Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for John Lee
Nominee to be United States Circuit Judge for the Seventh Circuit
May 18, 2022

1. **At your hearing, several Senators asked you about your decision in *Cassell v. Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (7th Cir. 2021). On April 30, 2020, the plaintiffs sought a temporary restraining order and a preliminary injunction preventing Illinois state government officials from enforcing COVID-19 stay-at-home orders. The plaintiffs alleged that the orders violated the First Amendment's Free Exercise Clause, as well as Illinois state laws. On May 3, 2020, you denied the plaintiffs' motions. In March 2021, a three-judge Seventh Circuit panel unanimously affirmed your decision, calling your opinion "swift and thorough."**

    a. **Please expand on your answers to the Senators, including—but not limited to—the reasoning behind your decision not to preliminarily enjoin Illinois's stay-at-home orders.**

    Response: On March 20, 2020, at the onset of the pandemic, the State of Illinois issued a "stay-at-home" order, which, among other things, limited activity outside the home and prohibited gatherings of more than ten individuals, including attendance at schools and movie theaters. The order subsequently was amended to allow individuals to leave their homes to perform certain "essential activities" and permitted individuals to attend worship programs so long as they complied with social distancing requirements and refrained from gatherings of greater than ten. Furthermore, the order encouraged religious organizations and houses of worship to use online or drive-in services to protect the health and safety of their congregants and permitted small group worship meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit, as well as allowing individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members.

    The plaintiffs filed a lawsuit challenging the order as an unconstitutional abridgement of their religious rights under the First Amendment and filed a motion for temporary restraining order and preliminary injunction, requesting that enforcement of the order be stayed. In evaluating the motion, I noted that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks omitted), and utilized the Seventh Circuit's test that a party seeking a preliminary injunction must show that (1) its case has "some likelihood of success on the merits," (2) it has "no adequate remedy at law," and (3) "without relief it will suffer irreparable harm." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). If the moving

party meets these requirements, I must "weigh[] the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied." *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011).

As to the merits of the plaintiffs' Free Exercise claim, I found that it was governed by Supreme Court's decision in *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905), which held that, when faced with an endemic, courts should only overturn emergency public health measures if they lack a "real or substantial relation to [public health]" or amount to "plain, palpable invasion[s] of rights." *Jacobson*, 197 U.S. at 31. This holding was consistent with the holdings of other courts to have addressed the issue at that time. *See, e.g.*, *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021) (mem.); *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB, 2020 WL 1979970, at *4–5 (C.D. Cal. Apr. 23, 2020). After carefully reviewing the factual record, I found that the Illinois stay-at-home order satisfied *Jacobson*, because it reasonably advanced the state's legitimate goal of safeguarding the public from the COVID-19 pandemic, given the severity and virulence of the virus, for which there was (at the time) no cure, vaccine, or effective treatment.

In addition to applying the holding in *Jacobson*, I also evaluated whether the state's order would withstand strict scrutiny under the First Amendment's Free Exercise Clause. That provision prevents the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" unless it demonstrates a "compelling government interest that justifies the burden." *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007). However, "neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (citing *Emp. Div. v. Smith*, 494 U.S. 872, 879–80 (1990)). In other words, a "neutral law of general applicability is constitutional if it is supported by a rational basis." *Ill. Bible Colls. Ass'n. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017).

Based upon the record and applying available legal precedents, I found that the state order was neutral and generally applicable because, among other things, it treated comparable secular activities, such as attending schools and movie theaters, no better than similar religious activities. In all three settings, individuals gathered closely together to engaged in joint activity. Based upon this reasoning, I applied the rational basis test and found that the plaintiffs' Free Exercise claim was unlikely to succeed on the merits. This then led me to conclude that, based upon the Seventh Circuit's "sliding scale approach," where the less likely a claimant is to win, the more that the balance of harms must weigh in his favor, *see Valencia v. City of Springfield*, 883 F.3d 859, 966 (7th Cir. 2018), the plaintiffs had not satisfied the requirements for preliminary injunctive relief, noting that

"[w]hile plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic."

My decision in *Cassell* came at the very beginning of the COVID-19 pandemic, and I did not have the benefit of the Supreme Court's guidance in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), among other cases, which clarified the standards courts should apply when judging whether a public health regulation impermissibly burdens the exercise of religion in violation of the Free Exercise Clause. Both of these cases emphasized that district courts tasked with determining whether a public health regulation violates free exercise must apply strict scrutiny, even if it bears a reasonable relation to public health, if the regulation "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. Comparability "is concerned with the risks various activities pose, not the reasons why people gather." *Id.*; *see Cuomo*, 141 S. Ct. at 65 (holding that an order that singles out religious exercise for harsher treatment than secular activity cannot be "neutral" and "generally applicable" and must survive strict scrutiny to be upheld).

b. Please explain the Seventh Circuit's holding in affirming your decision in *Cassell v. Snyders*, which it issued after the U.S. Supreme Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Danville Christian Academy, Inc. v. Beshear*.

Response: The Seventh Circuit affirmed my decision on March 8, 2021. *Cassell v. Snyders*, 990 F.3d 539 (7th Cir. 2021). In doing so, the court recognized that, while the appeal was pending, the legal landscape had "shift[ed] as the Supreme Court, this court, and other courts . . . faced a host of questions arising in our nation's response to the pandemic." *Id.* at 545. The Seventh Circuit further observed that "Plaintiffs' First Amendment claim has more potential merit than the district court recognized in May 2020, or than we would have recognized before November 25, 2020, when the Supreme Court decided *Roman Catholic Diocese* [*of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)]." *Id.* Nevertheless, the Seventh Circuit affirmed, citing *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), and holding that "there simply is no compelling need for preliminary relief against these long-expired orders, and there is every reason to expect that even if Illinois in the future believes some binding restrictions on worship services are needed, it will act with a close eye on the Supreme Court's latest pronouncements on the subject, including the need for measures closely tailored to meet public health needs." *Id.* at 548.

c. Please explain how you would analyze Free Exercise cases that would come before you if you are confirmed to the Seventh Circuit.

Response: If I am fortunate enough to be confirmed to the Seventh Circuit, I would fully and faithfully apply the precedents of the Supreme Court and Seventh Circuit to any Free Exercise cases that come before me.

2. **In *Northern Illinois Gas Co. v. City of Evanston*, 162 F. Supp. 3d 654 (N.D. Ill. 2016), the City of Evanston brought suit against the defendants under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*. In part, you held that methane leaking from pipelines did not meet RCRA's definition of "solid waste."**

   a. **Please explain the reasoning behind your decision.**

   Response: Northern Illinois Gas Company ("NICOR") and Commonwealth Edison ("ComEd") filed suit after the City of Evanston notified them in a letter that it intended to sue the companies under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, for improper disposal of "solid waste" as defined in RCRA. The City's allegations centered around two different types of "waste." First, the City claimed that certain processes created waste oils that had migrated into the surrounding soil and groundwater. Second, the City alleged that leakage of natural gas from pipelines resulted in a high concentration of methane gas in the soil. The question was whether methane gas constituted "solid waste" for the purposes of RCRA.

   RCRA defines "solid waste," in relevant part, as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). According to NICOR and ComEd, by including "contained gaseous material," the definition expressly excluded uncontained gaseous material like methane. In response, Evanston argued that the word "including" meant that the list was non-exhaustive and could be read to include uncontained gas like methane.

   Under the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, when interpreting a regulatory statute such as RCRA, the court first must analyze the statute's text and consider whether Congress "has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984); *see Am. Mining Congress v. E.P.A.,* 824 F.2d 1177, 1182 (D.C. Cir. 1987). If the statutory language is silent or ambiguous, the court then considers whether "Congress has authorized [an] agency to interpret the statute through rules carrying the force of law and [whether] the agency's interpretation is both reasonable and promulgated through the exercise of the authority given by Congress." *Brumfield v. City of Chi.*, 735 F.3d 619, 625–26 (7th Cir. 2013) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001)). If a court answers both questions in the affirmative, the agency's interpretation is entitled to deference under *Chevron*. *See id.* at 626. The purpose of this deference

is to respect Congress's decision to leave certain interpretive decisions to agencies rather than courts. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps.").

After reviewing the text of the statute, I concluded that the definition of solid waste contained in Section 6903 was ambiguous as to whether an uncontained gas, such as methane, was a RCRA solid waste. For example, the most natural reading of the provision's language is that a gas cannot be a "solid waste" because it is not a solid at all. *See Am. Mining*, 824 F.2d at 1183 ("In pursuit of Congress' intent, we start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted). On the other hand, other non-solid materials are explicitly included within the definition of "solid waste," such as liquids and "contained gaseous material."

I then noted that Congress had authorized the Environmental Protection Agency ("EPA") to oversee the implementation of RCRA and to issue regulations with the force of law in furtherance of this effort. *See* 42 U.S.C. § 6912(a)(1). And the EPA had concluded in at least two rulemakings that uncontained gases did not fall within RCRA's definition of solid waste. Because these rulemakings were subject to notice and comment and constitute a reasonable interpretation of the statute, I concluded that they were entitled to deference under *Chevron*. *See Sierra Club v. E.P.A.*, 375 F.3d 537, 541 (7th Cir. 2004) (deferring to EPA's reasonable interpretation of Clean Air Act because the agency acted within "the core of *Chevron*'s domain" by engaging in "notice-and-comment rulemaking under explicit statutory delegation"); *see also Owen Elec. Steel Co. of S.C.* ("[W]e accord the EPA's interpretation of statutory definition of 'solid waste' substantial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*"). Furthermore, as I noted, my decision was supported by other courts that had concluded that similar uncontained gases did not constitute RCRA "solid wastes." *See, e.g.*, *United States v. Sims Bros. Constr., Inc.*, 277 F.3d 734, 740 (5th Cir. 2001) (observing that "[f]or gaseous material to be 'solid waste' it must be 'contained.'"); *Helter v. AK Steel Corp.*, No. C–1–96–527, 1997 WL 34703718, at *12 (S.D. Ohio Mar. 31, 1997) ("[T]he Court concludes that the plain language of 42 U.S.C. § 9603(27) excludes the leaked COG [coke oven gas], in its gaseous form, from the definition of 'solid waste' and, thus, from RCRA's coverage.").

b. In your almost ten years on the bench, how many cases involving the *Chevron* doctrine have you presided over?

