Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Ana Reyes
Judicial Nominee to the U.S. District Court for the District of Columbia

1. **In the context of federal case law, what is super precedent?**

   Response: The U.S. Supreme Court has not identified any type of precedent as "super precedent." If confirmed, I would apply fairly and faithfully all binding Supreme Court and D.C. Circuit precedent.

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

   Response: American Bar Association Model Rule 1.6 provides that "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year." The Model Rule states that the pro bono services should be provided to: "(1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means…" Model Rule 1.6 does not state that lawyers or law firms should undertake the pro bono prosecution of crimes. Moreover, it is my understanding that private parties cannot prosecute crimes.

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

   Response: I am not aware of the context for that quotation. 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). During my career, I have not found such labels to be useful in applying precedent in my cases. Whatever the relevant precedent is called, if confirmed, I would apply it to the facts of a case.

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

   Response: Judicial decisions should be based solely on applying the law, including any applicable statutes and precedent, to the facts of the case at hand.

5. **Is threatening Supreme Court Justices right or wrong? Please explain your answer.**

   Response: It is wrong to threaten a Supreme Court Justice with the intent of impeding that Justice's performance of his or her duties. The fair and faithful administration of justice requires that justices and judges be free to perform their duties without fear of harm or reprisal.

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

   Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees some rights not enumerated in the Constitution. Any such "fundamental" right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id*. at 721.

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

   Response: 18 U.S.C. § 3553(a)(6) states that courts should "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The U.S. Sentencing Guidelines provide that, "[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." Chapter 5H sets forth the personal characteristics that a court can, and cannot, consider in imposing a sentence.

8. **Please discuss your criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, and how many times you have argued before the court in a criminal matter.**

   Response: My two-decade career has involved primarily handling complex civil matters. This has included handling jury voir dire and motions and objections under the Federal Rules of Evidence, which apply in federal criminal cases. I have personally handled two felony cases: (i) a felony murder charge that resulted in a plea bargain after the jury was impaneled, and (ii) a drug possession and firearms near a school district charge that resulted in a plea bargain prior to trial. I have handled one child abuse case, which as I recall was charged as a misdemeanor; it resulted in a plea bargain.

9. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
   a. **How often have you cited to either of these tomes during the course of your work?**
   b. **How often have you had an opportunity to work within these constructs during the course of your career?**

   Response: My two-decade career has involved primarily handling complex civil matters. This has included handling jury voir dire and motions and objections under the Federal Rules of Evidence, which apply in federal criminal cases. I am generally familiar with the Federal Rules of Criminal Procedure and the U.S. Sentencing Commission's

Advisory Sentencing Guidelines. However, in the course of my criminal work (described above in my response to Question 8), I have not had occasion to cite to or work with them. If confirmed, I would ensure that I was fully familiar with both, and applicable precedent, before undertaking any criminal matter and sentencing any individual.

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

Response: Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief. It remains an open question whether courts have the power, under this rule or otherwise, to issue nationwide injunctions. In 2020, Justice Gorsuch highlighted that the U.S. Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with a request for a nationwide injunction, I would apply Supreme Court and D.C. Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: In *New York State Rifle & Pistol Assoc. v. Bruen*, 2022 WL 2251305 (2022), the U.S. Supreme Court held, "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' *Konigsberg v. State Bar of Cal.*, 366 U. S. 36, 50, n. 10 (1961)." *Id.* at *8. In evaluating a question under the Second Amendment, I would apply the U.S. Supreme Court precedents on the amendment, including *D.C. v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York Rifle & Pistol Assoc. v. Bruen*, 2022 WL 2251305 (2022), and D.C. Circuit precedent.

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

Response: The U.S. Supreme Court reaffirmed in *Washington v. Glucksberg*, 521 U.S. 702 (1997) that parents enjoy the constitutional right to direct the education of their children. *Id.* at 720.

13. **Do Blaine Amendments violate the Constitution?**

Response: In *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the U.S. Supreme Court considered the constitutionality of state laws that prohibit public monies being spent in aid of religious institutions or religious education. Such laws are

sometimes referred to as "Blaine Amendments," after a proposed, but failed, amendment to the federal constitution that would have prohibited such aid. Applying strict scrutiny to its review of the state laws at issue, the Court held the laws violated the Free Exercise clause of the First Amendment. If confirmed and presented with a case concerning a so-called Blaine Amendment law, I would apply Supreme Court and D.C. Circuit precedent fairly and faithfully to the review.

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

Response: 18 U.S.C. § 1507 provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

My understanding is that this provision prohibits an individual, with the requisite intent, from picketing or parading in or near a building housing a court of the United States, or in or near a building or residence occupied or used by a judge, juror, witness, or court officer, or using any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence.

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

Response: The U.S. Supreme Court has not yet ruled on whether 18 U.S.C. § 1507 is constitutional on its face. However, the Court did uphold a state statute modeled on the bill that became section 1507 in *Cox v. Louisiana*, 379 U.S. 559 (1965). Because the question may come before the federal courts, it would not be appropriate to comment on whether it is or is not constitutional.

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

Response: The Sixth Amendments guarantees the "assistance of counsel" in criminal cases. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court established that states must appoint lawyers to represent indigent criminal defendants. Right to counsel in a civil case is not expressly enumerated in the Constitution and the Court has not held that there is such an unenumerated right. Whether, as a policy matter, civil litigants should be afforded counsel is a policy question best left to the legislatures.

17. **Do you think law firms should allow their paying clients to influence which pro bono clients they take?**

Response: Per American Bar Association Model Rule 1.6, lawyers are to provide pro bono representation as part of their professional work. How law firms structure their pro bono practices is left to the discretion of each law firm, so long as the practice is consistent with applicable ethical rules. I am unaware of an ethical rule that addresses the extent, if any, to which law firms can allow paying clients to influence which pro bono clients they take. Of course, as described further below in response to Question 18, once a law firm undertakes to represent a pro bono client, the firm's lawyers owe that pro bono client their zealous advocacy irrespective of any other client's views.

18. **Do you think law firms should allow their paying clients to influence the positions they assert on behalf of other clients?**

Response: A lawyer is bound to represent zealously each of his or her clients. American Bar Association Model Rules, including Model Rules 1.7, 1.8, 1.9, and 1.10, prohibit law firms from representing clients under a conflict of interest. While every case is fact specific, in general it would be against ethical rules for a lawyer to be influenced in his or her representation of one client by another client.

19. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**
    a. **Was *Brown v. Board of Education* correctly decided?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a judicial nominee, it is not appropriate for me to comment on whether cases are correctly decided. However, *Brown v. Board of Education* and *Loving v. Virginia* are two of a few cases, along with, for example, *Marbury v. Madison*, that are so firmly rooted in American jurisprudence that they are no longer litigated in the courts. Therefore, I can say that they were correctly decided. Separately, *Dobbs v. Jackson Women's Health* has overruled *Roe v. Wade* and *Planned Parenthood v. Casey*. With the exception of *Roe* and *Casey*, in light of *Dobbs*, I would faithfully apply each of the cases identified above if it applied to a case before me.

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

Response: No.

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

Response: No.

21. **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.

22. **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.

23. **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.

24. **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.

25. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara**

Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No as to 25a. and b. Not to my knowledge as to 25c.

26. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No as to 26a. and b. Not to my knowledge as to 26c.

27. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
    d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No as to 27a. and b. Not to my knowledge as to 27c. and d.

28. **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?**

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

Response: No as to 28a. and b. Not to my knowledge as to 28c.

29. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

30. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**
    a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**
    c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

    Response: No as to 30a. In connection with my application to the Norton Federal Law Enforcement Nominating Commission, I was advised to reach out to the Hispanic National Bar Association. In that context, I came into contact with Robert Raben and his associate, Dylan Tureff.

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

Response: On February 15, 2021, I submitted a Judicial Candidate Questionnaire to Representative Eleanor Holmes Norton's D.C. Federal Law Enforcement Nominating Commission. I met with the Commission in March 2021, and Representative Norton separately in March 2021.

On December 20, 2021, I submitted another Judicial Candidate Questionnaire to Representative Eleanor Holmes Norton's D.C. Federal Law Enforcement Nominating Commission. I met with the Commission on January 13, 2022. On January 14, 2022, Representative Norton recommended my nomination to the White House. I met with officials from the White House Counsel's Office on January 18, 2022. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 27, 2022, the President announced his nomination of me to the court.

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

Response: I personally answered each of these questions based on my own analysis and legal research. I received minor feedback from a representative from the Office of Legal Policy and then proceeded to finalize these answers.

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

Questions for the Record for Ana C. Reyes, Nominee for United States District Court for the District of Columbia

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes.

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: If confirmed, I would work to emulate judges who treat all litigants, attorneys and staff with respect; prepare carefully for each hearing by reviewing the briefing and relevant precedent; listen carefully during oral arguments and come ready with incisive questions that move the arguments forward; find areas of agreement between the parties to narrow the issues in dispute; issue well-reasoned opinions that faithfully apply the law to the facts; move cases along quickly and efficiently; and work every day to uphold the rule of law. I would apply all binding U.S. Supreme Court and D.C. Circuit precedent, and my personal beliefs would not play any role in my work or opinions.

Throughout my career, I have studied U.S. Supreme Court and D.C. Circuit cases to assess the legal contours of my cases. I have not had occasion, however, to study the jurisprudence of each of the Justices in the Warren, Burger, Rehnquist, and Roberts courts.

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

Response: I agree with Justice Kagan's statement at her Supreme Court confirmation hearing that, the Founding Fathers, "laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists." Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Committee on the Judiciary, 111 Cong. (2010).

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). During my career, I have not found such labels to be useful in applying precedent in my cases. Whatever the relevant precedent is called, if confirmed, I would apply it to the facts of a case.

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: In interpreting the Constitution, the text of the provision at issue always controls. If the text is ambiguous, then, if confirmed, I would look to whether the U.S.

Supreme Court or D.C. Circuit has indicated that original meaning may be relevant to the interpretation of a particular provision as one relevant consideration.

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: To my knowledge, the U.S. Supreme Court has not yet directly addressed whether the public's current understanding of the Constitution or of a statute is ever relevant in determining their meaning. However, "[i]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2068 (2018).

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

Response: Please answer to Question 5 above.

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, provides that, with certain exceptions unrelated to judicial confirmation hearings, a "judge should not make public comment on the merits of a matter pending or impending in any court." Because the question of whether there are additional unenumerated rights in the Constitution is the subject of pending federal litigation and public debate, it would not be appropriate for me to comment on these questions.

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

Response: *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808 (2022), is binding precedent.

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

Response: *New York Rifle & Pistol Assoc. v. Bruen*, 2022 WL 2251305 (2022) is binding precedent.

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

Response: Yes.

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

Response: The First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" If confirmed and asked to adjudicate a case involving government regulation of a religious organization or religious people, I would faithfully apply U.S. Supreme Court and D.C. Court precedent interpreting this clause.

13. **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, New York v. Andrew M. Cuomo, Governor of New York*, the Court reasoned that the applicants, by demonstrating that zoned restrictions on public gathering applied to religious services but not to "essential services" including garages, acupuncture facilities, and manufacturing plants, had shown that the state's action was neither neutral toward religion nor of general applicability and must satisfy strict scrutiny. Because the State's executive order was an outright ban rather than a quantitative restriction on attendance, the Court held it was insufficiently narrowly tailored to survive strict scrutiny. *Roman Catholic Diocese*, 141 S. Ct. 63, 67 (2020). Next, the Court held that, by prohibiting worshippers from participating fully in religious services, the State's restriction would cause irreparable harm to congregants. *Id.* Finally, the Court found insufficient evidence that granting the injunction would affect the further spread of COVID-19. *Id*

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

Response: *Tandon* concerned restrictions on private gatherings put in place by the state of California during the global COVID-19 pandemic. Plaintiff pastors sued, arguing that the restrictions violated their right to free exercise of religion because they prevented them from holding indoor Bible studies and hosting communal worship. Applying strict scrutiny, the U.S. Supreme Court held that California's regulations treated "comparable secular activity more favorably than religious exercise" and were therefore neither neutral nor generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Court concluded that the plaintiffs were likely to succeed on the merits of their free exercise claim, and thus were entitled to an injunction. *Id.*

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

Response: The First Amendment protects the rights of Americans to hold and exercise religious beliefs in their daily lives. *See, e.g.*, *Capitol Square Rev. & Advisory Bd. v.*

Pinette, 515 U.S. 753 (1995); *Employment Div., Dep't. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990).

16. **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 C.R. Comm'n*, 138 S. Ct. 1719 (2018), the U.S. Supreme Court considered the unequal application of administrative commission proceedings against religious and secular parties to discrimination suits. After a baker refused to create a wedding cake for a same-sex couple due to his sincerely held religious beliefs, the couple filed a discrimination complaint to the Colorado Civil Rights Commission, which ultimately ruled against the baker. The Court held that the variance between the commission's disposition of the baker's discrimination case and its treatment of similarly-situated defendants of opposing viewpoint evinced "a clear and impermissible hostility toward the [baker's] sincere religious beliefs." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. The Court held that the state actor's hostility toward a party based on such religious beliefs violated the Free Exercise Clause of the First Amendment.

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

Response: Yes. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (holding that it is not for courts to decide that religious beliefs are mistaken or insubstantial, but rather to determine whether the "line drawn" reflects an "honest conviction") (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)); *Welsh v. United States*, 398 U.S. 333, 339 (1970) (reasoning that "the central consideration" is whether the beliefs "play the role of a religion and function as a religion in the registrant's life").

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

Response: In *Welsh v. United States*, 398 U.S. 333, 339 (1970), the Supreme Court held that that "intensely personal convictions which some might find 'incomprehensible' or 'incorrect'" can come within the meaning of religious belief.

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

Response: It is not for the courts to decide what religious beliefs or interpretations are mistaken or insubstantial, but rather whether the line drawn is an "honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: I do not believe it is appropriate for a judicial nominee to opine on the official stance of any church with respect to issues that are being litigated before the courts. If confirmed and the Catholic church's views were relevant to any particular matter, I would consider all briefing by the parties and any amici on the church's views.

18. **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 U.S. Supreme Court held that, "when a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." 140 S. Ct. 2049, 2068 (2020). Two teachers in the consolidated *Our Lady of Guadalupe School* matter fell into the "ministerial exception," namely, that religious institutions are immune from employment discrimination claims brought by certain employees. The Court determined that, "what matters, at bottom, is what an employee does." *Id.* at 2063. In the case, the two teachers fell within the exception as they, among other things, "performed vital religious duties." *Id*. at 2066. And in addition to educating the students in the Catholic faith, both teachers, "prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities." *Id.*

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the U.S. Supreme Court held that, "[t]he refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id.* at slip 15. In reaching its conclusion, the Court relied, in part, on the fact that the non-discrimination requirement of the City's standard foster care contract was not generally applicable.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022) the U.S. Supreme Court held that, "Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at slip 22.

