Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Jamar K. Walker
Nominee to be United States District Judge for the Eastern District of Virginia

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

   Response: I am not familiar with the full context of Justice Brown Jackson's statement. The Constitution is an enduring document with a fixed meaning. The genius of the Constitution is in its ability to provide answers to questions that the Framers may not have anticipated; however, the meaning of the Constitution does not change unless it is amended pursuant to Article V of the Constitution.

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

   Response: I do not agree with this statement. The role of a judge is to faithfully apply the law to the specific set of facts of an individual case. The judge's own "value judgments" should play no role in the adjudication of matters before the court.

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

   Response: I am not familiar with Judge Reinhardt's statement nor the context in which it was given. If confirmed, I would dutifully apply Supreme Court and Fourth Circuit precedent.

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

   Response: If confirmed, my judicial philosophy would be a practical one: to approach every case impartially and with an open mind, to faithfully apply Supreme Court and Fourth Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented. I am not aware of any decision from Supreme Court in the last 50 years that best exemplifies this approach, as it is my understanding that the Justices generally adhere to these same basic principles.

5. **Please identify a Fourth Circuit or Eastern District of Virginia judicial opinion from the last 50 years that exemplifies your judicial philosophy and explain why.**

Response: If confirmed, my judicial philosophy would be a practical one: to approach every case impartially and with an open mind, to faithfully apply Supreme Court and Fourth Circuit precedent, to treated everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented. I am not aware of any decision from either the Fourth Circuit or the Eastern District of Virginia in the last 50 years that best exemplifies this approach as it is my understanding that judges generally adhere to these same basic principles.

6. **How would you evaluate a claim that a previously un-enumerated "fundamental" right is protected by the Due Process Clause? In your answer, please cite any relevant Supreme Court and Fourth Circuit precedent that you would consider.**

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. If confirmed, I would apply this test in evaluating any claims to a fundamental right that the Supreme Court has not addressed previously.

7. **Assume that the original public meaning of a statutory or constitutional provision is clear. Under what circumstances would it be appropriate for a federal judge to decline to apply the original public meaning of that provision?**

Response: As a district judge, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court based its interpretation of the Second Amendment individual right to keep and bear arms on the original public meaning of that provision. *Id.* at 576. However, in evaluating whether material is obscene and not protected by the First Amendment, the Supreme Court has instructed that courts should apply "contemporary community standards" when assessing whether the work, "taken as a whole, appeals to the prurient interest." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002) (internal citations omitted).

8. **Under existing federal law, may a small business owner decline to provide customers with service on the basis of a sincerely held religious belief? Please explain your answer, citing any relevant statutes or Supreme Court precedent.**

Response: The answer would depend on the specific facts of a given case.

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government places a substantial burden on the exercise of religion, it must demonstrate that it "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of

furthering that compelling government interest." *Id.* at § 2000bb-1(b). RFRA applies to religious organizations and also to for-profit closely held corporations. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

When evaluating claims of state violations of religious freedoms, laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *Empl. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990). Laws are considered not neutral or generally applicable if, for example, "the object of the law is to infringe upon or restrict practices because of their religious motivation," *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record demonstrates particular hostility toward religion in enforcing a facially neutral law, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018), or if the law treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Yes. The Supreme Court has held that parents have a constitutional right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925)).

10. How do you decide when text is ambiguous?

Response: A statute is ambiguous if it lends itself to more than one reasonable interpretation. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004) (internal quotation marks and citations omitted).

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

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

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions when such issues could come before me. However, consistent with the practice of past nominees, I am comfortable saying that *Brown v. Board of Education* was correctly decided, as the issue of de jure segregation is not likely to come before me, if confirmed.

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

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions

when such issues could come before me. However, consistent with the practice of past nominees, I am comfortable saying that *Loving v. Virginia* was correctly decided, as the issue of a state ban on interracial marriages is not likely to come before me, if confirmed.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. However, as a judicial nominee, it is generally inappropriate for me to express a personal view about whether a case was correctly decided.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Roe v. Wade*. If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Planned Parenthood v. Casey*. If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

Response: Please see my response to Question 11(c).

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

Response: Please see my response to Question 11(c).

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

Response: Please see my response to Question 11(c).

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

Response: Please see my response to Question 11(c).