Response: I have searched my records and electronic databases in an effort to locate all of the cases I have presided over that involved the *Chevron* doctrine. Based on this search, I was able to identify three cases, including the case discussed above, from the over 4,500 civil cases that I have presided over during my nearly ten years on the district court.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge John Z. Lee
Nominee to be United States Circuit Judge for the Seventh Circuit

1. **In *Troogstad v. City of Chicago*, you held that a vaccine mandate for certain public sector employees did not "implicate their fundamental right to bodily autonomy."**

   a. **Please define the "fundamental right to bodily autonomy" as you understand it, citing any relevant Supreme Court or Seventh Circuit precedent.**

   Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). One such fundamental right is the right to make private choices concerning matters that affect one's own body, which the Supreme Court has recognized across a wide variety of contexts. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right to contraception); *Rochin v. California*, 342 U.S. 165, 172 (1952) (bodily integrity); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (right to bear children). Liberty interests protected under this strand of substantive due process jurisprudence are often referred to as "rights to bodily autonomy." *See, e.g.*, *Glucksberg*, 521 U.S. at 774 (Souter, J., concurring in the judgment).

   b. **Under what circumstances can a right to bodily autonomy be curtailed by a state or local government?**

   Response: The right to bodily autonomy as recognized in the decisions cited above is a fundamental right, and accordingly, a state or local government action that infringes a fundamental right is typically subject to strict scrutiny, which requires the infringement to be "narrowly tailored to serve a compelling state interest." *Id.* at 721 (majority opinion) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

   c. **How should courts evaluate the effect of a pandemic on a government's authority to curtail individual rights?**

   Response: The Supreme Court's decision in *Jacobson v. Massachusetts* held that public health measures enacted by state and local governments in response to ongoing health crises do not violate the Due Process Clause unless they lack a "real or substantial relation to [public health]" or amount to "plain, palpable invasion[s] of rights." 197 U.S. 11, 31 (1905). While the Supreme Court has since clarified that regulations that implicate the exercise of religion are subject to a more searching inquiry, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), it is my understanding that *Jacobson*'s deferential approach still governs substantive

due process challenges. *See, e.g.*, *Klaassen v. Bd. of Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (rejecting plaintiffs' substantive due process challenge to vaccine mandate for students at public university on grounds that the students lacked a fundamental right not to be vaccinated in light of *Jacobson*).

2. **In your view, are there any circumstances under which a delay in processing a concealed-carry license application can violate an individual's Second Amendment right to bear arms? If so, please describe the circumstances, citing any applicable case law. If not, why not?**

   Response: The constitutionality of concealed-carry licensing schemes is currently being considered by the courts. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Corlett*, No. 20-843. Because such an issue is pending before the Supreme Court, as a sitting district judge and nominee to the Seventh Circuit, it would be inappropriate for me to comment on it other than to say that, if this issue were to come before me, I would fully and faithfully apply Supreme Court and Seventh Circuit precedent.

3. **Please describe the nature of your work when you served as Special Assistant to the Counsel to Attorney General Janet Reno.**

   Response: As a Special Assistant, I assisted the Counsel to the Attorney General and the Assistant Attorney General for the Environmental and Natural Resources Division regarding various environmental issues.

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

   Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Over time, the Supreme Court has recognized a number of "fundamental" rights that fall within this category, including: the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); to direct the education and upbringing of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 172 (1952); to abortion, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); to interstate travel, *Saenz v. Roe*, 526 U.S. 489, 500 (1999); and to marry a partner of the same sex. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

5. **Please explain the difference between the original intent of a law and its original public meaning.**

Response: Black's Law Dictionary defines "original intent" as "the subjective intention of the drafters or ratifiers of an authoritative text." *Intent*, BLACK'S LAW DICTIONARY (11th ed. 2019). It defines "original public meaning" (as used in the definition of "originalism") as "the meaning that [a law] would have conveyed to a fully informed observer at the time when the [law] first took effect." *Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

a. If there is a conflict between a law's original intent and original public meaning, which should a judge rely on to determine how to interpret and apply the law?

Response: As a federal district judge, I adhere to binding precedent where a federal statutory or regulatory provision has been interpreted by the United States Supreme Court or the Seventh Circuit. If there is no binding precedent, I begin with the plain language of the pertinent statute or regulation. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). If the language "is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). In a scenario in which the original public meaning of a law and the original intent of the legislature led to conflicting interpretations, I would consider both, along with the traditional tools of statutory construction, in light of the individual facts of the case.

6. As a judge, what legal framework would you use to evaluate a claim about a violation of the Establishment Clause?

Response: In *Lemon v. Kurtzman*, the Supreme Court articulated a three-prong test for determining whether a law violates the Establishment Clause. This test "asks whether a challenged government action (1) has a secular purpose; (2) has a 'principal or primary effect' that 'neither advances nor inhibits religion'; and (3) does not foster 'an excessive government entanglement with religion,'" *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079 (2019) (quoting 403 U.S. 602, 612–13 (1971)). The Supreme Court has not abrogated the *Lemon* test; however, it "has either expressly declined to apply the test or has simply ignored it." *Id.* at 2080 (collecting cases). Furthermore, the Supreme Court on occasion has employed an analysis "that focuses on the particular issue at hand and looks to history for guidance." *Id.* at 2087; *see, e.g.*, *id.* at 2089; *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent as to this issue.

7. **Do felon dispossession statutes violate the Second Amendment? If not, can states prohibit non-violent felons from possessing a firearm?**

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court referred to "prohibitions on the possession of firearms by felons" as "presumptively lawful" under the Second Amendment. *Id.* at 626–27 n.26. To my knowledge, the Court did not differentiate between violent and non-violent felons in their historical analysis of Second Amendment protections. *Id.*; *see also McDonald v. City of Chi.*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626–27) (reaffirming the constitutionality of "such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons'"). To my knowledge, no federal court of appeals has found the federal prohibition on firearm possession by felons, 18 U.S.C. § 922(g)—which does not differentiate between violent and nonviolent felonies—to be facially unconstitutional. *See Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (collecting cases). And in at least two instances, the Seventh Circuit has found that § 922(g) did not violate the Second Amendment as applied to offenders convicted of nonviolent felonies. *See Hatfield v. Barr*, 925 F.3d 950, 953 (7th Cir. 2019) (upholding the constitutionality of the provision as to a man convicted of making false statements under 18 U.S.C. § 1001(a)); *see also Kanter v. Barr*, 919 F.3d 437, 448 (7th Cir. 2019) (upholding the constitutionality of the provision as to a man convicted of mail fraud).

8. **Have you ever done any work, legal or non-legal, with or for a gun control group? If so, please identify the group and describe the nature of your work.**

   Response: No.

9. **Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Seventh Circuit precedent.**

   Response: Article III limits federal courts' jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. "[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) (citation and internal quotation marks omitted). The authority to award injunctive relief also depends on "traditional principles of equity jurisdiction" as they existed in 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). Furthermore, in *Trump v. International Refugee Assistance Project*, the Supreme Court upheld, in part, a nationwide injunction that applied to parties and similarly situated non-parties. 137 S. Ct. 2080, 2088–89 (2017) ("An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction."). That said, whether and in what circumstances nationwide injunctions are appropriate is a topic of much legal debate. *See, e.g., City of Chi. v. Barr*, 961 F.3d 882, 912–18 (7th Cir. 2020). And, as a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment on this issue in the abstract.

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

Response: Yes. The Supreme Court has long held that parents have the right to direct their children's education. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *see also Sebesta v. Davis*, 878 U.S. 226, 229 (7th Cir. 2017) ("A parent has a fundamental right, protected by the Constitution, to 'direct the upbringing of her child'" (quoting *Pierce*, 264 U.S. at 534)).

11. In a False Claims Act case, what is the standard used by the Seventh Circuit for determining whether a false claim is material?

Response: In the Seventh Circuit, "[t]o prevail on a claim under the False Claims Act, the plaintiff generally must prove (1) that the defendant made a statement in order to receive money from the government; (2) that the statement was false; and (3) that the defendant knew the statement was false." *United States ex rel. Mamalakis v. Anesthetix Mgmt. LLC*, 20 F.4th 295, 300 (7th Cir. 2021) (internal quotation marks omitted). Also, "the defendant's misrepresentation must have been material to the government's payment decision; the Supreme Court has characterized the materiality requirement as 'rigorous.'" *Id.* at 300–01 (citing *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 181 (2016)). In *Universal Health Services*, the Supreme Court held that a misrepresentation is material "if it would likely . . . induce a reasonable person to manifest his assent, or the defendant knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent to the transaction." 579 U.S. at 193 (internal quotation marks and citation omitted). The Supreme Court also held that a misrepresentation is not material "merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment" or "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated." *Id.* at 195.

12. 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: My process or approach is to read the parties' arguments, as well as the cited cases to ensure that the cases stand for the offered propositions. Then, I conduct my own independent research to confirm that the cited cases are not outliers and to ensure that I have a full understanding of the particular substantive law at issue. At no time during this process do I let my personal preferences affect my research or the result reached. As a sitting federal judge, I swore an oath to discharge my duties faithfully and impartially, and I take that obligation very seriously.

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?

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision. That being said, because the issue is unlikely to ever be before me, I am comfortable acknowledging that *Brown* was correctly decided.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision. That being said, because the issue is unlikely to ever be before me, I am comfortable acknowledging that *Loving* was correctly decided.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it

would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to follow the precedent of the Supreme Court and the Seventh Circuit fully and faithfully. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision.

14. 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 December 28, 2021, staff for Senator Dick Durbin contacted me regarding my potential nomination to the Seventh Circuit Court of Appeals to fill the anticipated vacancy that would arise when Judge Diane Wood takes senior status. On January 6, 2022, an attorney from the White House Counsel's Office contacted me to discuss my potential nomination. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 13, 2022, the President announced his intent to nominate me for the position and my nomination was transmitted to the Senate on April 25, 2022.

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

Response: No.

16. **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.

17. **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.

18. **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.

19. **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.

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

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

       Response: No.

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

       Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

22. 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? 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.

Response: No.

b. 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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

c. 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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

24. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

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

Response: No.

b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

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

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

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

   Response: No.

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

   Response: No.

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

   Response: No.

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

   Response: On May 18, 2022, the Office of Legal Counsel (OLP) provided me with a copy of these questions. After reviewing the questions and case materials, I drafted my answers. I then considered feedback from OLP and submitted my final answers to the Committee.

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

Questions for the Record for John Lee, Nominee for the Seventh Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: The Equal Protection Clause of the Fourteenth Amendment prohibits the states from denying any person "the equal protection of the laws." U.S. Const. amend. XIV. Additionally, the right to equal protection of the laws as guaranteed by the Fourteenth Amendment has been found by implication in the due process clause of the

Fifth Amendment, which applies to federal government action. *Johnson v. Robison*, 415 U.S. 361, 364 (1974); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Under Supreme Court precedent, a particular group qualifies as a "suspect class"—and any government actions adversely affecting that group must survive strict scrutiny—if the group possesses an "immutable characteristic determined solely by the accident of birth" or if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson*, 415 U.S. at 375 n.14 (internal quotation marks and citations omitted). In *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964), the Court held that race is a suspect class. Accordingly, based on this precedent, if state or federal government action based on race does not survive strict scrutiny, it is unlawful under the Constitution. In addition, Congress has enacted various statutes that prohibit race discrimination. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), the Fair Housing Act of 1968, 42 U.S.C. § 3605(a); Civil Rights Act of 1866, 42 U.S.C. § 1981.

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

Response: As a sitting federal district judge, I would describe my judicial philosophy as one of judicial respect and restraint. I believe that a judge should respect the limited role that the courts play within the context of our constitutional system; respect the rule of law and applicable precedents; and respect the parties by providing a just, fair, and impartial forum for the resolution of the case. These elements lead to the exercise of judicial restraint in that, I believe, the role of a judge should be limited to the particular dispute before the court and the judge's rulings must be circumscribed by the governing constitutional provisions, federal statutes, and/or Supreme Court and Seventh Circuit precedents. I have been unable to identify a particular Supreme Court Justice who has expressed a judicial philosophy most analogous to my own.