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

Response: In *Kennedy v. Bremerton School District*, 2022 WL 2295034 (2022) a government entity "sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of

the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id.* at slip 31-32. The U.S. Supreme Court held that, [t]he Constitution neither mandates nor tolerates that kind of discrimination." *Id.* at slip 32.

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

Response: In his *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021) concurrence, Justice Gorsuch seemingly set out a three-part test he would use to assess First Amendment claims under *Fulton*: the government must define the state interest with precision, consider exceptions given to other groups, and demonstrate narrow tailoring with evidence.

23. **Is cultural assimilation, as symbolized by the American "melting pot," a good thing or a bad thing in your opinion?**

Response: Generally, a broad proposition such as this one cannot be answered with a simple yes or no, but requires analysis of specific facts and context. As an immigrant myself, I can say the following based on my personal experiences. My family and I have been blessed with numerous opportunities since arriving in the United States, and we are incredibly grateful to have become American citizens. I was able to grow from not speaking English in the first-grade to graduating from law school and practicing law in the Nation's Capitol. That progress was made possible by the help of countless neighbors, friends, and teachers who took me and my family into their communities. My family also has traditions related to our specific cultural identity that we have preserved and shared. I hope those traditions have helped enrich the experience of our communities.

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

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

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

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

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

Response: I am not aware of what role, if any, I would play, if confirmed, with respect to any trainings that the U.S. District for the District of Columbia might offer. In general, I think that trainings must comply with the U.S. Constitution and federal laws and regulations. In addition, I think the U.S. Judicial Conference is best positioned to assess what trainings federal court employees should receive.

25. **In *Grutter v. Bollinger*, what did the U.S. Supreme Court say about race-based admissions needing to be limited in time?**

Response: The U.S. Supreme Court said, "[r]ace-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. 306, 310 (2003).

26. **While at Harvard in 1996, you campaigned against California's then-proposed [] outlawed racial discrimination and racial preferences in government hiring, admissions, and contracting.**

a. **Do you have any concerns that affirmative action programs, particularly at your alma mater, Harvard, racially discriminate against Asian-Americans, many of whom grew up disadvantaged or are either immigrants or children of immigrants?**

Response: As a respectful correction, I did not campaign on any issue while at Harvard. I worked on the Stop Prop 209 campaign in California in 1996, and I did not begin my studies at Harvard Law School until 1997. I understand the question of affirmative action programs, particularly those at Harvard, are currently under review by the U.S. Supreme Court and it would therefore not be appropriate for me to comment on them at this time. If confirmed, I would apply any forthcoming decisions from the U.S. Supreme Court in these cases, as in any case, fairly and faithfully.

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

Response: Please see my response above to Question 24.

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

Response: Yes.

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

Response: I do not believe that as a judicial nominee I should instruct the Executive on the bases for making political appointments.

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

Response: I have not studied the criminal justice system and therefore cannot provide an opinion on this question, which I would leave to those who study the system.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme**

Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: I do not believe that as a judicial nominee it is appropriate for me to opine on the size of the U.S. Supreme Court. If confirmed, I would fairly and faithfully apply any binding precedent from the Court, no matter how many justices are sitting on the Court at the time the case issued.

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

Response: Yes, according to *D.C. v. Heller*, 554 U.S. 570 (2008).

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

Response: No.

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

Response: No.

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

Response: The U.S. Supreme Court has laid out its view of the original public meaning of the Second Amendment in its jurisprudence, including most thoroughly in .*C. v. Heller*, 554 U.S. 570 (2008).

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

Response: In *D.C. v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that a "ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that, "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." In *New York Rifle & Pistol Assoc. v. Bruen*, No. 2022 WL 2251305 (2022), the Court held that the government cannot "broadly prohibit[] the public carry of commonly used firearms for personal defense," and cannot "require[] law-abiding, responsible citizens to demonstrate a special need for self-protection distinguishable from that of the general community" (internal quotation omitted).

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

Response: If a case came before me, if confirmed, in which litigants claimed that the Executive refused to enforce a law, I would carefully review the parties' arguments and

binding legal precedent. I would apply the law to the facts of the case to render a fair and reasoned opinion.

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

Response: The Administrative Procedure Act describes rule-making as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule," for purposes of the statute, is defined to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Generally, my understanding is that prosecutorial discretion involves the privilege prosecutors enjoy to determine whether to charge an individual with a crime and, if he or she does so, whether to offer a plea.

39. **What do you understand to be a "Major Question" for the purposes of the "Major Questions Doctrine"?**

Response: The U.S. Supreme Court recently laid out the scope of the Major Questions Doctrine in *West Virginia v. EPA*, 20-1530 (2022). It held that, per the doctrine, administrative agencies must be able to point to "clear congressional authorization" when they claim the power to make decisions of vast "economic and political significance." *Id*. at 17, 19 (internal quotations omitted).

40. **What do you understand to be the distinction between the Major Questions Doctrine and the Non-Delegation Doctrine?**

Response: Please see my answer above to Question 39. The Major Questions Doctrine is a form of the Non-Delegation Doctrine, which more generally refers to the view that Congressional delegation of certain authority to administrative agencies violates the Separation of Powers.

41. **What do you understand to be the original meaning of an "officer of the United States" under the appointments clause of Article II?**

a. **What do you understand to be the distinction between "principal" and "inferior" officers of the United States?**

Response: In *U.S. v. Arthrex*, 141 S. Ct. 1970 (2021), the U.S. Supreme Court held that, "[o]nly an officer properly appointed to a principal office [through the Appointments Clause] may issue a final decision binding the Executive Branch." The Court did not, however, "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Id.* at slip 19 (internal quotation omitted).

42. **What do you understand to be the limitations on the President's powers to remove an "officer of the United States"?**

Response: Please see my response above to Question 41.

43. **What tools or methods should judges use in helping discern statutory ambiguity?**

Response: Courts apply canons of statutory construction and can refer to legislative history to discern statutory ambiguity.

44. **Is it ever appropriate to use legislative history to determine if a statute is ambiguous or not?**

Response: Legislative history can be used to determine whether a particular word or phrase has specialized meaning that the legislature intended to be applied.

45. **Do you believe that internal agency adjudications adequately protect Americans' due process rights?**

Response: The answer depends on the specific internal agency adjudication at issue.

46. **Do you believe that agency policymaking through administrative adjudication is consistent with the text and underlying principles of the Administrative Procedure Act?**

Response: Because the question of the scope of administrative adjudication is the subject of pending federal litigation and public debate, it would not be appropriate for me to comment on these questions.

47. **What do you believe falls into the category of "public rights"?**

Response: The public rights doctrine provides that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is reduced.

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

Response: The federal death penalty is provided for in a statute that can only be modified by Congress and then signed into law by the President. The President has the power to pardon defendants or commute their sentences.

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

Response: In *Alabama Association of Realtors v. HHS*, 2021 WL 3783142 (2021), the U.S. Supreme Court held that 42 U.S.C. § 264(a) does not give the Center for Disease Control the authority to impose a nationwide ban on evicting tenants from residential rental properties to slow the spread of COVID-19.

Senator Josh Hawley
Questions for the Record

Ana Reyes
Nominee, U.S. District Court for the District of Columbia

1. **Have you ever had a dating relationship with somebody who is or was a subordinate at your workplace?**

    a. **If so, how many times and with whom?**

    b. **If so, did you occupy a position of power over the person with whom you were in a relationship?**

    c. **If so, did the person with whom you entered into a relationship return to the workplace?**

    d. **If so, were you in a relationship while they were at the workplace?**

    e. **If so, are they still at the same workplace?**

    f. **If so, and they are not at the same workplace, why did they leave?**

    g. **Do you believe it would be appropriate for a federal judge to enter into a dating relationship with a law clerk or recent law clerk?**

    Response: I have spent twenty-one years at the same law firm. On two occasions during the course of my tenure, I have dated individuals I met at the firm, one while I was a junior associate and one while I was a partner. I married the individual I met while I was a partner, though we are no longer married. The firm does not prohibit workplace relationships and has numerous policies in place to ensure that, for example, a partner cannot impact the career of a subordinate. At all times, my relationships complied fully with all workplace policies.