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

Response: Please see my response to Question 11(c).

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

Response: Please see my response to Question 11(c).

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

Response: Title 18, United States Code, Section 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."

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

Response: To my knowledge, the Supreme Court has not addressed a facial challenge to the constitutionality of 18 U.S.C. § 1507. As a judicial nominee, it is generally inappropriate for me to express a personal view on the merits of a matter that may come before the courts. If confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent to the specific facts and circumstances of the case.

14. 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 November 8, 2021, I submitted an application to Senators Mark Warner and Tim Kaine for a position on the United States District Court for the Eastern District of Virginia. On January 27, 2022, I interviewed with the Senators' selection committee. On February 11, 2022, I interviewed with Senators Warner and Kaine. On February 28, 2022, Senator Kaine advised me that he and Senator Warner would be referring my name to the White House for consideration. On March 4, 2022, I interviewed with an attorney from the White House Counsel's Office. Since March 7, 2022, I have been in contact with officials from the Department of Justice's Office of Legal Policy. On July 13, 2022, the President announced his intention to nominate me.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

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

       Response: No.

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

       Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

25. The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I reviewed the questions, conducted research when necessary, and provided a set of draft answers to the Department of Justice's Office of Legal Policy (OLP). After receiving feedback from OLP, I finalized my responses for submission to the Senate Judiciary Committee.

Questions for the Record for Jamar Kentrell Walker
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.

Senator Mike Lee
Questions for the Record
Jamar Walker, Nominee to be United States District Court for the Eastern District of Virginia

1. How would you describe your judicial philosophy?

Response: If confirmed, my judicial philosophy would be a practical one: to approach every case impartially and with an open mind, to faithfully apply Supreme Court and Fourth Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented.

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

Response: As a district judge, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation. I would first determine whether the Supreme Court or the Fourth Circuit had previously interpreted the federal statutory provision at issue. Assuming that the matter was one of first impression and no interpretive precedent existed, I would start with the text of the statute and consider, if necessary, any statutory canons of construction. Lastly, where appropriate, I would look to persuasive authority and any probative legislative history.

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

Response: As a district judge, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of any such interpretation. I would first determine whether the Supreme Court or the Fourth Circuit had previously interpreted the constitutional provision at issue. Assuming that the matter was one of first impression and no interpretive precedent existed, I would start with the text of the constitution and would further be guided in the method of interpretation by Supreme Court and Fourth Circuit precedent in similar or analogous cases as well as persuasive authority from other federal courts.

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

Response: The Supreme Court has repeatedly held that when interpreting constitutional provisions, the inquiry must start with the text of the Constitution. The Supreme Court has applied the original public meaning in various contexts, notably regarding the interpretation of the Second Amendment. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Please see my response to Question 2.

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

Response: As a district judge, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court based its interpretation of the Second Amendment individual right to keep and bear arms on the original public meaning of that provision. *Id.* at 576. However, in evaluating whether material is obscene and not protected by the First Amendment, the Supreme Court has instructed that courts should apply "contemporary community standards" when assessing whether the work, "taken as a whole, appeals to the prurient interest." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002) (internal citations omitted).

6. What are the constitutional requirements for standing?

Response: To establish Article III standing, "a plaintiff must demonstrate: (1) that he or she suffered an injury in fact that is concrete, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court first held that under the Necessary and Proper Clause, Congress has implied powers to carry out its enumerated powers in the Constitution.

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

Response: If confirmed, I would apply all relevant Supreme Court and Fourth Circuit precedent to evaluate whether Congress has legitimately exercised its authority to carry out an enumerated or implied power.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. If confirmed, I would apply this test in evaluating any claims to a fundamental right that the Supreme Court has not addressed previously.

In *Glucksberg,* the Court provided several examples of unenumerated rights that are protected by the Due Process Clause, including the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *Id.*

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The substantive due process rights outlined in Question 9 do not reflect my personal beliefs and are instead those rights recognized by the Supreme Court. If confirmed, I will faithfully apply Supreme Court precedent, notwithstanding any personal views I hold.

In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court held that there is not a constitutional right to an abortion. If confirmed, I would follow controlling Supreme Court precedent. Additionally, *Lochner* was rejected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and was effectively overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer controlling Supreme Court precedent.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the Supreme Court recognized Congress' ability to regulate three categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) activities that "substantially affect interstate commerce."