3. 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; specif[ically] the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Supreme Court has applied this methodology in certain circumstances. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Under this definition, I would not characterize myself as an "originalist" or an ascriber to any particular method of textual interpretation. As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent.

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

Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). Under this definition, I would not characterize myself as a "living constitutionalist" or an ascriber to any particular method of textual interpretation. As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent.

5. 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: When evaluating a constitutional issue of first impression, I would apply the interpretative methodologies recognized by the Supreme Court and the Seventh Circuit. For example, in *District of Columbia v. Heller*, the Supreme Court noted when evaluating the Second Amendment that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008).

6. 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: In *District of Columbia v. Heller*, the Supreme Court noted when evaluating the Second Amendment that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). Similarly, in *Bostock v. Clayton County*, the Supreme Court recognized the importance of "the ordinary public meaning of [a statute's] terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020).

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

Response: The Constitution is an enduring document. It is changed only through the amendment process set forth in Article V.

8. In December 2021, you denied public employees and other public officials' claims to their claims that the requirement they be fully vaccinated against COVID-19 is a violation of their substantive due process rights in *Troogstad v. City of Chicago*. Why did you hold their privacy interest was "not absolute" and that Governor Pritzker's Executive Order did not deny their substantive due process rights?

Response: In *Troogstad v. City of Chicago*, the plaintiffs contended that the Defendants' vaccine mandates, which required covered employees of the State of Illinois and the City of Chicago to be vaccinated (unless they received a valid medical or religious exemption) as a condition of continued employment, violated substantive due process. No. 21 C 5600, 2021 WL 5505542, at *3 (N.D. Ill. Nov. 24, 2021). More specifically, they argued that the orders infringed their "right to bodily autonomy" because they compelled the employees to receive medical treatment they did not want. *Id*. at *3 (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 (1990) (holding that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment")).

I found that Plaintiffs were unlikely to succeed on the merits of their substantive due process challenge because the Seventh Circuit's decision in *Klaassen v. Board of Trustees of Indiana University*, 7 F.4th 592 (7th Cir. 2021), foreclosed such a claim. In *Klaassen*, the Seventh Circuit rejected a substantive due process challenge to a vaccine mandate for students at a public university on grounds that the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "show[ed] that plaintiffs lack[ed]" a fundamental right to refuse vaccination during a pandemic. 7 F.4th at 593. As a district judge, the Seventh Circuit's holding that "there can't be a constitutional problem with vaccination against [COVID-19]" was, and is, binding on me. *Id*.; see *Troogstad,* 2021 WL 5505542, at *5 (stating that Klaassen "command[s] this result").

As to the specific quote referenced in the question, despite the fact that *Klaassen* foreclosed Plaintiffs' claims from the outset, I went on to address the merits of their due process challenge. I explained that although "there certainly is" a privacy interest implicated by a vaccination requirement like the one Plaintiffs challenged, *Jacobson*—and the numerous appellate decisions finding that COVID-19 vaccination requirements do not infringe a fundamental right to bodily autonomy—showed that that interest is "limited by 'reasonable conditions essential to the safety, health, and peace' of the public." *Id.* (alterations omitted) (first quoting 197 U.S. at 26, and then citing *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293 n.35 (2d Cir. 2021)).

9. In March 2020, you upheld Governor Pritzker's COVID-19 order limiting gatherings to ten people or fewer in *Cassell v. Snyders*, stating that the order "preserv[ed] relatively robust avenues for praise, prayer, and fellowship, and passes constitutional muster." Do you believe this upheld the purpose of the Free Exercise Clause, or prohibited it, and why?

Response: On March 20, 2020, at the onset of the pandemic, the State of Illinois issued a "stay-at-home" order, which, among other things, limited activity outside the home and prohibited gatherings of more than ten individuals, including attendance at schools and movie theaters. The order subsequently was amended to allow individuals to leave their homes to perform certain "essential activities" and permitted individuals to attend worship programs so long as they complied with social distancing requirements and refrained from gatherings of greater than ten. Furthermore, the order encouraged religious organizations and houses of worship to use online or drive-in services to protect the

health and safety of their congregants and permitted small group worship meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit, as well as allowing individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members.

The plaintiffs filed a lawsuit challenging the order as an unconstitutional abridgement of their religious rights under the First Amendment and filed a motion for temporary restraining order and preliminary injunction, requesting that enforcement of the order be stayed. In evaluating the motion, I noted that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks omitted), and utilized the Seventh Circuit's test that a party seeking a preliminary injunction must show that (1) its case has "some likelihood of success on the merits," (2) it has "no adequate remedy at law," and (3) "without relief it will suffer irreparable harm." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). If the moving party meets these requirements, I must "weigh[] the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied." *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011).

As to the merits of the plaintiffs' Free Exercise claim, I found that it was governed by Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905), which held that, when faced with an epidemic, courts should only overturn emergency public health measures if they lack a "real or substantial relation to [public health]" or amount to "plain, palpable invasion[s] of rights." *Jacobson*, 197 U.S. at 31. This holding was consistent with the holdings of other courts to have addressed the issue at that time. *See, e.g., In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021) (mem.); *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB, 2020 WL 1979970, at *4–5 (C.D. Cal. Apr. 23, 2020). After carefully reviewing the factual record, I found that the Illinois stay-at-home order satisfied *Jacobson*, because it reasonably advanced the state's legitimate goal of safeguarding the public from the COVID-19 pandemic, given the severity and virulence of the virus, for which there was (at the time) no cure, vaccine, or effective treatment.

In addition to applying the holding in *Jacobson*, I also evaluated whether the state's order would withstand strict scrutiny under the First Amendment's Free Exercise Clause. That provision prevents the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" unless it demonstrates a "compelling government interest that justifies the burden." *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007). However, "neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (citing *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 879–80 (1990)). In

other words, a "neutral law of general applicability is constitutional if it is supported by a rational basis." *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017).

Based upon the record and applying available legal precedents, I found that the state order was neutral and generally applicable because, among other things, it treated comparable secular activities, such as attending schools and movie theaters, no better than similar religious activities. In all three settings, individuals gathered closely together to engage in joint activity. Based upon this reasoning, I applied the rational basis test and found that the plaintiffs' Free Exercise claim was unlikely to succeed on the merits. This then led me to conclude that, based upon the Seventh Circuit's "sliding scale approach," where the less likely a claimant is to win, the more that the balance of harms must weigh in his favor, *see Valencia v. City of Springfield*, 883 F.3d 859, 966 (7th Cir. 2018), the plaintiffs had not satisfied the requirements for preliminary injunctive relief, noting that "[w]hile plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic."

My decision in *Cassell* came at the very beginning of the COVID-19 pandemic, and I did not have the benefit of the Supreme Court's guidance in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), among other cases, which clarified the standards courts should apply when judging whether a public health regulation impermissibly burdens the exercise of religion in violation of the Free Exercise Clause. Both of these cases emphasized that district courts tasked with determining whether a public health regulation violates free exercise must apply strict scrutiny, even if it bears a reasonable relation to public health, if the regulation "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. Comparability "is concerned with the risks various activities pose, not the reasons why people gather." *Id.*; *see also Cuomo*, 141 S. Ct. at 65 (holding that an order that singles out religious exercise for harsher treatment than secular activity cannot be "neutral" and "generally applicable" and must survive strict scrutiny to be upheld).

10. 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: To establish a Free Exercise claim under the First Amendment, a plaintiff must show that the government action in question has burdened the exercise of a sincerely held religious belief. *See Fulton v. City of Phila*., 141 S. Ct. 1868, 1876 (2021). Under *Employment Division v. Smith*, 494 U.S. 872 (1990), however, neutral government restrictions of general applicability that only incidentally burden religion will be upheld, as long as they are supported by a rational basis. *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82); *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017). Otherwise, government action burdening religious activity must pass strict scrutiny. *Fulton*, 141 S. Ct. at 1881.

In order to determine whether a government restriction is neutral, a court engages in a two-part inquiry. First, the court considers whether the law is facially neutral—that is, whether the law "regulate[s] or outlaw[s] conduct because it is religiously motived," or "impose[s] special disabilities on the basis of ... religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). If the answers to these questions are yes, the law must pass strict scrutiny. *See id.* If the answers are no, the court proceeds to the second step and evaluates whether the restriction's enactment or enforcement was motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–31 (2018) (holding that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause because the state civil rights commission expressed open hostility to religion in enforcing the law). That said, even if the restriction was not motivated by religious animus, it still must satisfy strict scrutiny if it is not "generally applicable." That is, the government restriction must apply to religious and secular activity in the same way; it cannot "in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542; *see Ill. Bible Colls. Ass'n*, 870 F.3d at 639–40. The Supreme Court's recent decision in *Fulton v. City of Philadelphia* explained that laws are not generally applicable if they allow for a system of individualized exemptions that require the government to inquire into the reasons for the conduct at issue. 141 S. Ct. at 1877.

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

Response: To establish a Free Exercise claim under the First Amendment, a plaintiff must show that the government action in question has burdened the exercise of a sincerely held religious belief. *See Fulton v. City of Phila*., 141 S. Ct. 1868, 1876 (2021). Under *Employment Division v. Smith*, 494 U.S. 872 (1990), however, neutral government restrictions of general applicability that only incidentally burden religion will be upheld, as long as they are supported by a rational basis. *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82); *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017). Otherwise, government action burdening religious activity must pass strict scrutiny. *Fulton*, 141 S. Ct. at 1881.

In order to determine whether a government restriction is neutral, a court engages in a two-part inquiry. First, the court considers whether the law is facially neutral—that is, whether the law "regulate[s] or outlaw[s] conduct because it is religiously motived," or "impose[s] special disabilities on the basis of ... religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). If the answers to these questions are yes, the law must pass strict scrutiny. *See id.* If the answers are no, the court proceeds to the second step and evaluates whether the restriction's enactment or enforcement was motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–31 (2018) (holding that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause because the state civil rights commission expressed open hostility to religion in enforcing the law). That said, even if the restriction was not motivated by religious animus, it still must satisfy strict scrutiny if it is not "generally applicable." That is, the

government restriction must apply to religious and secular activity in the same way; it cannot "in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542; *see Ill. Bible Colls. Ass'n*, 870 F.3d at 639–40. The Supreme Court's recent decision in *Fulton v. City of Philadelphia* explained that laws are not generally applicable if they allow for a system of individualized exemptions that require the government to inquire into the reasons for the conduct at issue. 141 S. Ct. at 1877.