    I do not believe it is appropriate for a federal judge to date a law clerk, recent law clerk or any other employee in his or her chambers.

2. **Judge Ketanji Brown Jackson, who will soon join the Supreme Court, made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you**

are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders:

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

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

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

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

Response: Because I have never served as a federal district court judge, I have never sentenced criminal defendants. If confirmed, I would consider and apply the factors set forth in 18 U.S.C. § 3553(a), the U.S. Sentencing Guidelines and the recommendations of the prosecution, defense attorneys, and probation office. I would take seriously the enhancements and departures outlined by the Sentencing Guidelines. I would carefully consider whether the facts of any particular case warranted the application of either.

3. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

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

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

   Response: I believe that the question of what penalties should be included as part of the U.S. Sentencing Guidelines is one for Congress to address.

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

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

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

   Response: I am not aware of the context for this quote and cannot comment on the full scope of Justice Marshall's philosophy. If confirmed, I would work to emulate judges who treat all litigants, attorneys and staff with respect; prepare carefully for each hearing by reviewing the briefing and relevant precedent; listen carefully during oral arguments and come ready with incisive questions that move the arguments forward; find areas of agreement between the parties to narrow the issues in dispute;

issue well-reasoned opinions that faithfully apply the law to the facts; move cases along quickly and efficiently; and work every day to uphold the rule of law. I would apply all binding U.S. Supreme Court and D.C. Circuit precedent, and my personal beliefs would not play any role in my work or opinions.

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

Response: Under the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments. *See Lance v. Dennis*, 546 U.S. 459, 463 (2006). The standard that lower courts, including the D.C. Circuit, follow comes from Justice Ginsburg's opinion in *Exxon Mobil Corp v. Saudi Basic Indus. Corp.*: federal district courts are prevented from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. 544 U.S. 280, 284 (2005). The D.C. Circuit has consistently followed the lead of the U.S. Supreme Court and applied the *Rooker-Feldman* doctrine narrowly. For example, in *Jackson v. Office of the Mayor of the District of Columbia*, the D.C. Circuit declined to apply the *Rooker-Feldman* doctrine because the appellant did not ask the district court to review and reject the Superior Court's dismissal of his state court complaint. 911 F.3d 1167, 1170 (D.C. Cir. 2018) (citing *Exxon*).

Under the Political Question doctrine, judicial review is excluded where "prominent on the surface" of the case is: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Under the *Younger* doctrine, federal courts will abstain from resolving disputes where a party seeks injunctive or declaratory relief in federal court against an ongoing, parallel state proceeding in recognition of "longstanding public policy against federal court interference with state court proceedings." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). The D.C. Circuit has applied *Younger* abstention where there is "no showing of bad faith, harassment, or some other extraordinary circumstance" that would make abstention inappropriate. *See Klayman v. Lim*, 830 Fed.Appx. 660, 662 (D.C. Cir. 2020) (quoting *Middlesex*, 457 U.S. at 435). The D.C. Circuit has also applied *Younger* abstention where three conditions are satisfied: (1) the ongoing state proceedings are judicial in nature; (2)

the state proceedings implicate important state interests; (3) the proceedings afford an adequate opportunity in which to raise the federal claims. *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518-19 (D.C. Cir. 1989) (citing *Middlesex Cnty Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433 (1982). Finally, *Younger* abstention does not apply where equitable relief is warranted by extraordinary circumstances. *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977). The D.C. Circuit has consistently followed one or both of these standards. *See, e.g.*, *Eisenberg v. West Virginia Office of Disciplinary Counsel, "OLDC"*, 856 Fed. Appx. 314, 316 (D.C. Cir. 2021).

Pullman abstention precludes federal courts from deciding federal constitutional question when the case may be decided on questions of state law. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Justice v. Superior Court, Dist. of Columbia*, 732 F.2d 949, 950 (D.C. Cir. 1984) ("this case falls squarely within the scope of the *Pullman* abstention doctrine.").

Generally, federal courts should not abstain to avoid duplicative state court proceedings. *Alabama Pub. Serv. Comm'n. v. Southern R. Co*., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result). In *Colorado River Water Conservation Dist. v. United States*, however, the U.S. Supreme Court articulated an exception to this rule, holding that "principles . . . of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,'" sometimes justify abstention. 424 U.S. 800, 817 (1976) (internal citations omitted). The Court applies this exception narrowly. *Id*. at 819 ("Only the clearest of justifications will warrant dismissal."). The D.C. Circuit has followed the lead of the Supreme Court. *See Reiman v. Smith*, 12 F.3d 222, 223-25 (D.C. Cir. 1993) (articulating the *Colorado River* test and concluding that the district court should not have abstained).

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

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

Response: I have not.

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

Response: The U.S. Supreme Court has addressed the role original public meaning should play in the interpretation of specific provisions and courts follow that precedent. For example, in *U.S. v. Heller*, 554 U.S. 570 (2008), the Court held that the Second Amendment should be interpreted based on its original public meaning.

8. Do you consider legislative history when interpreting legal texts?

Response: Extrinsic factors come into play only if a court finds that the text of a statute is ambiguous. Like an unambiguous statute, the court interprets an ambiguous statute by looking to the intent of the legislature. Courts assess legislative intent by examining the words of the statute as they were used at the time of enactment, the canons of statutory construction, and its legislative history.

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

Response: The U.S. Supreme Court has held that different sources of legislative history are accorded different weight. For example, excerpts from committee testimony are "among the least illuminating forms of legislative history." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (internal quotation omitted).

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

Response: It is not appropriate to rely on the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

9. Under the precedents of the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit, 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: A death row inmate who claims the state's proposed method of execution violates the Eighth Amendment's prohibition on cruel and unusual punishment must both establish that the method presents a "substantial risk" of severe pain beyond that of death itself and propose a method that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, No. 21-439, 2022 WL 2251307, at *4 (citing *Glossip v. Gross*, 576 U.S. 863, 868 (2015)). The penalty imposed is death, not death and additional unnecessary pain.

10. Under the Supreme Court's holding in *Glossip v. Gross*, 576 U.S. 863 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Please see my response above to Question 9. The alternative method proposed must be feasible, readily implemented, and significantly less likely to cause "superadded" pain to execution. *Glossip*, 576 U.S. at 868; *Bucklew v. Precythe*, 139 U.S. 1112, 1126 (2019).

11. Has the Supreme Court or the U.S. court of Appeals for the D.C. Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: The U.S. Supreme Court has declined to recognize a constitutional right to access a State's evidence for DNA testing. *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009). To my knowledge, the D.C. Circuit has not addressed whether such a right exists.

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

Response: No, none.

13. Under Supreme Court and U.S. Court of Appeals for the D.C. Circuit precedent, 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 case that you believe would be binding precedent.

Response: In, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the U.S. Supreme Court held that, "the government has the burden to establish that [a] challenged law satisfies strict scrutiny. To do so … it must do more than assert that certain risk factors are always present in worship, or always absent from the other secular activities the government may allow. Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address [the government's] interest …. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Id*. at 1296; *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020).