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

Response: In determining whether a particular group qualifies as a "suspect class," the Supreme Court has looked to several factors, including whether the group "shares traditional indicia of suspectedness," such as "immutable characteristics determined solely by the accident or birth" or whether the group is "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 374 n.14 (1974). Race, religion, alienage, and national origin have been deemed suspect classes. *Id.*

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

Response: "Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996). Indeed, the separation of powers is "exemplified by the very structure of the Constitution." *McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (internal quotations omitted). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another." *Id.* (internal quotations omitted).

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

Response: If confirmed, I would apply Supreme Court and Fourth Circuit precedent and the text of the Constitution itself to determine whether a branch of government has exceeded its authority.

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

Response: A judge's personal views should not play a role in resolving a case.

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

Response: Both outcomes are equally undesirable.

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 do not know, nor have I considered what accounts for this increase. As a district judge, if confirmed, I would faithfully apply the Supreme Court's decisions to uphold laws as constitutional and to strike down laws as unconstitutional.

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

Response: Judicial review refers to the principle espoused in *Marbury v. Madison*, 5 U.S. 137 (1803), which held that the "province and duty of the judicial department" is to "say what the law is." *Id.* at 177. Black's Law Dictionary defines "judicial supremacy" as the "doctrine interpretations of the Constitution by the federal judiciary in the exercise of judicial review . . . are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: Elected officials are duty bound to follow the Constitution and are required to follow judicial decisions regarding the Constitution's meaning. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958).

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

Response: As a district judge, if confirmed, my limited role would be to faithfully apply the law to the facts of the cases before me. In other words, it is the province of the court to interpret the law, not to enforce it or to create it.

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: A district court must apply binding precedent from the Supreme Court and the relevant appellant court.

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: In fashioning an appropriate sentence, district judges must consider the factors outlined in 18 U.S.C. § 3553(a), including the "history and characteristics of the defendant." *Id.* at § 3353(a)(1). However, a defendant's race, sex, national origin, creed, religion, and socio-economic status are not relevant factors in the determination of a sentence. U.S.S.G. § 5H1.10.

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

Response: I am not familiar with this statement from the Biden Administration nor am I aware of the context in which it was given. The term "equity" as defined by the Black's Law Dictionary includes "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law," and it defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019).

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

Response: The Fourteenth Amendment's plain text provides in part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In interpreting the Fourteenth Amendment's Equal Protection Clause, I would be guided by the text as well as Supreme Court and Fourth Circuit precedent.

27. How do you define "systemic racism?"

Response: The term "systemic racism" appears to have many different meanings to different people; however, I am generally aware that it refers to policies of discrimination and unequal treatment that are distinct from individual acts of racism. If I am confirmed, I would ensure that every person who appears before me is treated equally, regardless of their race.

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

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

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

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

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

Questions for the Record for Jamar K. Walker, Nominee to the United States District Court the Eastern District of Virginia

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: Racial discrimination that is violative of laws passed by Congress, such as Title VI and Title VII of the Civil Rights Act of 1964, is unlawful. Certain constitutional provisions, such as the Equal Protection Clause of the Fourteenth Amendment, have been interpreted to prohibit discriminating on the basis of race.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. If confirmed, I would apply this test in evaluating any claims to a fundamental right that the Supreme Court has not addressed previously.

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

Response: My judicial philosophy is informed by my time spent as an Assistant United States Attorney prosecuting complex federal crimes, my time in private practice, and the year I spent clerking in the United States District Court for the Eastern District of Virginia. If confirmed, my judicial philosophy would be a practical one: to approach every case impartially and with an open mind, to faithfully apply Supreme Court and Fourth Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented.

As an Assistant United States Attorney and as a law clerk in the same district where the seat to which I have been nominated is located, I have been fortunate enough to appear in front of, work for, and observe many learned, well-respected judges. While I have not studied the judicial philosophies of the aforementioned Supreme Court justices, I believe the approached I have outlined is one shared by many Justices and judges alike.