12. 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*, the Supreme Court held that petitioners were entitled to a preliminary injunction because they were likely to succeed on the merits of their claim that the executive order violated the Free Exercise Clause. 141 S. Ct. 63 (2020). The Court first determined that, because the executive order specifically targeted religious exercise for harsher treatment than secular activity, it was not "neutral" and "generally applicable." *Id.* at 65 (2020). Thus, the order had to satisfy strict scrutiny, which requires a law targeting religious exercise to be "narrowly tailored" to serve a "compelling state interest." *Id.* at 67 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)) (internal quotation marks omitted). Although the Court found that the state's interest in combatting COVID-19 was "unquestionably" compelling, the regulation failed the "narrowly tailored" prong because the order was far stricter than necessary to abate the spread of the virus. *Id.* The Court then went on to address the "irreparable harm" and "public interest" prongs of the preliminary injunction standard, and found that based on petitioners' concrete First Amendment injury and the fact that less restrictive measures could have protected the public from the spread of COVID-19, petitioners were entitled to injunctive relief.

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

Response: The Supreme Court's decision in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 1296. *Tandon* also stated that, when assessing whether two activities are "comparable" for purposes of the Free Exercise Clause, the court must consider "the asserted government interest that justifies the regulation at issue." *Id.* In other words, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause because the state civil rights commission expressed open hostility to religion in enforcing the law. 138 S. Ct. 1719, 1729–31 (2018). The holding in *Masterpiece Cakeshop* establishes that, even if a law is facially neutral, the Court must ask whether the law's enactment or enforcement was motivated by religious animus on the part of the government in evaluating a Free Exercise claim. If the answer to this question is yes, the law must survive strict scrutiny analysis. *See id.* This step requires the Court to search the record for evidence of bias against religious belief. *See id.*

16. 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 Free Exercise Clause of the First Amendment protects religious belief so long as it is "sincerely held," regardless of whether it comports with the guidance or official position of a person's faith. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Indeed, a sincerely held religious belief "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). As a sitting district court judge and a nominee to the Court of Appeals, it would be inappropriate for me to make a statement on the "official position" of a particular religious denomination; therefore, I am unable to offer an opinion as to this issue.

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

Response: See response to 16a.

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

Response: See response to 16a.

17. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court

reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court held that the "ministerial exception" to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, foreclosed plaintiffs' employment discrimination claims brought under that statute. 140 S. Ct. 2049, 2055 (2020). The ministerial exception, which the Supreme Court first recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, grants religious institutions immunity from employment discrimination suits brought by "ministers" of the institution. 565 U.S. 171, 188 (2012). The *Hosanna-Tabor* Court held that this immunity was necessary to protect the right of religious institutions to decide matters of church organization and doctrine free from government interference. *See id.* In *Our Lady of Guadalupe*, the Court provided additional guidance on how to determine which employees are "ministers" and, therefore, subject to the exemption. The Court clarified that "what matters, at bottom, is what an employee does." *Our Lady of Guadalupe*, 140 S. Ct. at 2064. That is, a court must look to the functions the employee performs and ask whether they are religious in nature. *See id.* at 2064–66. Applying this standard to the facts of the case, the Supreme Court concluded that the plaintiffs, who were two teachers at religious schools, qualified as "ministers" because they had "prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities." *Id.* at 2066.

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

Response: In *Fulton v. City of Philadelphia*, the Supreme Court held that Philadelphia's policy to not contract with foster care agencies that refused to certify same-gender foster couples was not neutral or generally applicable and, therefore, was subject to strict scrutiny. 141 S. Ct. 1868 (2021). The Supreme Court then concluded that "the interest of the City in the equal treatment of prospective foster parents and foster children . . . cannot justify denying [plaintiff] an exception for its religious exercise" and invalidated the policy. *Id.* at 1882.

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

Response: *Mast v. Fillmore County* involved a challenge under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, to a Minnesota county ordinance requiring all residents to install septic systems in their homes. 141 S. Ct. 2430 (2021). The Minnesota Court of Appeals found that the ordinance did not violate RLUIPA because the state had a compelling interest in ensuring

uniform septic system installation. *See id.* at 2431. The Supreme Court granted certiorari, vacated the judgment, and remanded the case in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *Mast*, 141 S. Ct. at 2430. Justice Gorsuch issued a concurrence, emphasizing that the compelling interest element of strict scrutiny "requires a more precise analysis," namely, whether the government's interest is compelling in light of the particular harms it will impose on the religious community or individual challenging the law. *Id.* at 2432 (quoting *Fulton*, 141 S. Ct. at 1881). He also wrote that the state court erred in failing to "give due weight" to the exemptions from the ordinance given to other secular groups such as hunters, fishers, and cabin owners. *Id.* Quoting *Fulton*, Justice Gorsuch noted that the state needed to provide a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others." *Id.* (quoting 141 S. Ct. at 1882).

20. Would it be appropriate for the court to provide its employees trainings which include the following:

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

Response: I am not aware of any trainings on these topics conducted by the District Court for the Northern District of Illinois or the Seventh Circuit. Any employee trainings should be consistent with the Constitution and comply with all applicable federal employment laws.

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

Response: See response to 20a.

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

Response: See response to 20a.

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

Response: See response to 20a.

21. 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.

22. 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 not aware of any role played by Seventh Circuit judges in the selection of employee training materials. That said, any employee training materials should be consistent with the Constitution and comply with all applicable federal employment laws.

23. Is the criminal justice system systemically racist?

Response: I have not had occasion to study or analyze whether the criminal justice system as a whole is systemically racist; therefore, I have no opinion to offer on that matter. What I can say is that, as a sitting district judge, I have presided over six hundred criminal cases. And, in each case, I have diligently analyzed the applicable legal precedent and the facts of the particular case without regard to an individual's race, except when doing so was expressly relevant to a particular legal issue as required by the Supreme Court or the Seventh Circuit. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986). I will continue that practice as a circuit judge, if I am fortunate enough to be confirmed.

24. Does America suffer from "systemic sexism"?

Response: I have not had occasion to study or analyze whether America as a whole suffers from "systemic sexism;" therefore, I have no opinion to offer on that matter. Because this is question that bears on public policy, the more appropriate forum to investigate and address this issue is the legislative branch of government.

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

Response: Under Article II of the Constitution, the President has the power to nominate and appoint individuals to certain high-level federal government positions with the advice and consent of the Senate. Moreover, the executive branch of our government, like the legislative and judicial branches, must faithfully abide by the terms of the Constitution and all relevant federal statutes and regulations. If the issue raised by this question were to come before me in my capacity as a district judge or a circuit judge (if I am confirmed), I would apply the governing Supreme Court and Seventh Circuit precedents to the facts of the particular case.

26. 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.

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

Response: As a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment on whether Congress should increase the number of justices, decrease the number of justices, or leave the number as it is. This question of

public policy is best left to the political branches of our constitutional government to consider.

28. In 2018, you dismissed the plaintiff's claim in *Eldridge v. Challenging Law Enforcement Official* that their Second Amendment rights were violated when the Illinois Concealed Carry Licensing review took "at least twenty months" to determine whether [the plaintiff] posed a danger to himself or others so that he might receive a concealed-carry permit.

a. Why did you reason that there "[did] not appear to be a clearly established constitutional right regarding the timing of decisions that impact gun-possession laws"?

Response: In *Eldridge v. Challenging Law Enforcement Official*, the plaintiff. Mr. Eldridge, brought a lawsuit against The Illinois Concealed Carry Licensing Review Board and its individual members. No. 17-CV-4241, 2018 WL 1561729 (N.D. Ill. Mar. 30, 2018). Mr. Eldridge's application for a concealed-carry gun license had allegedly been pending for twenty months without explanation, and he sought injunctive relief and monetary damages. He based the case, in part, on the Second Amendment right of an individual to bear arms. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

By the time Eldridge's complaint was before me, however, the Licensing Review Board already had issued his concealed-carry license. Accordingly, his request for injunctive relief was moot, and his only remaining claim against the Licensing Board and its members was for civil damages. *Eldridge*, 2018 WL 1561729, at *1. But "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In determining whether qualified immunity applies, I evaluate whether a plaintiff has shown a violation of a constitutional right, see *Graham v. Connor*, 490 U.S. 386, 397 (1989), and whether that right was clearly established at the time of the alleged violation, *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If the answer is "no" to either inquiry, then the defendant is entitled to qualified immunity. *See Koh v. Ustich*, 933 F.3d 836, 844 (7th Cir. 2019).

Using this framework, I proceeded to determine whether Eldridge's right regarding the timing of decisions that impact gun possession was clearly established. The Supreme Court has repeatedly held that whether a right is "clearly established" for the purposes of qualified immunity cannot be "define[d] . . . at a high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (cleaned up). "The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (cleaned up). Accordingly, it was my role in *Eldridge* to determine whether the constitutionality of delays in gun license

issuance in particular were clearly established. Because Seventh Circuit precedent at the time had held in a similar context (involving the return of confiscated firearms) that "courts have not established [constitutional] time limits for holding hearings and making decisions on [such] motions", *Rhein v. Coffman*, 825 F.3d 823, 827 (7th Cir. 2016), I held that, for the purposes of qualified immunity, any right to a decision as to the issuance of a gun license was not clearly established for the purposes of qualified immunity. In other words, without any factually similar case law to put government officials on notice that a delay in licensing may have violated Mr. Eldridge's Second Amendment rights, qualified immunity barred his suit against the Licensing Review Board.

To be clear, both *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), applied to Mr. Eldridge's case, as all binding Supreme Court precedent applies to lower court cases. But neither of those cases dealt with a comparable factual scenario—a delay in the issuance of a gun license. Without factual similarity, these cases did not create a "clearly established constitutional right" within the meaning of qualified immunity.

b. Why do you believe the Court's rulings in *McDonald* and *Heller* did not apply?

Response: See response to 28a.

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

Response: Under the binding precedent established in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595.

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

Response: The Supreme Court has held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Constitution guarantees an individual right to bear arms. "Like most rights," the Court explained, "this right . . . is not unlimited." *Id*. at 626. But the Court declined to establish the exact test or level of scrutiny that would apply to Second Amendment challenges. *Ezell v. City of Chi.*, 651 F.3d 684, 701 (7th Cir. 2011).

The Seventh Circuit, in applying *Heller*, has established a two-pronged approach to Second Amendment challenges. First, a court must ask "if the restricted activity falls within the scope of the Second Amendment." *White v. Ill. State Police*, 15 F.4th 801, 811 (7th Cir. 2021) (citing *Ezell*, 651 F.3d at 701). This step considers, as a historical and textual matter, whether the regulated activity is the type of activity normally protected under the Second Amendment; if not, the inquiry is over. *See Ezell*, 651 F.3d at 701–03.

If the regulated activity is the type protected under the Second Amendment, the Court proceeds to a means-end scrutiny analysis. This "'requires the court to evaluate the

regulatory means the government has chosen and the public-benefits end it seeks to achieve.' . . . Though some form of heightened scrutiny always applies, there is no fixed standard of review. Instead, the precise standard of review 'depend[s] on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.'" *White*, 15 F.4th at 811 (quoting *Ezell*, 651 F.3d at 703). "[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. [And] laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right." *Ezell*, 651 F.3d at 708. The Seventh Circuit has applied something close to strict scrutiny to laws that prohibit, rather than regulate, gun ownership for law-abiding citizens, *see id.* at 707, but a test closer to intermediate scrutiny in cases challenging regulations of gun ownership by those with criminal convictions. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). While I am aware of no Supreme Court or Seventh Circuit opinion affording this right more or less protection than any other constitutional right, different laws and constitutional provisions require the application of different legal precedents. As a sitting district judge and, if confirmed, as a circuit judge, I will apply fully and faithfully Supreme Court and Seventh Circuit precedent should I encounter a legal challenge under the Second Amendment.