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

Response: Government actions that regulate religious activity are subject to strict scrutiny unless they are neutral and generally applicable. Determining whether an action is neutral and generally applicable requires a two-part analysis. First, a court must resolve whether a law is neutral, which includes looking both at whether it is facially neutral and whether religious animus motivated the challenged action. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729–31 (2018). If the action is not neutral, it is subject to strict scrutiny. Second, a court determines whether a government action is generally applicable. *Fulton v. City of Philadelphia*, 141

S. Ct. 1868, 1877 (2021). The court asks whether there is already "a mechanism for individualized exemptions," and whether the action "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. at 1877.

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

Response: The D.C. Circuit follows the precedent of the U.S. Supreme Court and applies the standard set out in *Hobby Lobby* and *Welsh*. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (holding that it is not for courts to decide that religious beliefs are mistaken or insubstantial, but rather to determine whether the "line drawn" reflects an "honest conviction") (internal quotation omitted); *Welsh v. United States*, 398 U.S. 333, 339 (1970) (reasoning that "the central consideration" is whether the beliefs "play the role of a religion and function as a religion in the registrant's life").

16. 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 *D.C. v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that a "ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

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: I have not.

17. 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: My understanding is that Justice Holmes was asserting that the Constitution does not favor one economic theory over another, though I am not familiar with Herbert Spencer's Social Studies. If confirmed, I would

apply U.S. Supreme Court and D.C. Circuit precedent to any question of constitutional interpretation.

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

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the U.S. Supreme Court upheld the constitutionality of state minimum wage legislation. The Court's decision overturned *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) and is generally regarded as having ended the *Lochner* era.

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

a. If so, what are they?

Response: I do not currently have a belief that any particular Supreme Court decision is no longer good law. However, I have not studied the issue as to all opinions and therefore cannot provide a complete answer to this question other than to say that the U.S. Supreme Court—and not federal district court judges—determines whether prior decisions are no longer good law.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I do not have a view as to whether Judge Hand's statement is correct.

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

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

Response: Neither the U.S. Supreme Court nor the D.C. Circuit has established a minimum percentage of market share needed to constitute a monopoly. However, the Supreme Court's holdings on sufficient market shares in a particular case are

instructive. *Eastman Kodak Co. v. Image Technical Service*, 504 U.S. 451, 481 (1992) (greater than 66% is sufficient) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)); *United States v. Grinnell Corp,* 384 U.S. 563, 571 (1966) (87%); *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956) (75%). A company's control of less than 60% of the market share is presumptively insufficient to constitute a monopoly.

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

Response: In *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020), the Court held that federal "common lawmaking must be 'necessary to protect uniquely federal interests'" in striking down a federal common law rule addressing the distribution of corporate tax refunds. A federal court sitting in diversity applies the applicable state's law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

21. 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: When a federal court sits in diversity jurisdiction, it must apply the substantive law of the state whose law governs the dispute. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Even if the provision is identical to the federal constitution, the first place to look for the scope of the state constitutional right is the precedent of the relevant state courts. When a federal court sits in federal question jurisdiction, identical constitutional provisions constitute an exception to Pullman abstention, and the court can decide the question based on the federal provision, thereby avoiding interpreting the state constitution's scope. *See Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1971).

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

Response: Identical texts can be passed at different times and with different intent. They can therefore potentially be susceptible to multiple meanings. For example, the Takings Clause of the Fifth Amendment reads "Nor shall private property be taken for public use, without just compensation." This is similar to the wording of Article X, Section 2 of the Michigan State Constitution, which reads "Private property shall not be taken for public use without just compensation." But the U.S. Supreme Court and the Michigan Supreme Court have interpreted the "public use" requirement of these provisions in different ways. *Compare Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005) (holding that economic development is sufficient to satisfy the public use requirement) *with County of Wayne v. Hathcock*, 471 Mich. 445 (Mich. 2004)

(holding that economic development is not a public use under the Michigan State Constitution).

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

Response: Yes, our federal system is characterized by the federal government and the states governments as co-equal sovereigns. *See* U.S. Const. Amend. X. States' power to provide greater protections within their states is founded in their historic police power. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The backstop to this is the Supremacy Clause, which grounds preemption doctrine. Unless one of the preemption doctrines apply, state provisions can build on federal provisions, providing more protections. *See, e.g.*, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (holding that a California statute gauging maturity of avocados by oil content does not offend the Supremacy Clause even though it requires avocado growers to keep avocados on the vine longer than federally mandated).

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

Response: As a judicial nominee, it is not appropriate for me to comment on whether cases are correctly decided. However, *Brown v. Board of Education* is one of a few cases, such as *Marbury v. Madison*, that is so firmly rooted in American jurisprudence that they are no longer litigated in the courts. Therefore, I can say that it was correctly decided.

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

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

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

Response: Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief. It remains an open question whether courts have the power, under this rule or otherwise, to issue nationwide injunctions. In 2020, Justice Gorsuch highlighted that the U.S. Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with this question, I would apply Supreme Court and D.C. Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: Please see my response above to Question 23.

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

Response: Federalism is an important part of our constitutional system. That is so, in part, because, "[f]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

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

Response: Please see my response above to Question 5.

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

Response: The advantages and disadvantages of awarding damages versus injunctive relief is fact and case dependent. Typically, commercial cases are susceptible only to monetary damages. The United States District Court for the District of Columbia often sees challenges to statutes and regulations. Those cases more typically are susceptible only to injunctive relief. Where a case is susceptible to both monetary damages and injunctive relief, the Court should fashion the remedy that is best able to address the plaintiff's alleged harm.

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

Response: Substantive due process is the principle that the Fifth and Fourteenth Amendments protect fundamental rights from government interference. The fundamental liberties protected by the Due Process Clause include most of the rights enumerated in the Bill of Rights and extend to "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 576 U.S. 644, 663, 681 (2015). The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

The U.S. Supreme Court has recognized the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972), the right to keep one's family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the right of parents to control the

upbringing of their children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), the right to procreate, *Skinner v. Oklahoma*, 558 U.S. 1053 (2009), the right to purchase and use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), protection of sexual orientation and sexual activity, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry under the Due Process Clause, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a law prohibiting interracial marriage for unconstitutionally inhibiting the right to marry), *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (invalidating state laws prohibiting same sex marriage for unconstitutionally inhibiting the right to marry).

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

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

Response: The First Amendment expressly protects a fundamental and foundational right to religious liberty. It guarantees that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

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

Response: My understanding is that the right to free exercise of religion includes an individual's freedom to worship. The U.S. Supreme Court recently addressed the freedom of individuals to worship in the public sphere in *Kennedy v. Bremerton School District*, 21-418 (2022).

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

Response: Please see my response above to Questions 13 and 14.

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

Response: The U.S. Supreme Court has assessed the sincerity of a religiously held belief in a number of cases. Those cases typically involve a request for an accommodation based on religious belief. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015); *Ramirez v. Collier, Exec. Dir., Texas Dep't of Criminal Justice, et al.*, 21-5592 (2022).

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: "Congress enacted [the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb4] in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 693 (2014). As set forth in *Hobby Lobby*, "Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.' 42 U. S. C. §2000bb(a)(5)." *Id*. at 735.

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: I have not.

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

a. What do you understand this statement to mean?

Response: I am not aware of the context for this statement by Justice Scalia, and therefore cannot opine on precisely what he meant. In general, judges see a wide array of cases that come with an even wider array of potential outcomes. Given this variety, it is unlikely that every decision a judge reaches will comport with his or her own personal views. In that sense, the judge who faithfully applies the law will not "always like the result" he or she reaches. However, that same judge will always like the results in the sense that the judge will want his or her decisions to comport with the law.

31. 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 not taken the position that a federal or state statute was unconstitutional.