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

Response: Black's Law Dictionary defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). While I do not subscribe to a particular label, the Supreme Court has applied the original public meaning in analyzing the individual right to keep and bear arms under the Second Amendment. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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

Response: Black's Law Dictionary defines "living constitutionalism" as the "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). While I do not subscribe to a particular label, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

6. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: The analysis of a constitutional issues of first impression would start with the interpretation of the text. If the public meaning of the text was clear and resolved the issue, that meaning would apply. Even if the specific issue was a case of first impression, I would nevertheless be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court based its interpretation of the Second Amendment individual right to keep and bear arms on the original public meaning of that provision. *Id.* at 576.

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

Response: Generally, no. When interpreting constitutional and statutory provisions, judges should follow the plain meaning of the constitutional or statutory provision if that plain meaning is clear and unambiguous. However, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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

Response: No.

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

Response: *Dobbs v. Jackson Women's Health Org.* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent.

a. Was it correctly decided?

Response: As a judicial nominee, pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions when such issues could come before me. If confirmed as a United States District Judge, I will faithfully

apply all Supreme Court and Fourth Circuit precedent.

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

Response: *New York Rifle & Pistol Ass'n, Inc. v. Bruen* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent.

a. Was it correctly decided?

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions when such issues could come before me. If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

Response: *Brown v. Board of Education* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent.

a. Was it correctly decided?

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions when such issues could come before me. However, consistent with the practice of past nominees, I am comfortable saying that *Brown v. Board of Education* was correctly decided, as the issue of de jure segregation is not likely to come before me, if confirmed.

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

Response: Title 18, United States Code, Sections 3142(e)(2) and (f)(1) provide some circumstances under which a rebuttable presumption for pretrial detention may be triggered, if the person was previously convicted of certain offenses enumerated in 18 U.S.C. § 3142(f)(1), such as offenses for which the maximum sentence is life imprisonment or death or Controlled Substances Act offenses for which a maximum term of imprisonment of ten years or more is prescribed in 21 U.S.C. § 951 *et seq*. *See* 18 U.S.C. §§ 3142(e)(2) & (f)(1). The prior offense must have been committed while the person was on release pending trial, and the conviction must be either less than five years old or the person must have been released from prison for that offense less than five years ago, whichever occurs later. *Id.* at 3142(e)(2).

Title 18, United States Code, Section 3142(e)(3) provides an additional list of offenses for which there is a rebuttable presumption in favor of pretrial detention if the judicial officer finds probable cause to believe that the person committed "(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46; (B) an offense under section

924(c), 956(a), or 2332b of this title; (C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed; (D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title." *Id.*

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

Response: If confirmed, I would apply the laws as written irrespective of policy rationales. I am not aware of any Supreme Court or Fourth Circuit precedent addressing the policy rationales for 18 U.S.C. § 3142.

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

Response: Yes. The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government places a substantial burden on the exercise of religion, it must demonstrate that "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* at § 2000bb-1(b). RFRA applies to religious organizations and also to for-profit closely held corporations. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

State laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *Empl. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990). Laws are considered not neutral or generally applicable if, for example, "the object of the law is to infringe upon or restrict practices because of their religious motivation," *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record demonstrates particular hostility toward religion in enforcing a facially neutral law, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), or if the law treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Any law that discriminates against religious organizations or religious people is subject to strict scrutiny: "A law that targets religious conduct for distinctive treatment or advances legitimate government interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993).

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order

violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court granted the plaintiffs' request for a preliminary injunction against Governor Cuomo's order restricting capacity at worship services within certain zones. In analyzing the injunction under its prior holding in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the Supreme Court held that the plaintiffs were likely to succeed on the merits of their claim, that they would suffer irreparable harm absence injunctive relief, and that the public interest weighed in favor of granting the injunction as there was no evidence that public health would be imperiled if the injunction issued. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 67–68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' petition for emergency injunctive relief who alleged that the State's Blueprint System for restrictions on private gatherings, specifically at-home worship, was unconstitutional. The Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (internal citations omitted). In light of its prior precedent in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Court reasoned that the plaintiffs in this case were likely to succeed on the merits of their claims. *Tandon*, 141 S. Ct. at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), a Colorado baker refused to create a wedding cake for a same-sex couple—claiming that doing so would violate his sincerely held religious beliefs. The couple filed a claim pursuant to the Colorado Anti-Discrimination Act, and the Colorado Civil Rights Commission rejected the baker's First Amendment free exercise claims. The Supreme Court held that the Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality, and the record at issue in the case demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id.* at 1729.