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

Response: Under Supreme Court precedent, claims alleging violations of an individual's right to vote and claims alleging violations of an individual's right to own a firearm are protected by different constitutional tests.

As a "general rule . . . 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy' the Fourteenth Amendment's protections of the right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). But, "[h]owever slight [a] burden [on the right to vote] may appear,. . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–289 (1992)).

By contrast, the Supreme Court has declined to clarify exactly what level of scrutiny applies to Second Amendment challenges, leaving the questions to the lower courts. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). And while the Seventh Circuit has developed jurisprudence to address the protections of the Second Amendment, *see*, *e.g.*, *White v. Ill. State Police*, 15 F.4th 801, 811 (7th Cir. 2021), I am not aware of any case law explicitly comparing these protections to the constitutional protections to the right to vote.

32. In March 2021, you held in *Sherry v. City of Chicago* that the City did not deny the

officer's Second Amendment rights and cited the statute of limitations had run. How would the officer have known about the possibility and viability of a Second Amendment claim in 2006 given that *District of Columbia v. Heller* was decided in 2008, *McDonald v. City of Chicago* was decided in 2010, and the contours of the fundamental right to keep and bear arms are still being litigated in federal courts today?

Response: My March 2021 opinion in *Sherry v. City of Chicago*, No. 18 C 5525, 2021 WL 1103481 (N.D. Ill. Mar. 23, 2021), did not deal with the plaintiff's Second Amendment rights. It addressed his Fifth Amendment and Fourteenth Amendment rights to due process and how they were implicated by his placement on restricted duty status by the Chicago Police Department. *Id.* at *2–3. Those claims were time-barred.

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

Response: Under the United States Constitution, the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. As a sitting federal judge, my current role in the justice system is to evaluate the facts of cases and controversies brought by parties with standing to adjudicate their legal claims. I resolve cases and controversies on a case-by-case basis and examine the parties' legal arguments based on the law as I understand it. The law includes binding precedents of the Supreme Court and the Seventh Circuit. As a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment in the abstract as to whether in all instances it is appropriate for the Executive under the Constitution to refuse to enforce a law, absent constitutional concerns. That being said, the Supreme Court has held that the "exclusive authority and absolute discretion to decide whether to prosecute a case" lies with the Executive. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

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

Response: The Supreme Court has described prosecutorial discretion as "carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Bond v. United States*, 572 U.S. 844, 865 (2014). To my knowledge, the Supreme Court has not given a final definition for when an administrative rule change is substantive, although the Court has described such rule changes as those "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

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

Response: Under its power under Article I of the Constitution, Congress has enacted the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 1391 *et seq.*, whereby federal district courts may impose death sentences under certain specified circumstances. *See United States v. Tsarnaev*, 142 S. Ct. 1024, 1037 (2022). Furthermore, the Supreme Court has

upheld the death penalty as constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 177 (1976). Because the President "shall take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, the President acting alone lacks the authority to amend the FDPA or its prescribed sentences for criminal offenses.

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

Response: In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court considered the stay of a nationwide injunction against the Center for Disease Control's eviction moratorium. Previously, the district court had ruled that the CDC had exceeded its statutory authority in issuing the moratorium, but stayed enforcement of its judgment while the case was on appeal. However, when that moratorium expired, the CDC extended it, and the plaintiffs returned to the district court, asking the court to lift the previous stay. The district court agreed, but the appellate court reversed. The Supreme Court then vacated the stay. In so doing, it applied the four-factor test from *Nken v. Holder*, 556 U.S. 418 (2009), to decide whether to lift the stay of the injunction: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted). The Court found that the plaintiffs' likelihood of success on the merits was high, as the CDC had very likely exceeded its authority; and it found that landlords across the country were seeing substantial injury, even as the government's interest in the matter decreased. *Id.* at 2490. Accordingly, the Court lifted the stay of the district court's judgment against the CDC. *Id.*

Senator Josh Hawley
Questions for the Record

John Lee
Nominee, U.S. Court of Appeals for the Seventh Circuit

1. **Judge Ketanji Brown Jackson, who has been nominated to the Supreme Court, has refused to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether you have used them in the past to increase the sentence you imposed on a child pornography offender. Please provide citations:**

   Response: I am not aware of the exact statements or actions of Justice Jackson to which the question refers. That said, I am familiar with the United States Sentencing Guidelines, which offer an advisory framework for sentencing criminal defendants upon conviction. *See United States v. Booker*, 543 U.S. 220, 243 (2005). Furthermore, 18 U.S.C. § 3553(a) requires that I consider the Guidelines in "impos[ing] a sentence sufficient, but not greater than necessary, to comply with the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; ... to afford adequate deterrence to criminal conduct; ... to protect the public from further crimes of the defendant; and ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 3553(a)(2). Congress also requires judges to consider "any pertinent policy statement ... issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments." *Id.* § 3553(a)(5).

   To my knowledge, I have sentenced three offenders for crimes related to child pornography as of this date: *United States v. Merrill*, 16-cr-114; *United States v. Jones*, 17-cr-417; and *United States v. Christmann*, 17-cr-50085. In those cases, I imposed terms of imprisonment of 15 years, 15 years, and 10 years, respectively. I have applied each of the enhancements below as appropriate based upon the individualized circumstances of the case.

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

      Response: I applied the enhancement for material involving a prepubescent minor in *Christmann* and *Jones* based upon the individualized circumstances of each case.

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

Response: I applied the enhancement for sadistic or masochistic conduct or other depictions of violence in *Christmann* based upon the individualized circumstances of the case.

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

Response: I applied the enhancement for offenses involving the use of a computer in *Merrill*, *Jones*, and *Christmann* based upon the individualized circumstances of each case.

d. The enhancements for the number of images involved

Response: I applied the enhancement for the number of images involved (U.S.S.G. § 2G2.2(b)(7)) in *Merrill* and *Christmann* based upon the individualized circumstances of each case.

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

a. Do you agree with that philosophy?

Response: I believe the proper role of a judge is to faithfully apply the law and governing precedents to the facts of the particular case before the court in a fair and impartial manner. A judge must not allow his personal beliefs or preferences impact the consideration of a case or the result.

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

Response: Federal judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. As a sitting district judge, I have done my utmost to abide by this oath and will continue to do so, if I am confirmed to the Seventh Circuit.

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

Response: While the United States Supreme Court has stated that "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant," the Court "has recognized ... certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013). The abstention doctrines that arise most frequently include:

The *Pullman* abstention doctrine, which is applicable "where a federal constitutional issue might be mooted or presented in a different posture if a pertinent state law issue which is currently undecided were to be resolved in a particular way." *E&E Hauling, Inc. v. Forest Pres. Dist. of DuPage Cnty.*, 821 F.2d 433, 436 (7th Cir. 1987) (citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941)).

The *Burford* abstention doctrine, which addresses the situation where parallel federal court jurisdiction would interfere with an elaborate, specially designed, state regulatory scheme. *Burford v. Sun Oil Co.*, 319 U.S. 315, 327–34 (1943). In the Seventh Circuit, a court may abstain under *Burford* when "faced with difficult questions of state law that implicate significant state policies" or "when concurrent federal jurisdiction would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) (internal quotation marks omitted).

The *Younger* abstention doctrine, which prohibits a federal court's interference with pending state judicial proceedings absent extraordinary circumstances. *See Younger v. Harris*, 401 U.S. 37, 54 (1971); *see also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). In the Seventh Circuit, *Younger* abstention is appropriate where "there is an ongoing state proceeding that is judicial in nature, involves important state interests, provides the plaintiff an adequate opportunity to raise the federal claims, and no exceptional circumstances exist." *Ewell v. Toney*, 853 F.3d 911, 916 (7th Cir. 2017).

The *Colorado River* abstention doctrine, which recognizes a narrow set of circumstances in which a federal suit should yield to a concurrent parallel state suit involving the same subject matter. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 818–20 (1976). In determining whether the doctrine is applicable, courts in the Seventh Circuit consider ten factors, none of which is, in itself, determinative. They include: "1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim." *LaDuke v. Burlington N. R.R. Co.*, 879 F.2d 1556, 1559 (7th Cir. 1989).

The *Rooker-Feldman* abstention doctrine, which "prevents the lower federal courts from

exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the district court proceedings commenced.'" *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)); *see D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923). The Seventh Circuit employs a two-step analysis. *Andrade v. City of Hammond*, 9 F.4th 947, 950 (7th Cir. 2021). First, the court asks "whether a plaintiff's federal claims are independent or, instead, whether they either directly challenge a state court judgment or are inextricably intertwined with one." *Id.* (internal quotation marks omitted). Second, the court determines "whether the plaintiff had a reasonable opportunity to raise the issue in state court proceedings." *Id.* (internal quotation marks omitted).

The ecclesiastical abstention, which has its roots in the First Amendment's Free Exercise and Establishment Clauses and "respects the authority of churches to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions' free from governmental interference." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013).

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: To the best of my recollection, I have never worked on a legal case or representation in which I opposed a party's 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: In *District of Columbia v. Heller*, the Supreme Court noted when evaluating the Second Amendment that "the public understanding of a legal text in the period after its enactment or ratification ... is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). Similarly, in *Bostock v. Clayton County*, the Supreme Court recognized the importance of "the ordinary public meaning of [a statute's] terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020). As a sitting district judge and, if confirmed, a circuit judge, I would fully and faithfully follow Supreme Court and Seventh Circuit precedent as to the methodology to employ when construing constitutional provisions.

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

    Response: As a federal district judge, I adhere to binding precedent where a federal statutory or regulatory provision has been interpreted by the United States Supreme Court or the Seventh Circuit. If there is no binding precedent, I begin with the plain language of the pertinent statute or regulation. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545

U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). If the language "is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). A statute is ambiguous if it is susceptible of two reasonable interpretations. *Houghton v. Payne*, 194 U.S. 88, 99 (1904); *see Hackl v. Comm'r*, 335 F.3d 664, 667 (7th Cir. 2003).

Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *Exxon Mobil*, 545 U.S. at 568–69, it has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language, *id.* at 568. That said, the Supreme Court has acknowledged that extrinsic materials, including legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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: Please see my answer to Question 6.

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

Response: In *District of Columbia v. Heller*, the United States Supreme Court referenced English common law when construing the ordinary public meaning of the Second Amendment. 554 U.S. 570 (2008). I am not aware of other instances where the Supreme Court employed the laws of foreign nations to interpret the Constitution. As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent as to the methodology to employ when construing constitutional provisions.