32. 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: I have not.

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

Response: I do not.

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

Response: I have, though I have never taken a position in litigation that I believed was unsupported by the law.

35. How did you handle the situation?

Response: I represented my client and the litigation position zealously and to the best of my ability, irrespective of my personal views.

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

Response: I do, unequivocally.

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

Response: Federalist #81.

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

Response: Because consideration of this question is likely to come before the courts, it would be inappropriate for me to opine on it.

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

Response: I do not recall the date, but at some point I was issued a subpoena to testify as a third-party witness in a criminal case that was pending in the United States District Court for the District of Columbia. I complied with the subpoena. The testimony was short, I believe it lasted less than half an hour. I do not have a transcript or case citation.

40. 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.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

42. 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: I have never authored a brief that was filed in court without my name on the brief. To my recollection, I have also never edited such a brief. However, it is likely that as a young associate I provided legal research for briefs that were filed without my name on the brief. I do not recall any specifics.

43. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I do not recall ever making or confessing a material error before a court. There have certainly been instances over a twenty-one-year career in which, in the give and take of argument and trial, I have acknowledged non-substantive errors. I have also argued legal and factual positions that courts have rejected, though I always made them in good faith.

44. 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: Canon 3(A)(6) of the U.S. Judicial Code of Conduct, which applies to judicial nominees, provides that, with certain exceptions unrelated to judicial confirmation hearings, a "judge should not make public comment on the merits of a matter pending or impending in any court." Nominees' abilities to answer questions when testifying before the Senate Judiciary Committee are bound by these and other ethical and practical considerations.

Questions for the Record for Ana C. Reyes
From Senator Mazie K. Hirono

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

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

   Response: No.

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

   Response: No.

Questions for the Record
Senator John Kennedy

Ana Reyes

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

   Response: If f confirmed, I would work to emulate judges who treat all litigants, attorneys and staff with respect; prepare carefully for each hearing by reviewing the briefing and relevant precedent; listen carefully during oral arguments and come ready with incisive questions that move the arguments forward; find areas of agreement between the parties to narrow the issues in dispute; issue well-reasoned opinions that faithfully apply the law to the facts; move cases along quickly and efficiently; and work every day to uphold the rule of law. I would apply all binding U.S. Supreme Court and D.C. Circuit precedent, and my personal beliefs would not play any role in my work or opinions.

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

   Response: If the text of a law is unambiguous, then the court is to apply the plain meaning of the words as understood at the time of the law's enactment.

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

   Response: In interpreting a statute, the court is to derive the intent of the legislature. A court can use extrinsic evidence to derive such intent if the statute's language is ambiguous. Whether a presidential statement can illuminate that intent is likely case specific.

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

   Response: While the private owner of a shopping center may not be constrained by the First Amendment, depending on the specific circumstances of the case, the owner may be constrained by the constitution of the state in which the shopping mall is located. *Compare Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) *with PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

5. **How does the Major Questions Doctrine relate to *Chevron*?**

   Response: The U.S. Supreme Court has recently articulated the contours of the Major Question Doctrine in *West Virginia v. Environmental Protection Agency*, 20-1530 (2022). The opinion did not address the relationship between the Major Question Doctrine and

Chevron.

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

Response: In *D.C. v. Heller*, 554 U.S. 570 (2018), the U.S, Supreme Court analyzed the term "the people" in the Second Amendment, in part by comparing it how the term was used in other provisions of the Constitution. It explained: "The first salient feature of the operative clause is that it codifies a 'right of the people.' The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times, in the First Amendment's Assembly–and–Petition Clause and in the Fourth Amendment's Search–and–Seizure Clause. The Ninth Amendment uses very similar terminology ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to "the people" in a context other than 'rights'—the famous preamble ('We the people'), § 2 of Article I (providing that 'the people' will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or 'the people'). Those provisions arguably refer to "the people" acting collectively— but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right.

What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 579-80 (footnotes omitted).

If confirmed, I would apply any precedent from the U.S. Supreme Court and D.C. Circuit concerning the term "the people" in the specific provision at issue.

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

Response: The U.S. Supreme Court has addressed the rights of non-citizens in certain contexts. For example, in *Mathews v. Diaz*, the Court held: "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions

rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." 426 U.S. 67, 78-80 (1976) (internal citations and footnotes omitted). To my knowledge, the Court has not addressed whether non-citizens unlawfully present in the United States to have a right to privacy.

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

   Response: The U.S. Supreme Court has held that, "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

9. **When does equal protection of the law attach to a human life?**

   Response: Canon 3(A)(6) of the U.S. Judicial Code of Conduct, which applies to judicial nominees, provides that, with certain exceptions unrelated to judicial confirmation hearings, a "judge should not make public comment on the merits of a matter pending or impending in any court." Because the question of when law attaches to human life is the subject of pending federal litigation and public debate, it would not be appropriate for me to comment on these questions.

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

    Response: I am aware that the U.S. Supreme Court has upheld certain voter identification laws and has also held that voter identification laws are not *per se* unconstitutional. *See Crawford v. Marion County Election Brd.*, 553 U.S. 181 (2008).

11. **What is the constitutional basis for a federal judge to issue a universal injunction?**

    Response: Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief. It remains an open question whether courts have the power, under this rule or otherwise, to issue nationwide injunctions. In 2020, Justice Gorsuch highlighted that the Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with this question, I would apply Supreme Court and D.C. Circuit precedent to determine the proper scope of any injunction to be issued.

12. **Have you ever been formally or informally accused of maintaining an inappropriate workplace relationship?**

a. **If yes, have you ever been disciplined for maintaining an inappropriate workplace relationship?**

Response: I have never had an inappropriate workplace relationship. To my knowledge, no one has ever raised formal or informal concerns about my having an inappropriate workplace relationship with any employer where I have worked, and I have never been disciplined for any such relationship.

13. Have you ever been formally or informally accused of workplace retaliation?

a. **If yes, have you ever been disciplined for workplace retaliation?**

Response: Please see my answer above to Question 12. I have never engaged in any retaliatory conduct. To my knowledge, no one has ever raised formal or informal concerns about my having engaged in any retaliatory conduct with any employer where I have worked, and I have never been disciplined for any such conduct.

Senator Mike Lee Questions
for the Record
Ana Reyes, Nominee to be United States District Judge for the District of Columbia

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

Response: If confirmed, I would work to emulate judges who treat all litigants, attorneys and staff with respect; prepare carefully for each hearing by reviewing the briefing and relevant precedent; listen carefully during oral arguments and come ready with incisive questions that move the arguments forward; find areas of agreement between the parties to narrow the issues in dispute; issue well-reasoned opinions that faithfully apply the law to the facts; move cases along quickly and efficiently; and work every day to uphold the rule of law. I would apply all binding U.S. Supreme Court and D.C. Circuit precedent, and my personal beliefs would not play any role in my work or opinions.

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

Response: If confirmed, as a district court judge I would look first to any relevant, binding U.S. Supreme Court and D.C. Circuit precedent. Generally, courts first consult the text of the statute itself. It that text is unambiguous, the analysis ends. If it is ambiguous, the court may look to extrinsic factors. Like an unambiguous statute, an ambiguous statute must be interpreted to mean what the legislature intended it to mean. Courts assess legislative intent by examining the words of the statute, the reasonableness of proposed constructions, and its legislative and statutory history.

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

Response: If confirmed, I would review the text of the provision at issue and apply binding U.S. Supreme Court and D.C. Circuit precedent. If neither the plain text nor applicable precedent provided an answer, I would next look to sources that the Supreme Court and D.C. Circuit have consulted to interpret that or a similar provision.

