit corporations. Based on this binding precedent, it is clear that RFRA applies to all persons, non-profits, and for-profit corporations subject to federal laws, unless Congress clearly indicates otherwise.

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.

James v. Edwards, No. 20-cv-452-DMD, 2021 WL 1856908 (E.D. La. May 10, 2021).

James v. Edwards, No. 20-cv-452, 2020 WL 2500202, at *6 (E.D. La. Apr. 7, 2020), *report and recommendation adopted,* No. CV 20-452, 2020 WL 2495710 (E.D. La. May 14, 2020).

Pitre v. Larpenter, No. CV 19-14049, 2019 WL 9197580, at *2 (E.D. La. Dec. 12, 2019), *report and recommendation adopted*, No. CV 19-14049, 2020 WL 3577514 (E.D. La. July 1, 2020).

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

a. What do you understand this statement to mean?

Response: I understand this to mean that judges should faithfully and impartially follow the law without regard to their own preferences. If confirmed, I intend to commit to apply the law faithfully and impartially.

29. 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: To the best of my recollection, during my 18-year tenure as a litigator, it is possible that I was involved in litigation regarding the constitutionality of state statutes. However, I am unable to recall a specific case where the issue was raised on behalf of a client I represented. I have not taken such a position in any publication.

30. 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.

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

Response: Questions regarding the role of race in society are important questions facing policy makers. However, I can unequivocally state that I have treated every litigant in the cases over which I have presided with equal respect. Additionally, I have worked faithfully to ensure that the law is applied fairly and impartially in all cases. If confirmed, I will continue to uphold these principles as reflected in the judicial canons.

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

Response: Yes.

33. How did you handle the situation?

Response: By diligently, competently, and zealously representing my clients in accord with the Rules of Professional Conduct.

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

Response: Yes.

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

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

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

Response: As a sitting United States Magistrate Judge, it is inappropriate for me to comment on this issue, because my judicial decisions are not based on my beliefs. If confirmed, I will faithfully and impartially apply the precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

37. 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: No.

38. 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)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No.

40. 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: To the best of my recollection, during my 18-year tenure as a litigator—particularly during my time as an associate—it is likely that I contributed to research, drafted or edited briefs filed in court without my name on the brief. However, I am unable to identify any particular case.

41. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

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

Response: Judicial nominees are sworn to testify truthfully before the Senate Judiciary Committee.

Questions from Senator Thom Tillis
for Dana M. Douglas
Nominee to be United States Circuit Judge for the Fifth 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: A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents. Black's Law Dictionary (11th ed. 2019). Judicial activism is not appropriate.

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

   Response: Impartiality is an expectation for a judge. Canon 2 of the Code of Conduct for United States Judges expressly provides that a judge, "respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In addition, Canon 3 provides that judges should perform the duties of the office fairly, impartially and diligently."

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: Yes. As a judge, I have followed all precedent of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. If confirmed, I will continue to follow that precedent to reach the outcomes dictated by the law.

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

   Response: No.

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

Response: If confirmed, I will follow all precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. I will also continue to uphold the judicial canons by presiding over the case in a manner that is diligent, fair and impartial.

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

Response: I would evaluate such a lawsuit by diligently reviewing the record and applying the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

Response: The United States Supreme Court and the United States Fifth Circuit Court of Appeals have held that once a defendant properly pleads qualified immunity, the burden shifts to the plaintiff to establish that (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. *Craig v. Martin,* 26 F.4th 699, 704 (5th Cir. 2022) (*citing Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011)).

As a United States Magistrate Judge I have applied all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. If I am confirmed, I will continue to do so.

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 United States Magistrate Judge, it would not be appropriate for me to opine on a question of policy. I have applied all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. If I am confirmed, I will continue to do so.

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

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

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?**

b. **Please describe any particular experiences you have had 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?**

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 to all subparts: During my 18-year career as a civil litigator, I litigated various intellectual property matters including but not limited to copyright, patent infringement, trademark, and misappropriation of trade secrets. I also assisted clients with the filing of trademark applications and drafting trademark and copyright licensing agreements. I also assisted clients facing the problem of "cybersquatting." I have not litigated any First Amendment or free speech issues.