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: In *Glossip v. Gross*, the Supreme Court held that a petitioner seeking to stay an execution on the grounds that execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment must make several showings. First, the petitioner must show that "the State's [execution] protocol creates a demonstrated risk of

severe pain." 576 U.S. 863, 878 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)). Next, he "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52). Furthermore, as the Supreme Court recognized in *Bucklew v. Precythe*, the Eighth Amendment, as originally understood, "does not guarantee a prisoner a painless death," but only forbids "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superadd[ition] of terror, pain, or disgrace." 139 S. Ct. 1112, 1124 (2019) (cleaned up). The Seventh Circuit is bound by these holdings and must follow this precedent in its review of execution protocols.

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: Yes. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) ("[W]here . . . the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."); *see also Glossip v. Gross*, 576 U.S. 863, 878 (2015).

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: No.

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: When deciding whether a facially neutral state action substantially burdens religion in violation of the Free Exercise Clause, a court must first examine the record to determine whether the enactment or enforcement of the law betrayed an animus toward religious belief. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct.

1719, 1729–31 (2018); *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 740 (7th Cir. 2015) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." (alteration omitted) (quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993))). If evidence of animus is present, the law receives strict scrutiny. *Lukumi Babalu*, 508 U.S. at 534. Even if the law is found not to be motivated by animus, however, the law still receives strict scrutiny unless it is "generally applicable." *See id.* at 542–44. In other words, the law must apply to religious and secular activity in the same way; it cannot "in a selective manner impose burdens only on conduct motivated by religious belief" without satisfying strict scrutiny. *Id.* at 542; *see Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639–40 (7th Cir. 2017). The Supreme Court's recent decision in *Fulton v. City of Philadelphia* explained that laws are not generally applicable if they allow for a system of individualized exemptions that require the government to inquire into the reasons for the conduct at issue. 141 S. Ct. 1868, 1877 (2021). Additionally, in *Tandon v. Newsom*, the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021). If the law is both neutral (on its face and in practice) and generally applicable, it receives rational basis review. *See Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 474 U.S. 872, 878–80 (1990). On the other hand, if it fails either prong, it receives strict scrutiny and can stand "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi Babalu*, 508 U.S. at 546).

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: To establish a Free Exercise claim under the First Amendment, a plaintiff must show that the government action in question has burdened the exercise of a sincerely held religious belief. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). Under *Employment Division v. Smith*, 494 U.S. 872 (1990), however, neutral government restrictions of general applicability that only incidentally burden religion will be upheld, as long as they are supported by a rational basis. *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82); *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017). Otherwise, government action burdening religious activity must pass strict scrutiny. *Fulton*, 141 S. Ct. at 1881.

In order to determine whether a government restriction is neutral, a court engages in a two-part inquiry. First, the court considers whether the law is facially neutral—that is, whether the law "regulate[s] or outlaw conduct because it is religiously motived," or "impose[s] special disabilities on the basis of ... religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). If the answers to these questions are yes, the law must pass strict scrutiny. *See id.* If the answers are no, the court proceeds to the second step and evaluates whether the restriction's enactment or

enforcement was motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729–31 (2018) (holding that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause because the state civil rights commission expressed open hostility to religion in enforcing the law). That said, even if the restriction was not motivated by religious animus, it still must satisfy strict scrutiny if it is not "generally applicable." That is, the government restriction must apply to religious and secular activity in the same way; it cannot "in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542; *see Ill. Bible Colls. Ass'n*, 870 F.3d at 639–40. The Supreme Court's recent decision in *Fulton v. City of Philadelphia* explained that laws are not generally applicable if they allow for a system of individualized exemptions that require the government to inquire into the reasons for the conduct at issue. 141 S. Ct. at 1877. Additionally, in *Tandon v. Newsom*, the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021).

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 Supreme Court has held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981)). Indeed, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court emphasized that a court's "narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction'" 573 U.S. 682, 725 (2014) (citation omitted)); *see Vinning-El v. Evans*, 657 F.3d 591, 593 (7th Cir. 2011) ("A personal religious faith is entitled to as much protection as one espoused by an organized group."). As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent as to this issue.

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)?

Response: In *District of Columbia v. Heller*, the Supreme Court held that "the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). "Like most rights," the Court explained that "this right . . . is not unlimited," *id.* at 626, and it clarified that the individual right to keep and bear arms did not invalidate "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

With this established, the Supreme Court went on the consider the statute at issue and ruled that the District of Columbia's prohibition on handguns in the home was unconstitutional, as was the requirement that any handguns in a person's home be "unloaded and disassembled or bound by a trigger lock or similar device." *Id.* at 630.

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: To my recollection, I have adjudicated one claim related to the Second Amendment. *See Eldridge v. Challenging L. Enf't Off.*, No. 17-CV-4241, 2018 WL 1561729 (N.D. Ill. Mar. 30, 2018).

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?

Response: I understand Justice Holmes to have been saying that the Justices in the majority were reading their preferred economic theory into the Constitution, rather than protecting the "liberty" actually contemplated by the Fourteenth Amendment. In so doing, the majority was subverting what Holmes called "the natural outcome of a dominant opinion" as embodied in the statute at issue. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). I agree that a judge should not allow personal preferences or views to impact the judge's consideration or ruling in a case.

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

Response: I understand that the Supreme Court has abrogated *Lochner*. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (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?

Response: Absent a change in law, only the Supreme Court can overrule its own precedent. As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully apply all Supreme Court precedent applicable to the cases before me.

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

Response: Yes.

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?

Response: The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (cleaned up). And in 1992, the Court held that control of 80% to 95% of a particular market with no readily available substitutes is sufficient to survive a motion for summary judgment as to a monopoly claim under the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). That said, the Seventh Circuit cautioned that "while market share may indicate market power in certain cases, the two are not necessarily the same." *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989). If I am confirmed, I will apply the applicable Supreme Court and Seventh Circuit precedents in evaluating any antitrust actions that come before me.

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

Please see my response to Question 17a.

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.

Please see my response to Question 17a.

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

Response: My general understanding is that the "federal common law" can refer to two distinct concepts. First, it can refer to the "federal general common law," which federal courts had previously applied in deciding diversity cases. The Supreme Court has long since held that such "federal common law" does not exist. *See Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

Second, it can refer to a body of law that the federal courts have created "to protect uniquely federal interests." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1509 (2022) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). These interests include foreign relations, *see id.*, and "certain controversies between States." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020). But this second category "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Id.* (quoting U.S. CONST. art. I, § 1).

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?

Response: The Supreme Court has repeatedly held that interpretation of a state constitutional provision is a matter of state law. In interpreting a state constitution, federal courts must defer to the decisions of the highest court of that state. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

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

Response: Although in statutory interpretation "the authoritative statement is the statutory text," *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), the Supreme Court has, for example, noted that "[f]ederal and state courts, . . . can and do apply identically worded procedural provisions, in widely varying ways." *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011).

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

Response: The Supreme Court has made clear that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I am duty-bound to fully and faithfully follow the precedent of the Supreme Court and the Seventh Circuit. However, as a district judge and a nominee to the circuit court, it would be inappropriate for me to comment on the correctness of any particular Supreme Court decision. That

being said, because the issue is unlikely to ever be before me, I am comfortable acknowledging that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided.

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

Response: Article III limits federal courts' jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. "[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) (citation and internal quotation marks omitted). The authority to award injunctive relief also depends on "traditional principles of equity jurisdiction" as they existed in 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). Furthermore, as the Supreme Court held in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." In *Trump v. Int'l Refugee Assistance Project*, the Supreme Court upheld, in part, a nationwide injunction that applied to parties and similarly situated non-parties. 137 S. Ct. 2080, 2088–89 (2017) ("An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction.").

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

Response: See my answer to Question 21.

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

Response: Whether and in what circumstances nationwide injunctions are appropriate is a topic of much legal debate, *see, e.g., City of Chicago v. Barr*, 961 F.3d 882, 912–18 (7th Cir. 2020). And, as a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment on this issue in the abstract.

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 answer to Question 21.

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

Response: The Supreme Court has held that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be

equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985). In so doing, federalism promotes several important goals, including: "preserv[ing] the integrity, dignity, and residual sovereignty of the States"; "secur[ing] to citizens the liberties that derive from diffusion of sovereign power"; "mak[ing] the government more responsive"; and "ensuring that laws enacted in excess of delegated governmental power cannot direct or control [an individual's] actions." *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (internal quotation marks omitted).

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 answer to Question 3.

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

Response: As a general matter, the purpose of damages is to compensate for past harms, while the purpose of injunctive relief is to prevent future or further harm. *See*, *e.g.*, *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983). Furthermore, the Supreme Court has characterized injunctive relief is an "extraordinary remedy" based on the likelihood of irreparable harm and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Over time, the Supreme Court has recognized a number of "fundamental" rights that fall within this category, including: the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to abortion, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and to marry a partner of the same sex. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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: Please see my answer to Question 12.

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

Response: The Supreme Court has recognized that "'the exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (quoting *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

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

Response: Please see my answer to Question 12.

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

Response: Please see my answer to Question 13.

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

Response: The Supreme Court has held that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–1(a), (b), "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: Based on a review of files and electronic databases, I have found the following opinions I have written that directly address constitutional or statutory claims involving the free exercise of religion: *Garrick v. Moody Bible Inst.*, 412 F. Supp. 3d 859 (N.D. Ill. 2019); *Cassell v. Snyders*, 458 F. Supp. 3d 999 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (7th Cir. 2021), *abrogated by Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Garrick v. Moody Bible Inst.*, 494 F. Supp. 3d 570 (N.D. Ill. 2020); *Troogstad v. City of Chi.*, ___ F. Supp. 3d ____, 2021 WL 5505842 (N.D. Ill. Nov. 24, 2021); *Troogstad v. City of Chi.*, ___ F. Supp. 3d ____, 2021 WL 6049975 (N.D. Ill. Dec. 21, 2021).

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 the proper role of a judge is to faithfully apply the law and governing precedents to the facts of the particular case before the court in a fair and impartial manner. A judge must not allow his personal beliefs or preferences impact the consideration of a case or the result.

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, I have never taken the position in litigation or a publication that a federal or state statute was unconstitutional.

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: I have not had occasion to study or analyze whether America as a whole is systemically racist; therefore, I have no opinion to offer on that matter. What I can say is that, as an immigrant who came to this country as a four-year-old boy from South Korea, my parents could not have dreamed that I would be a sitting district judge, let alone a nominee to the Seventh Circuit. The more appropriate forum to investigate and address this issue is the legislative branch of government.

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

Response: When I was a practicing attorney, it was my professional obligation to zealously advocate in the best interests of my client. I stopped being a practicing attorney over ten years ago, and at this time, I am unable to recall a particular instance when I took a position in litigation that conflicted with my personal views.

33. How did you handle the situation?

Response: Please see my answer to Question 32.

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: Although I have read many of the Federalist Papers over the years, I cannot say that any particular Federalist Paper has shaped my view of the law more than others.

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

Response: A federal judge has a duty to decide cases and controversies that come before the court based on an impartial analysis of the relevant facts and law, regardless of personal beliefs. As a sitting district judge, I fully and faithfully apply Supreme Court and Seventh Circuit precedent to the facts before me in every case and will continue to do so, if confirmed.