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

Response: I agree with Justice Kagan's statement at her Supreme Court confirmation hearing that, the Founding Fathers, "laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists." *See* Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before S. Committee on the Judiciary, 111th Cong. (2010).

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

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

Response: If confirmed, I would apply the plain meant of statutory text as the words of the text were in public use at the time of enactment.

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

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the U.S. Supreme Court created a three-part test to determine whether a party has standing to sue:

a. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent
b. There must be a causal connection between the injury and the conduct brought before the court
c. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

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

Response: Congress has only those powers enumerated in the Constitution and implied from them. In *McCulloch v. Maryland*, the U.S. Supreme Court held that Congress possesses "implied powers" derived from the Necessary and Proper Clause (Art. 1, Section 8). 17 US 316 (1819). The Court held, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421; *see also Marshall v. Gordon*, 243 U.S. 521, 537 (1917).

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

Response: Any question of the constitutionality of a statute starts with the text of the Constitution and of the statute; in the case of Congress's enumerated powers, it would include at least an analysis of Article I, Article IV and any relevant amendment, such as the Sixteenth Amendment's grant to Congress of the power to collect and levy taxes.

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

Response: The Constitution protects rights that are not expressly enumerated. Substantive due process is the principle that the Fifth and Fourteenth Amendments protect fundamental rights from government interference. The fundamental liberties protected by the Due Process Clause include most of the rights enumerated in the Bill of Rights and extend to "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 576 U.S. 644, 663, 681 (2015). The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

The U.S. Supreme Court has recognized the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972), the right to keep one's family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the right of parents to control the upbringing of their children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), the right to procreate, *Skinner v. Oklahoma*, 558 U.S. 1053 (2009), the right to purchase and use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), protection of sexual orientation and sexual activity, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry under the Due Process Clause, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a law prohibiting interracial marriage for unconstitutionally inhibiting the right to marry), *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (invalidating state laws prohibiting same sex marriage for unconstitutionally inhibiting the right to marry).

10. **What rights are protected under substantive due process?**

Response: Please see my answer above to Question 9.

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

Response: In *Dobbs State Health Officer of the Mississippi Dep't of Health, et al. v. Jackson Women's Health Org. et al.*, 2022 WL 2276808 (2022), the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). And the Court has abrogated *Lochner v. New York*, 198 U.S. 45 (1905). If confirmed, I would fairly and faithfully apply all binding U.S. Supreme Court and D.C. Circuit precedent.

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

Response: The U.S. Supreme Court has held that Congress has three types of power under the Commerce Clause. "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce."

Gonzales v. Raich, 545 U.S. 1, 16–17 (2005). The Court has also held that the Commerce Clause does not grant Congress the right "to regulate individuals as such, as opposed to their activities[.]" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012).

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

Response: There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971).

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

Response: Checks and balances and separation of powers are designed to address the political question, "Who guards the guardians." In Federalist #51, subtitled, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," Madison explains how the separation of powers with checks and balances protects liberty. At bottom, the Constitution employs checks and balances to prevent the concentration of power in one branch of government in order to protect liberty interests.

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 set forth in *Marbury v. Madison*, 5 U.S. 137 (1803), and its progeny, if a court finds that a branch of government has exerted authority not granted to it by the text of the Constitution or any implied power from that text, the action should be stricken.

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

Response: A judge should treat all litigants with respect. However, the judge's decision-making as to any matter before the court should be based on a fair and faithful application of the law to the facts.

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

Response: Each hypothetical outcome is equally contrary to law.

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 studied the number of times the U.S. Supreme Court has exercised its power of judicial review to strike down federal statutes over time. I therefore cannot opine on what accounts for any change. The downsides of judicial overreach and passivity are largely the same, the danger they present to a well-ordered system of checks and balances.

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; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional." Judicial Review, Black's Law Dictionary (11th ed. 2019). It defines "judicial supremacy," as, "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

20. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court**

. . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: In my view, elected and appointed officials should strive to adhere to the U.S. Constitution and, in so doing, should follow U.S. Supreme Court and other appropriate precedent.

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: In Federal #78, Hamilton described the judicial branch as "weak" because it has no ability to control the country's purse or military. However, the judicial branch's independence was supported by the guarantee of judges to life tenure for good cause. Without the power to enforce its decisions, but with the freedom from political pressures, Hamilton described the power of courts coming from the power of judges' sound judgment. Without the exercise of sound judgment, and the fair and faithful application of law to the facts, the judicial branch can lose its power. Judges should keep this in mind in making decisions.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be**

rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: The role of a district court judge is to apply all binding precedent fairly and faithfully to the facts of each case. If a precedent does not speak to the issue at hand, then the court is required to determine whether other precedent speaks more directly to the issue. If no precedent speaks directly to an issue, then the court must take guidance from prior precedent and conduct its own analysis of the unique facts at issue to render a reasoned opinion grounded in law and fact. While as part of its opinion a court can question the validity of prior precedent, ultimately, if that precedent controls, the court must apply it to render its ultimate decision.

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: At section 5H1.10, the U.S. Sentencing Guidelines state that race, sex, national origin, creed, religion and socio-economic status should not be taken into account in sentencing.

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

Response: Please see my response below to Question 25.

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

Response: Black's Law Dictionary defines "equity," as, "[f]airness; impartiality; evenhanded dealing." *Equality*, *Black's Law Dictionary* (11th ed. 2019). It defines, "equality," as "[t]he quality, state, or condition of being equal; especially, likeness in power or political status." *Id.*

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

Response: The Fourteenth Amendment guarantees all citizens, "equal protection of the laws." It does not refer to equity.

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

Response: Black's Law Dictionary does not have a definition for systemic racism. The Oxford English Dictionary defines "systemic racism," as, "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." *Systematic Racism*, *Oxford English Dictionary* (3rd ed. 2022).

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

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

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

Response: I would distinguish critical race theory from systemic racism based on comparing and contrasting the two definitions cites above in response to Questions 27 and 28.

Senator Ben Sasse
Questions for the Record for Ana C. Reyes
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 22, 2022

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

   Response: No.

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

   Response: If confirmed, I would work to emulate judges who treat all litigants, attorneys and staff with respect; prepare carefully for each hearing by reviewing the briefing and relevant precedent; listen carefully during oral arguments and come ready with incisive questions that move the arguments forward; find areas of agreement between the parties to narrow the issues in dispute; issue well-reasoned opinions that faithfully apply the law to the facts; move cases along quickly and efficiently; and work every day to uphold the rule of law. I would apply all binding U.S. Supreme Court and D.C. Circuit precedent, and my personal beliefs would not play any role in my work or opinions.

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

   Response: I agree with Justice Kagan's statement at her Supreme Court confirmation hearing that, the Founding Fathers, "laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists." Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Committee on the Judiciary, 111 Cong. (2010).

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

   Response: Just as with originalism, judges are all textualists in the sense that in interpreting the text of the Constitution or of a statute, the unambiguous text must be applied faithfully. It is only if the text is ambiguous that a judge may consider issues outside of the text to render a decision.

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

   Response: Black's Law Dictionary defines "living 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). During my career, I have not found such labels to be useful in citing precedent in my cases. Whatever the relevant precedent is called, if confirmed, I would apply it to the facts of a case.

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

   Response: In my career, I have often studied U.S. Supreme Court and D.C. Circuit cases to assess the legal contours of my cases. I have not had occasion, however, to study the jurisprudence of each of the Justices appointed since January 20, 1953.

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: A federal Circuit court cannot overrule its own precedent unless it is sitting en banc. A Circuit court sitting en banc would analyze U.S. Supreme Court and its own precedent in assessing what substantive factors to use to determine whether any prior decision should be overruled on constitutional grounds.