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

Response: Yes, if the individual's beliefs are sincerely held. *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the

protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

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

Response: The limited question that courts confront in this context is whether beliefs are sincerely held. The Supreme Court has held that federal courts have "no business" addressing whether an individual's asserted religious belief is "reasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Instead, the "narrow function" is to "determine whether the line drawn reflects an honest conviction." *Id.* at 725 (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981)). "Only beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas*, 450 U.S. at 713 (internal citations omitted). The determination of what constitutes a religious belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

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

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

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

Response: I am not aware of the Catholic Church taking an official position on whether an abortion is acceptable or morally righteous.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), religious school teachers brought an action against religious schools alleging employment discrimination. The Supreme Court held that, under the "ministerial exception," churches and other religious institutions are permitted to "decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (*quoting Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 186 (2012)). In determining whether a case falls under the ministerial exception, the Supreme Court focused on what an employee does. The Court found that the specific role of the teachers in *Our Lady of Guadalupe* was critical in "educating young people in their faith, inculcating its teachings, and training them to live their faith"—responsibilities that the Court found "lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe*, 140 S. Ct. at 2064. Thus, such roles were exempted from government intrusion in employment decisions.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the policy at issue—Philadelphia's refusal to work with a Catholic organization in its foster care program because the organization would not certify same-sex couples as foster parents—was subject to strict scrutiny because it was not neutral and generally applicable in light of certain formal mechanisms for granting exceptions at the government's discretion. *Id.* at 1879. The Court held that the city's stated interests of maximizing the number of foster families, of protecting the city from liability, and in the equal treatment of foster parents and foster children were not compelling interests that justified burdening the agency's free exercise rights. *Id.* at 1881–82.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for its tuition assistance program for private secondary schools was unconstitutional. Specifically, the Court found that the law was subject to strict scrutiny because it conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court found that the program violated the Free Exercise Clause of the First Amendment because the "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998.

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), a high school football coach lost his job because he knelt at midfield and offered a quiet prayer of thanks after the games ended. The Court held that the School District impermissibly infringed upon Mr. Kennedy's free exercise of religion. The Court found that the government policy at issue was not neutral as it was "specifically directed at . . . a religious practice." *Id.* at 2422. Based on the specific facts in the record, the Court also determined that Mr. Kennedy's speech was private speech, not government speech. Irrespective of the applicable level of heightened scrutiny that should apply, the school district could not sustain its burden to justify the infringement on Mr. Kennedy's free exercise rights. *Id.* at 2424. In determining that an "Establishment Clause violation does not automatically follow whenever a public school or government entity fails to censor private religious speech," *id.* at 2427, the Court concluded that a purported Establishment Clause violation was insufficient justification to censor Mr. Kennedy's private speech.

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

Response: Justice Gorsuch's concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), outlines his view that the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires the application of strict scrutiny, was misapplied by Fillmore County and the lower courts. Specifically, Justice Gorsuch claimed that the County and the lower courts erred by treating the County's general interest in sanitation regulation as compelling without reference to applying those rules specifically to the Amish community. Justice Gorsuch suggests that the focus of this case should not be whether the County has a compelling interest in enforcing its septic system requirement but whether it has a compelling interest in denying an exception to the Amish. Additionally, Justice Gorsuch noted that the lower courts failed to consider exemptions granted to other groups but denied to this specific religious group.

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

Response: If such a question were to come before me if I am fortunate enough to be confirmed, I would apply the law to the facts of a case presented and apply Supreme Court and Fourth Circuit precedent to determine the appropriate interpretation of 18 U.S.C. § 1507.

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

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

Response: No. I am not aware of any such training conducted in the Fourth Circuit or the Eastern District of Virginia. Any training provided should be consistent with the Constitution and the laws of the United States.

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

Response: No. I am not aware of any such training conducted in the Fourth Circuit or the Eastern District of Virginia. Any training provided should be consistent with the Constitution and the laws of the United States.

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

Response: No. I am not aware of any such training conducted in the Fourth Circuit or the Eastern District of Virginia. Any training provided should be consistent with the Constitution and the laws of the United States.