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: On January 26, 2012, I testified before the United States Senate Committee on the Judiciary at my confirmation hearing to be a United States District Judge for the Northern District of Illinois. Furthermore, prior to becoming a federal judge, I provided deposition testimony in a fee dispute between my prior law firm, Freeborn & Peters LLP, and a former client. That matter was resolved, and I do not have a copy of the transcript.

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)?

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: My spouse owns shares in Apple, Inc.

b. Amazon?

Response: My spouse owns shares in Amazon.com, Inc.

c. Google?

Response: No.

d. Facebook?

Response: No.

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, I have never authored or edited a brief that was filed in court without my name.

41. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, I have not confessed error to a court.

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: At my confirmation hearing, I took an oath to tell the truth and accepted an obligation to answer your questions to the best of my ability. I have done so and will continue to do so with my answers to these questions.

Senator Mike Lee
Questions for the Record
John Z. Lee, Nominee to be United States Circuit Judge for the Seventh Circuit

1. How would you describe your judicial philosophy?

Response: As a sitting federal district judge, I would describe my judicial philosophy as one of judicial respect and restraint. I believe that a judge should respect the limited role that the courts play within the context of our constitutional system; respect the rule of law and applicable precedents; and respect the parties by providing a just, fair, and impartial forum for the resolution of the case. These elements lead to the exercise of judicial restraint in that, I believe, the role of a judge should be limited to the particular dispute before the court and the judge's rulings must be circumscribed by the governing constitutional provisions, federal statutes, and/or Supreme Court and Seventh Circuit precedents.

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

Response: As a sitting district judge and, if confirmed, a circuit judge, I would look for any binding precedent where the Supreme Court or the Seventh Circuit has interpreted the statute at issue. Where there is no binding precedent, I would begin with the plain language of the pertinent statute or regulation. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). If the language "is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). A statute is ambiguous if it is susceptible of two reasonable interpretations. *Houghton v. Payne*, 194 U.S. 88, 99 (1904); *see Hackl v. Comm'r*, 335 F.3d 664, 667 (7th Cir. 2003).

Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *Exxon Mobil*, 545 U.S. at 568–69, it has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. *Id.* at 568. That said, the Supreme Court has acknowledged that extrinsic materials, including legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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

Response: As a sitting district court judge, when I am confronted with a question requiring me to interpret the Constitution, I look to the precedents of the Supreme Court and Seventh Circuit for guidance. If no precedent is on point, I would apply the traditionally recognized tools of constitutional interpretation, including original public meaning, to resolve the matter.

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

Response: When interpreting a constitutional provision, as a sitting district judge and, if confirmed, a circuit judge, I would apply the interpretative methodologies recognized by the Supreme Court and the Seventh Circuit. For example, in *District of Columbia v. Heller*, the Supreme Court noted when evaluating the Second Amendment that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008).

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: As stated above, as a sitting district judge and, if confirmed, a circuit judge, I would look for any binding precedent where the Supreme Court or the Seventh Circuit has interpreted the statute at issue. Where there is no binding precedent, I would begin with the plain language of the pertinent statute or regulation. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). If the language "is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). A statute is ambiguous if it is susceptible of two reasonable interpretations. *Houghton v. Payne*, 194 U.S. 88, 99 (1904); *see Hackl v. Comm'r*, 335 F.3d 664, 667 (7th Cir. 2003).

Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *Exxon Mobil*, 545 U.S. at 568–69, it has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language, *id.* at 568. That said, the Supreme Court has acknowledged that extrinsic materials, including legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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: In *Bostock v. Clayton County*, the Supreme Court recognized the importance of "the ordinary public meaning of [a statute's] terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020). As a sitting district judge and, if confirmed, a circuit judge, I would fully and faithfully apply all Supreme Court and Seventh Circuit precedent as to this issue.

6. What are the constitutional requirements for standing?

Response: Article III limits federal courts' jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. The United States Supreme Court has "long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016).

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

Response: In *M'Culloch v. Maryland*, the Supreme Court held that Congress has implied powers derived from the Necessary and Proper Clause. 17 U.S. 316, 436–37 (1819). Congress's implied powers are "such . . . as are necessary and proper to carry into effect [its] enumerated powers." *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936). The extent of Congress's implied powers are "limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.'" *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

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

Response: The Supreme Court has instructed that the question of whether Congress has the authority to enact a law "does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). However, even though Congress is not required to refer to any specific power when it enacts a law, the court still must consider whether the law falls within Congress's enumerated powers. *See Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Over time, the Supreme Court has recognized a number of "fundamental" rights not expressly enumerated in the Constitution that fall within this category, including: the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to abortion, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and to marry a partner of the same sex. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

10. What rights are protected under substantive due process?

Response: See my response to Question 9.

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

Response: The Supreme Court has differentiated between some personal rights, such as the right to abortion, with economic rights such as those at stake in *Lochner v. New York*. *Compare Roe v. Wade*, 410 U.S. 113 (1973), *and Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *with West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). As a sitting district judge and, if I am fortunate enough to be confirmed, a circuit judge, I am dutybound to follow the controlling precedent of the Supreme Court and the Seventh Circuit fully and faithfully.

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

Response: The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Under the precedents of the United States Supreme Court, "Congress may regulate the channels of interstate commerce[,] . . . . persons or things in interstate commerce, ... [and] those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609–10 (2000). But the Commerce Clause does not permit Congress to "compel[] individuals to become active in commerce by purchasing a product, on the ground

that their failure to do so affects interstate commerce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: Under Supreme Court precedent, a particular group qualifies as a "suspect class" if it possesses an "immutable characteristic determined solely by the accident of birth" or if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted); *see, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (religion); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964) (race); *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (nationality).

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

Response: Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (internal quotation marks omitted). It is a foundational principle of our nation, "designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Constitution "diffuses power the better to secure liberty"). Because separation of powers is a protection afforded to the people, "whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge." *Collins*, 141 S. Ct. at 1780 (citing *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 2196 (2020)); *see Bond v. United States*, 564 U.S. 211, 223 (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: As a sitting district judge and, if confirmed, a circuit judge, I would fully and faithfully apply the precedent of the Supreme Court and the Seventh Circuit as to the particular issue. For example, in *INS v. Chadha*, the Supreme Court held that, when faced with a claim that Congress had exceeded its constitutional authority, courts must "begin . . . with the presumption that the challenged statute is valid," 462 U.S. 919, 944 (1983), and analyze the challenged action in light of the "provisions of the Constitution [that] prescribe and define the respective functions" of the three branches of government. *Id.* As for a challenge to the President's use of executive power, the Supreme Court has directed courts to begin by reviewing "the Constitution's text and structure, as well as precedent and history bearing on the

question." *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring))."

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

Response: The proper role of a judge is to faithfully apply the law and governing precedents to the facts of the particular case before the court in a fair and impartial manner. A judge must not allow his personal beliefs or preferences to impact the consideration of a case or the result.

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

Response: Both are equally unacceptable outcomes.

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 had occasion to study the trends of judicial review from 1789 to present. Accordingly, I cannot say with any level of certainty what trends, if any, exist in the Court's actions, or what may drive them. Furthermore, as a sitting district judge and, if confirmed, a circuit judge, my role is to adjudicate the particular case before me based upon the government law and the facts of the case. Whatever trends there may be should have and will have no impact on my duties.

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

Response: Black's Law Dictionary defines judicial review as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, BLACK'S LAW DICTIONARY (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Judicial Supremacy*, BLACK'S LAW DICTIONARY (11th ed. 2019). Based only on these definitions, my understanding is that judicial review is the process by which courts review and decide issues of constitutionality, whereas judicial supremacy is the requirement that other coequal branches of government adopt and follow the Supreme Court's holdings on constitutional issues.

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, and have an independent obligation to uphold the Constitution. Furthermore, the Supreme Court has held that its decisions interpreting the Constitution are binding on the lower courts, *see*, *e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 345 (1975); other branches of the federal government, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); and state governments. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a sitting district judge, I faithfully adhere to these precedents.

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: My understanding of this passage in Federalist 78 is that the proper role of a judge is to decide only the discrete questions raised by the particular case before the court and not to engage in making policy or law. As a sitting district judge, I have adhered to this principle by adjudicating only the cases and controversies that are brought before the court where the parties have standing.

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: A lower court judge is duty-bound to follow precedents of the Supreme Court and the circuit in which the judge sits. The Supreme Court has reminded lower courts that they "are bound by summary decisions of this Court until such time as the Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (cleaned up). Lower courts must not only follow precedent, they must do so faithfully. *See United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022) ("[L]ower courts cannot create prophylactic supervisory rules that circumvent or supplement legal standards set out in decisions of this Court."). As a sitting district judge and, if I am confirmed, a circuit judge, I will fully and faithfully apply the precedents of the Supreme Court and the Seventh Circuit to the individual facts of the cases before me.

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: As a district judge, when I sentenced defendants convicted of crimes, I carefully considered all of the factors enumerated in 18 U.S.C. § 3553(a), including the need to promote respect for the law, to provide just punishment for the crime, to protect the public from any further crimes by the defendant, and to deter further criminal activity.

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 that definition of "equity" and, therefore, cannot offer any meaningful comment on it. That said, as a sitting district judge and, if confirmed, a circuit judge, it is my duty to treat all parties that come before me justly, fairly, and impartially, whatever their backgrounds may be. Furthermore, if the definition of the word "equity" is raised in a case before me, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent applicable to that issue.

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

Response: Black's Law Dictionary defines equality as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *Equality*, BLACK'S LAW DICTIONARY (11th ed. 2019). By contrast, the same edition defines equity as "[f]airness; impartiality; evenhanded dealing." *Equity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

Response: The guarantees of the Equal Protection Clause of the Fourteenth Amendment are defined by the Constitution and the Supreme Court's interpretation of it. As a sitting district judge and, if confirmed, circuit judge, it is my duty to apply that precedent to the facts of any case before me to determine whether a particular law, policy, or practice violates the Equal Protection Clause.

27. How do you define "systemic racism?"

Response: I have heard this term used in a variety of contexts, but have not had occasion to study its meaning. Therefore, I am unable to comment on how "systemic racism" is defined in those many contexts.

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

Response: One definition of "critical race theory" is "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, BLACK'S LAW DICTIONARY (11th ed. 2019). I have not had occasion to study how the term is otherwise defined.

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

Response: I have had no occasion to study the relationship between systemic racism and critical race theory and, therefore, am unable to provide a meaningful response to this question.

Senator Ben Sasse
Questions for the Record for John Z. Lee
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 11, 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: As a sitting federal district judge, I would describe my judicial philosophy as one of judicial respect and restraint. I believe that a judge should respect the limited role that the courts play within the context of our constitutional system; respect the rule of law and applicable precedents; and respect the parties by providing a just, fair, and impartial forum for the resolution of the case. These elements lead to the exercise of judicial restraint in that, I believe, the role of a judge should be limited to the particular dispute before the court and the judge's rulings must be circumscribed by the governing constitutional provisions, federal statutes, and/or Supreme Court and Seventh Circuit precedents. I have been unable to identify a particular Supreme Court Justice who has expressed a judicial philosophy most analogous to my own.