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: A federal Circuit court cannot overrule its own precedent unless it is sitting en banc. A Circuit court sitting en banc would analyze U.S. Supreme Court and its own precedent in assessing what substantive factors to use to determine whether any prior decision should be overruled on the basis that it conflicts with the text of a statute.

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: Extrinsic factors should not play any factor if the "meaning of a statute's term is plain." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). However, if the statute is ambiguous, courts can look to extrinsic evidence, including canons of statutory construction and legislative history. In *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the U.S. Supreme Court held that, "[f]actors relevant to the assessment of government neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body" *Id.* at 1731 (internal quotation omitted).

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: The U.S. Sentencing Guidelines provide that "race" is "not relevant in the determination of a sentence." § 5H1.10.

Questions from Senator Thom Tillis
for Ana Cecilia Reyes
Nominee to be US District Judge for the
District of Columbia

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

   Response: I do.

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

   Response: Black's Law Dictionary defines, "judicial activism," as, "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial Activism, Black's Law Dictionary (2019). I do not believe that that is appropriate. I believe that a judge should fairly and faithfully apply the law to the facts of each case before him or her.

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

   Response: I believe it is both.

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

   Response: No.

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

   Response: Yes. If confirmed, I would reconcile that result with my firm belief that the rule of law, which requires the faithful application of the law by courts, is the bedrock of our democracy.

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

   Response: No.

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

   Response: If confirmed, I would fairly and faithfully apply the Second Amendment and U.S. Supreme Court and D.C. Circuit precedent to any case involving rights covered by that

amendment that comes before me. By faithfully applying the law, courts work to ensure Americans that their rights are protected.

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

   Response: If confirmed, I would evaluate any lawsuit with careful attention to the facts of the case and the legal precedents at issue. For example, based on the hypothetical you have described, I would likely consult the U.S. Supreme Court's precedents in *D.C. v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York Rifle & Pistol Assoc. v. Bruen*, 2022 WL 2251305 (2022), and any D.C. Circuit precedent. I would also likely consult the U.S. Supreme Court's and D.C. Circuit's precedents in quarantine cases, such as *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

   Response: If confirmed, I would evaluate any lawsuit with careful attention to the facts of the case and the legal precedents at issue. Law enforcement personnel enjoy qualified immunity subject to certain exceptions. They are not entitled to such immunity if, "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful…." *D.C. v. Wesby*, 138 S. Ct. 577, 589–90 (2018) (citations and quotation marks omitted); *see also Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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: The question of the amount and type of immunity protections for law enforcement is a matter for legislatures.

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

    Response: The question of the amount and type of immunity protections for law enforcement is a matter for legislatures.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in**

abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: I have not studied the U.S. Supreme Court's patent eligibility jurisprudence, based on 35 U.S.C. §101, and therefore cannot opine on its current status. I am generally aware that numerous courts, members of Congress, legal scholars and patent practitioners have called for the Supreme Court to clarify the two-part test for patent eligibility set forth in *Alice Corp. v. CLS Bank Int'l*., 573 U.S. 208 (2014). The Supreme Court recently denied *certiorari* in a case that the Petitioner and Solicitor General (in response to a query from the Court) argued presented a good vehicle for the Court to clarify this jurisprudence.

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

Response: I do not believe it is appropriate for judicial nominees to opine on hypothetical cases involving legal issues that come before the courts. Generally, however, the assessment of each of the hypotheticals below will require a court to assess developing case law on the interpretation of 35 U.S.C. §101, and in particular the types of inventions that are not patent eligible under this section. There are broad categories of such exceptions including abstract ideas, laws of nature, and natural phenomenon.

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

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

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

d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and**

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

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

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

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

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

i. ***Hantson Pharmaceuticals*** **develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

j. ***Stoll Laboratories*** **discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures?**

What about the space applications of superconductivity that benefit from this effect?

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: I believe that whether current law provides the clarity and consistency needed to incentivize innovation is an important for consideration for Congress in assessing whether to amend 35 U.S.C. § 101.

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

a. What experience do you have with copyright law?

Response: From early in the litigation, I participated in the *MGM Studios v. Grokster*, 545 U.S. 913 (2005), case that ultimately reached the U.S. Supreme Court. My firm represented movie studios, and the case involved the question of copyright infringement in the context of file-sharing. As a member of the team, I participated in all aspects of the case including briefing, discovery, and strategy meetings. In a unanimous opinion, the Court held that companies that distributed software, and promoted that software to infringe copyrights, were liable for the resulting acts of infringement.

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

Response: In my twenty-one-year career in complex civil litigation, I have not had occasion to work on a case involving the Digital Millennium Copyright Act.

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

Please see my response above to Question 15a.

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: Please see my response above to Question 15a with respect to my copyright experience. I also have experience in patent litigation, including trying to verdict a patent bench trial and a patent licensing international arbitration. I do not recall any specific experience with First Amendment and free speech issues.

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

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

    Response: In interpreting a statute, the court's role is to assess congressional intent. The best evidence of congressional intent is the text of the statute. Generally speaking, only if a statute is ambiguous should courts consider other sources (including canons of statutory interpretation, precedents interpreting identical or similar provisions in other statutes, and potentially legislative history).

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

    Response: In assessing what weight, if any, to give agencies in the interpretation of text, a court relies on the application of *Chevron*, *Skidmore*, or *Auer* deference as appropriate to the case at bar.

    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: Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, provides that, with certain exceptions unrelated to judicial confirmation hearings, a "judge should not make public comment on the merits of a matter pending or impending in any court." Because the question of what type of notice is sufficient to put online services provider on notice of that infringement is the subject of pending federal litigation and public debate, it would not be appropriate for me to comment on this question.

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

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

Response: A court interpreting a statute is to apply its plain and ordinary text to assess Congressional intent. If that language is unambiguous, the court applies it. If it is ambiguous, the court can look to extrinsic evidence (including canons of statutory interpretation, precedents interpreting identical or similar provisions in other statutes, and potentially legislative history).

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

Response: Please see my response above to Question 17a. In general, the application of precedent to any particular case is highly dependent on the facts and legal issues presented by that case.

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

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

Response: I have not studied this issue and do not have sufficient information to address this question.

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

Response: I have not studied this issue and do not have sufficient information to address this question.

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

Response: I think the U.S. Judicial Conference is best suited to address what steps a judge can and should take, if any, with respect to the fora for litigation.

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

Response: I think the U.S. Judicial Conference is best suited to address what steps a judge can and should take, if any, with respect to the fora for litigation.

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

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

Response: I think the U.S. Judicial Conference is best suited to address what steps, if any, should be taken if a judge continues to flaunt binding case law despite numerous mandamus orders.

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

Response: I think the U.S. Judicial Conference is best suited to address what steps, if any, should be taken if a judge continues to flaunt binding case law despite numerous mandamus orders.

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

Response: I have not studied this issue and do not have sufficient information to address this question.

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: The question of what studies should be conducted with respect to the type and amount of litigation in the various federal venues is a matter for legislatures.

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

Response: The question of how cases are administered within a particular district court is a matter for that district court and/or the legislatures.

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

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

Response: I do not have in mind any specific amount of mandamus reversals that give an inference that a judge is behaving in a lawless manner. Such considerations would best be left to the U.S. Judicial Commission to assess on a judge-by-judge basis.

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

Response: I do not have in mind any specific amount of mandamus reversals that give an inference that a judge is behaving in a lawless manner. Such considerations would best be left to the U.S. Judicial Commission to assess on a judge-by-judge basis.