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

Response: No. I am not aware of any such training conducted in the Fourth Circuit or the Eastern District of Virginia. Any training provided should be consistent with the

Constitution and the laws of the United States.

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

Response: I am not aware of any such training conducted in the Fourth Circuit or the Eastern District of Virginia. Any training provided should be consistent with the Constitution and the laws of the United States. I would not support training that suggested that the values of work ethic and self-reliance are racist or sexist.

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: Article II, Section 2, Clause 2 of the Constitution vests the authority to make political appointments with the President of the United States, upon advice and consent of the Senate. If I am confirmed and am asked to rule upon the constitutionality of a specific appointment, I would faithfully apply Supreme Court and Fourth Circuit precedent to resolve the matter.

30. Is the criminal justice system systemically racist?

Response: I have not had occasion to conduct any quantitative or qualitative research to determine whether the criminal justice system is systemically racist. If confirmed to be a United States District Judge, I would ensure that any individual who appears before me is treated fairly, regardless of their race.

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

Response: The question of reforming the number of justices on the Supreme Court is a policy question for members of the executive and legislative branches of government to consider. As a judicial nominee, it would not be appropriate for me to weigh in on whether the number of Supreme Court Justices should be increased or decreased. If confirmed as a district judge, I will faithfully apply Supreme Court precedent.

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

Response: No.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court

held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2021), the Court concluded that the original public meaning of the Second Amendment also afforded the right to keep and bear arms for self-defense outside the home.

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

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2021), the Supreme Court adopted a historical analysis approach to determine what restrictions on the right to bear arms are appropriate. "In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. To impose a restriction on the Second Amendment's "unqualified command," "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

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

Response: Yes.

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

Response: No. The Supreme Court has made clear that the Second Amendment standard "accords with how we protect other constitutional rights." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

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

Response: Please see my response to Question 36.

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

Response: During my time as an Assistant United States Attorney prosecuting complex fraud matters, I have made prosecutorial charging decisions based on the individual facts of a case without reference to whether an entire category of laws should or should not be enforced.

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

Response: Generally, prosecutorial discretion refers to decisions by members of the Executive Branch to charge a matter based on the specific facts and circumstances of the case. I assume the second part of this question refers to rule changes in the context of administrative law. Under the Administrative Procedures Act, a substantive rule, also referred to as "legislative rule," is issued through notice-and-comment rulemaking and thus has the "force and effect of law." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96

(2015).

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

Response: No. The death penalty is statutorily authorized for certain categories of offenses as codified in 18 U.S.C. § 3591.

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

Response: In *Alabama Ass'n of Realtors v. Dept. of Health & Human Services*, 141 S. Ct. 2485 (2021), an association of realtors challenged the nationwide eviction moratorium the Center for Disease Control (CDC) issued in response to the COVID-19 pandemic. The Court concluded that Congress had not clearly delegated this broad authority to the CDC: "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* at 2489 (internal citations omitted). In determining that the stay of the district court's order should lift while the government pursued its appeal, the Court held that the plaintiffs were likely to succeed on the merits because the CDC clearly exceeded its authority in issuing the nationwide eviction moratorium. *Id.* While acknowledging that the public has a strong interest in combating the spread of the Delta variant, the Court ultimately reasoned that "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* at 2490.

Senator Ben Sasse
Questions for the Record for Jamar K. Walker
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 21, 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, my judicial philosophy would be a practical one: to approach every case impartially and with an open mind, to faithfully apply Supreme Court and Fourth Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented.

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

   Response: Black's Law Dictionary defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). While I do not subscribe to a particular label, the Supreme Court has applied the original public meaning in analyzing the individual right to keep and bear arms under the Second Amendment. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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

   Response: Please see my responses to Questions 2 and 3.

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

   Response: The Constitution is an enduring document with a fixed meaning. The genius of the Constitution is in its ability to provide answers to questions that the Framers may not have anticipated; however, the meaning of the Constitution does not change unless it is amended pursuant to Article V of the Constitution.

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

Response: I have the utmost respect for the Supreme Court as an institution and for the justices who have served on it. I would not say that I admire one particular justice more than others for his or her jurisprudence. I do, however, have great admiration for Justice Thurgood Marshall for his trailblazing role as the first African-American on the Court.