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; specif[ically] the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Supreme Court has applied this methodology in certain circumstances. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Under this definition, I would not characterize myself as an "originalist" or an ascriber to any particular method of textual interpretation. As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully follow Supreme Court and Seventh Circuit precedent.

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

   Response: I believe that the text is the starting point for every question of constitutional or statutory interpretation. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (constitutional interpretation); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (statutory interpretation).

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

   Response: The Constitution is an enduring document. It is changed only through the amendment process set forth in Article V.

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

   Response: As a sitting federal district judge, I would describe my judicial philosophy as one of judicial respect and restraint. I believe that a judge should respect the limited role that the courts play within the context of our constitutional system; respect the rule of law and applicable precedents; and respect the parties by providing a just, fair, and impartial forum for the resolution of the case. These elements lead to the exercise of judicial restraint in that, I believe, the role of a judge should be limited to the particular dispute before the court and the judge's rulings must be circumscribed by the governing constitutional provisions, federal statutes, and/or Supreme Court and Seventh Circuit precedents. I have been unable to identify a particular Supreme Court Justice who has expressed a judicial philosophy most analogous to my own.

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: "Overruling precedent is never a small matter." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). The Supreme Court has stated that any departure from *stare decisis* "demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Willkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Similarly, the Seventh Circuit has held that "disagreement with a prior holding is an inadequate basis to overturn precedent. . . . We may only overturn precedent for a compelling reason." *United States v. Lamon*, 893 F.3d 369, 372 (7th Cir. 2018) (cleaned up). Such reasons include a legislative or regulatory change, *see Bethesda Lutheran Home and Servs., Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001), or a Supreme Court decision that undermines the precedent, *see Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006).

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: "Overruling precedent is never a small matter." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). The Supreme Court has stated that any departure from *stare decisis* "demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Willkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Similarly, the

Seventh Circuit has held that "disagreement with a prior holding is an inadequate basis to overturn precedent. . . . We may only overturn precedent for a compelling reason." *United States v. Lamon*, 893 F.3d 369, 372 (7th Cir. 2018) (cleaned up). Such reasons include a legislative or regulatory change, *see Bethesda Lutheran Home and Servs., Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001), or a Supreme Court decision that undermines the precedent, *see Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006).

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: As a federal district judge, I adhere to binding precedent where a federal statutory or regulatory provision has been interpreted by the Supreme Court or the Seventh Circuit. If there is no binding precedent, I begin with the plain language of the pertinent statute or regulation. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). If the language "is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). A statute is ambiguous if it is susceptible of two reasonable interpretations. *Houghton v. Payne*, 194 U.S. 88, 99 (1904); *see Hackl v. Comm'r*, 335 F.3d 664, 667 (7th Cir. 2003).

Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *Exxon Mobil*, 545 U.S. at 568–69, it has warned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language, *id.* at 568. That said, the Supreme Court has acknowledged that extrinsic materials, including legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id.* at 568.

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

Response: No. As a district judge, when I sentenced defendants convicted of crimes, I carefully considered all of the factors enumerated in 18 U.S.C. § 3553(a), including the need to promote respect for the law, to provide just punishment for the crime, to protect the public from any further crimes by the defendant, and to deter further criminal activity. Furthermore, § 3553(a)(6) requires me to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty

of similar conduct." Accordingly, I consider the criminal histories and conduct of comparable defendants without regard to their race or other protected characteristic when making sentencing determinations.

Questions from Senator Thom Tillis
for John Lee
Nominee to be United States Circuit Judge for the Seventh 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: One definition of judicial activism is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism*, BLACK'S LAW DICTIONARY (11th ed. 2019). Canon 3 of the Code of Conduct for United States Judges states that "a judge should perform the duties of the office fairly, impartially, and diligently." Accordingly, judicial activism is antithetical to a federal judge's obligation to be fair and impartial.

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

   Response: Impartiality is a requirement of every federal judge. Canon 3 of the Code of Conduct for United States Judges states that "a judge 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: The role of a judge is to faithfully apply the controlling law to the facts of the particular dispute before the court, regardless of the desirability of the outcome.

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

   Response: No.

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

   Response: As a sitting district judge and, if confirmed, a circuit judge, I will fully and faithfully apply all binding precedents of the Supreme Court and Seventh Circuit, including those pertaining to an individual's right to keep and bear arms under the

Second Amendment. *See, e.g., McDonald v. City of Chi.*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response to First Subpart: I would evaluate such a lawsuit by applying controlling Supreme Court and Seventh Circuit precedent to the facts of the specific case before me. However, because the Supreme Court has recently heard oral argument in a case on a similar issue, *see New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, and the decision in that case is still pending, as a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment on the proper approach to such an issue. Whatever the decision of the Supreme Court may be, I will fully and faithfully apply it as controlling precedent.

   Response Second Subpart: As a sitting district judge and, if confirmed, circuit judge, I would apply fully and faithfully all binding Supreme Court and Seventh Circuit precedents if this issue were to come before me. For example, the Supreme Court recently has stated that, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

   Response Third Subpart: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court has clarified that any government action that is not neutral or generally applicable must be subject to strict scrutiny under the Free Exercise Clause, even during a public health crisis. Other regulations pertaining to the pandemic continue to be challenged in the courts. As a sitting district judge and nominee to the Seventh Circuit, it would be inappropriate for me to comment in the abstract on such matters.

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 doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In determining whether qualified immunity applies, I ask whether a plaintiff has shown a violation of a constitutional right, *see Graham v. Connor*, 490 U.S. 386, 397 (1989), and whether that right was clearly established at the time of the alleged violation. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If the answer is "no" to either inquiry, then the defendant is entitled to qualified immunity. *See Koh v. Ustich*, 933 F.3d 836, 844 (7th Cir. 2019).

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 sitting district judge and, if I am fortunate enough to be confirmed, as a judge on the Seventh Circuit, I am bound by Supreme Court and Seventh Circuit precedent regarding the doctrine of qualified immunity. And I will continue to apply fully and faithfully that precedent to the facts before me in every case where this issue is raised. Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question that is best left to the political branches of our government.

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

Response: "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). As a sitting district judge and as a nominee to the Seventh Circuit, it would be inappropriate for me to comment on existing precedent, which establishes the scope of qualified immunity. That said, I will continue to apply fully and faithfully Supreme Court and Seventh Circuit precedent to the facts before me in every case where this issue is raised. The proper scope of qualified immunity protections for law enforcement is a question that is best left to the political branches of our government.

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

a. What experience do you have with copyright law?

Response: As an attorney, I worked on a number of cases involving copyright law. As a district judge, I have presided over numerous copyright infringement cases. Some of these cases have involved motions seeking injunctive relief, dismissal of the complaint, and summary judgment. One case in particular required a two-week jury trial.

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

Response: Based on a search of files and electronic databases, I found two opinions I authored involving the Digital Millennium Copyright Act, 17 U.S.C. § 1202 *et seq.*, ("DMCA"): *Milo Enters., Inc. v. Bird-X, Inc.*, No. 18 C 6315, 2022 WL 874625, at *9 (N.D. Ill. Mar. 24, 2022) (granting defendant's summary

judgment motion on plaintiff's DMCA claim); *Carter v. Pallante*, 256 F. Supp. 3d 791, 800–01 (N.D. Ill. 2017) (denying defendant's motion to dismiss a DMCA claim).

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

Response: To the best of my recollection, I have not been involved in any cases, either as a litigator or as a district judge, addressing intermediary liability for online service providers.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: As a district judge, I have presided over numerous cases involving alleged violations of a plaintiff's right to free speech under the First Amendment. Based on a search of Westlaw, I found no opinions I authored that involved the intersection of free speech and intellectual property issues, including copyright.

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: As a sitting district judge, I adhere to binding precedent where a federal statutory provision has been interpreted by the Supreme Court or the Seventh Circuit. If there is no binding precedent, I begin with the plain language of the pertinent statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). "If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). If the statutory text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common

understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted).

Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *Exxon Mobil*, 545 U.S. at 568–69, it has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. *Id.* at 568. That said, the Supreme Court has acknowledged that extrinsic materials, including legislative history, "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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

Response: Under the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, when interpreting a regulatory statute, the court first must analyze the statute's text and consider whether Congress "has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984); *see Am. Mining Congress v. E.P.A.*, 824 F.2d 1177, 1182 (D.C. Cir. 1987). If the statutory language is silent or ambiguous, the court then considers whether "Congress has authorized [an] agency to interpret the statute through rules carrying the force of law and [whether] the agency's interpretation is both reasonable and promulgated through the exercise of the authority given by Congress." *Brumfield v. City of Chi.*, 735 F.3d 619, 625–26 (7th Cir. 2013) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001)). If the court answers both questions in the affirmative, the agency's interpretation is entitled to deference under *Chevron*.

Furthermore, the Supreme Court has explained that "interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law" and are "entitled to respect" only to the extent that they have the "power to persuade"). *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)). The Seventh Circuit has indicated that an agency's interpretations "issued after formal adjudication or notice-and-comment procedures . . . may warrant substantial deference from courts." *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 863 (7th Cir. 2019) (citing *Christensen*, 529 U.S. at 587).

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 district judge, my role is to evaluate the facts of the specific case before me and apply the governing Supreme Court and Seventh Circuit precedent to those facts. As a district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment as to whether and to what extent 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.

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

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

Response: As a sitting district judge, I adhere to binding precedent where a federal statutory provision, such as the DMCA, has been interpreted by the United States Supreme Court or the Seventh Circuit. If there is no binding precedent, I begin with the plain language of the pertinent statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."), "If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450 (2002)). If the statutory text is ambiguous, the Supreme Court has stated that "courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the common understanding of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021) (internal quotation marks omitted). "Extrinsic materials [such as legislative history] have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil*, 545 U.S. at 568. Although the Supreme Court has not gone so far as to deem "legislative history inherently unreliable in all circumstances," *id.* at 568–69, it has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. *Id.* at 568.

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: As a sitting district judge, I adhere to the binding precedent of the Supreme Court and the Seventh Circuit. If I am fortunate enough to be confirmed

to the Seventh Circuit, I will continue to follow binding authority fully and faithfully.

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: As a district judge in the Northern District of Illinois, I have not observed specific instances of forum shopping or judge shopping. And my district has installed certain procedures to discourage such activity.

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

Response: See response to 15a.

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: As a district judge in the Northern District of Illinois, I have not observed specific instances of forum-selling. That said, I do not believe it is appropriate.

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?

Response: As a district judge in the Northern District of Illinois, I have not observed the concentration of certain types of cases in my district as the question describes. To the extent that the question is referring to the concentration of patent cases in certain other districts, I understand that the Judicial Conference currently is studying this issue.

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: As a district judge in the Northern District of Illinois, I have not observed the concentration of certain types of cases in my district as the question describes. To the extent that the question is referring to the concentration of patent cases in certain other districts, I understand that the Judicial Conference currently is studying this issue.

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

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

    Response: As a sitting district judge and a nominee to the Seventh Circuit, it would be inappropriate for me to comment in the abstract on how courts should resolve this question.

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

    Response: See response to 17a.