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: I would begin any case by looking to United States Supreme Court and Fifth Circuit precedent. If there was no precedent on point in a case involving statutory interpretation, I would begin with the text of the statute. If the statutory text is clear and unambiguous my inquiry would end there. If the text was ambiguous, I would consider canons of construction, persuasive precedent from other courts, and finally legislative history. The United States Fifth Circuit Court of Appeals has instructed that only, "if the statute is ambiguous, we may look to the legislative history [] for guidance." *United States v. Orellana,* 405 F.3d 360, 365 (5th Cir. 2005). Not all forms of legislative history are given equal weight. For example, the United States Supreme Court in *Garcia v. United States*, 469 U.S. 70, 76 (1984), states that committee reports are considered more authoritative than other 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: My analysis of any statute begins with the plain language of the text. The United States Supreme Court has provided that, "the starting point for interpreting a statute is the language itself." *Consumer Prod. Safety Comm'n c. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The United States Fifth Circuit Court of Appeals has provided that only if the statute is ambiguous, may the court look to the legislative history or agency interpretations for guidance. *NPR Invs., L.L.C. ex rel. Roach v. United States,* 740 F.3d 998, 1007 (5th Cir. 2014).

In addition, when reviewing an agency's construction of a statute, courts apply a two-step process. The Court first determines "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, then the Court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The United States Supreme Court has explained that "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

The Supreme Court further recently held that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2022) *quoting FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159-160 (2000). Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. *Id.*

An administrative rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference. *Auer v. Robbins,* 519 U.S. 452, 461–463 (1997). So may an interpretation of an ambiguous statute, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–845 (1984), but only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.,* 533 U.S. 218, 226–22 (2001). Otherwise, the interpretation is "entitled to respect" only to the extent it has 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: As a sitting judge, I have presided over copyright infringement claims. Consequently, it would be inappropriate for me to comment on pending and impending matters before the court.

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?

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: Courts are required to interpret the DMCA in the same manner as other federal laws. The general methodology guiding a court's construction of a statute is well established. The court looks first to the language of the statute. If the statute is unambiguous, the inquiry ends. Courts are required to enforce the congressional intent embodied in that plain wording. *See United States v. Clark,* 454 U.S. 555, 560 (1982). In such cases, investigations of the statute's structure and of relevant legislative history can both provide useful insights to help us construe the statute in the way most consistent with congressional intent. *See, e.g., Alexander v. Sandoval,* 532 U.S. 275 (2001). The United States Supreme Court has held that "[p]olicy considerations cannot override our interpretation of the text and structure of [a statute], except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it." *Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164, 188, 114 S. Ct. 1439, 128 L.Ed.2d 119 (1994).

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: The 2021 Year-End Report of the Federal Judiciary ("Report") recognized the importance of judicial assignment and venue for patent cases in federal district courts. The Report further recognized that the issue raises two "important and sometimes competing values," including (1) supporting the random assignment of cases and fostering the role of district judges as generalists capable of handling the full range of legal issues and (2) that Congress has intentionally shaped the lower courts into districts and divisions codified by law so that litigants are served by federal judges tied to their communities. The Conference recognized that the reconciliation of these values is important to public confidence in the courts, and asked the Director of the Administrative Office, who serves as Secretary of the Judicial Conference, to put the issue before the Conference.

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).

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

Response: I have never taken 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?

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?

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 No. 15.

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?

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to respond to a hypothetical. If confirmed and confronted with a mandamus, I will properly analyze the matter under the applicable federal statutes and the precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals.

Senator Marsha Blackburn
Questions for the Record
Dana Marie Douglas, Judicial Nominee to the U.S. Circuit Court for the Fifth Circuit

1. **I understand that you frequently mention your law enforcement-serving family in public speeches, and I congratulate you on all their service to their communities. Separately, I understand that you have worked with and professionally interacted with many attorneys, including now-Assistant Attorney General for the Criminal Division, Kenneth A. Polite Jr. Polite was on a panel that you introduced regarding the 2017 criminal justice reform package, and you overlapped with him at Liskow and Lewis from 2010 to 2013. Polite has previously voiced support for police reform measures like greater reliance on community policing, enhanced use of federal consent decrees over police departments, elimination of cash bail, and others.**

   Do you share in the promotion of these progressive, police reform policies?

   Response: As a sitting United States Magistrate Judge, the promotion of policy falls outside the ambit of my duties. Article III only allows the consideration of cases and controversies brought before the court which I commit to do under the current precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals if confirmed.