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

Response: In the Fourth Circuit, a panel of judges "cannot overrule a decision issued by another panel." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc). An en banc hearing, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, will occur when it "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

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

Response: Please see my response to Question 7.

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

Response: If the statutory language is clear and unambiguous, the inquiry ends, and extrinsic factors play no role. If, however, the statute is unclear or ambiguous, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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

Response: While a defendant's race, sex, national origin, creed, religion, and socio-economic status are not relevant factors in the determination of a sentence, *see* U.S.S.G. § 5H1.10, the district court should consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" when fashioning a sentence that is sufficient but not greater than necessary. *See* 18 U.S.C. § 3553(a)(6).

Senator Josh Hawley
Questions for the Record

Jamar Walker
Nominee, Eastern District of Virginia

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

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

    Response: I have not studied Justice Jackson's sentencing practices during her time as a district judge. When fashioning a sentence that is sufficient but not greater than necessary, district judges must first begin by calculating the applicable guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 50 (2007). The district judge should also consider all of the factors outlined in 18 U.S.C. § 3553(a) and sentence defendants individually. If confirmed, I would consider the specific facts of the case in determining whether a given sentencing enhancement is appropriate.

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

    Response: Please see my response to Question 1(a).

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

    Response: Please see my response to Question 1(a).

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

    Response: Please see my response to Question 1(a).

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

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

Response: Policy decisions regarding appropriate criminal penalties rest with the members of Congress. If confirmed, I would faithfully apply the law as written to the facts of a case.

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

Response: Please see my response to Question 2(a).

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

Response: When fashioning a sentence that is sufficient but not greater than necessary, district judges must first begin by calculating the applicable guidelines range. *See Gall v. United States*, 552 U.S. 38, 50 (2007). In connection with that determination, the district judge should also consider any relevant conduct of the defendant. *See* U.S.S.G. § 1B1.3. If confirmed, I would consider the specific facts of the case, including all applicable relevant conduct, in determining the appropriate sentence.

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

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

Response: I am not familiar with Justice Marshall's comments nor the context in which they were given; however, I do not agree that judges should inject their personal beliefs into decision making. If confirmed, I would follow Supreme Court and Fourth Circuit precedent and faithfully apply the law to the facts of the case, notwithstanding any personal views I held.

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

Response: I am not familiar with Justice Marshall's comments nor the context in which they were given. It would nonetheless be inappropriate for me to comment on whether a current or former Supreme Court justice violated a judicial oath.

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

Response: *Dobbs v. Jackson Women's Health Org.* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent.

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

Response: Generally, abstention doctrine refers to instances in which a federal court may or must refuse to hear a case within its jurisdiction in order to avoid an intrusion upon the authority of a state court. The following reflects my understanding of various types of abstention doctrine.

Under the *Pullman* abstention doctrine, federal courts should decline to hear cases that present questions of both federal and state law if a decision on the state law would obviate the need for resolution of the federal matter. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). More specifically, "*Pullman* abstention requires federal courts to abstain from deciding an unclear area of state law that raises constitutional issues because state court clarification might serve to avoid a federal constitutional ruling." *Nivens v. Gilchrist*, 444 F.3d 237, 245 (4th Cir. 2006).

Under the *Younger* abstention doctrine, federal courts should abstain from hearing federal torts claims arising from criminal matters or civil proceedings similar in nature to a criminal proceeding that are pending in state courts. "[T]he possible constitutionality of a statute on its face does not in itself justify an injunction against good-faith attempts to enforce it" absent a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Younger v. Harris*, 401 U.S. 37, 56 (1971). "[C]riminal prosecutions, civil enforcement proceedings, and civil proceedings, involving certain orders uniquely in furtherance of state courts' ability to perform their judicial functions," are all deemed "exceptional" circumstances warranting abstention. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013); *see also Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 332 (4th Cir. 2022).

Under the *Burford* abstention doctrine, federal courts should consider abstaining on questions bearing on matters of state policy. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The *Burford* doctrine applies "(1) where there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc.*, *v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989); *see also Town of Nags Head v. Toloczko*, 728 F.3d 391, 396 (4th Cir. 2013).

Under the *Rooker-Feldman* doctrine, lower federal courts are not permitted to sit in review of state court judgments. Appellant jurisdiction over those matters is limited to the United States Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The doctrine is narrow, "confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280,

283–84 (2005). Federal courts may, however, entertain claims previously examined by a state court, if those claims do not seek review of the state court decision itself. *See Elyazidi v. SunTrust Bank*, 780 F.3d 227, 233 (4th Cir. 2015).

Lastly, under the *Colorado River* abstention doctrine, federal courts should consider refraining from hearing matters involving parallel litigation in federal and state court. "These principles rest on consideration of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservative Dist. v. United States*, 424 U.S. 800, 817 (1976) (internal quotations omitted). Courts in the Fourth Circuit have "emphasized that only in the most extraordinary circumstances . . . may federal courts abstain from exercising jurisdiction in order to avoid piecemeal litigation." *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America*, 946 F.2d 1072, 1074 (4th Cir. 1991).

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

Response: No.

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

Response: N/A.

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

Response: As a district judge, if confirmed, I would be bound by Supreme Court and Fourth Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court based its interpretation of the Second Amendment individual right to keep and bear arms on the original public meaning of that provision. *Id.* at 576.

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

Response: I would consider legislative history in interpreting legal texts if permitted by Supreme Court and Fourth Circuit precedent. If confirmed and I am confronted with a question of the interpretation of a statute not previously addressed by Supreme Court or Fourth Circuit precedent, I would first look to the statute's text to determine if its meaning is clear and unambiguous. If the meaning is clear and unambiguous, the inquiry ends. However, to the extent the meaning is unclear or ambiguous, the Supreme Court has authorized other methods of interpretation, including statutory canons of construction and appropriate legislative history. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

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: "Legislative history is meant to clear up ambiguity, not create it." *Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011). The Supreme Court has determined that contemporaneous committee reports are more probative of legislative intent than other forms of legislative history, such as "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Constitution is a domestic document that should generally be interpreted consistent with domestic authorities. If confirmed, I would look to Supreme Court and Fourth Circuit precedent when interpreting constitutional provisions.

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

Response: To prevail on a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment, the prisoner must demonstrate that there is a "substantial risk of serious harm," and the prisoner must identify an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (internal quotations omitted)*; accord Emmett v. Johnson*, 532 F.3d 291, 298 (4th Cir. 2008).

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

Response: Yes.

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

Response: No. I am not aware of any Supreme Court or Fourth Circuit case recognizing a constitutional right to DNA analysis for habeas petitions.

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.

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

Response: The Supreme Court has held that facially neutral and generally applicable state laws that place a burden on the free exercise of religion are subject to rational basis review; however, strict scrutiny applies in cases where the law is not, in fact, neutral or generally applicable. Laws are considered not neutral or generally applicable if, for example, "the object of the law is to infringe upon or restrict practices because of their religious motivation," *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record demonstrates particular hostility toward religion in enforcing a facially neutral law, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), or if the law treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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: Please see my response to Question 13.

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 Supreme Court has held that federal courts have "no business" addressing whether an individual's asserted religious belief is "reasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Instead, the "narrow function" is to "determine whether the line drawn reflects an honest conviction." *Id.* at 725 (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981)). "Only beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas*, 450 U.S. at 713 (internal citations omitted). The determination of what constitutes a religious belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

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

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

Response: No.

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: In his dissent in *Lochner*, Justice Holmes asserted that the justices of the Supreme Court decided the case not on legal principles but instead on a theory of economics held by those in the *Lochner* majority.

I agree that judges should not inject their own personal views or policy preferences into the adjudication of cases.

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

Response: *Lochner* was rejected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and was effectively overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer controlling Supreme Court precedent.

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: Though it has been superseded by the Thirteenth and Fourteenth Amendments, I do not believe that *Dred Scott v. Sandford*, 60 U.S. 393 (1857), has been "formally overruled by the Supreme Court."

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 am not familiar with Judge Learned Hand's statement in *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945); however, if confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent in determining what constitutes a monopoly.

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

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

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

Response: If confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent in determining what constitutes a monopoly. For example, the Fourth Circuit has observed that "there is no fixed percentage market share that conclusively resolves whether monopoly power exists, [but] the Supreme Court has never found a party with less than 75% market share to have monopoly power." *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 174 (4th Cir. 2014). Courts have not only looked to market share but also to "the durability of the defendant's market power, particularly with an eye towards other firms (in)ability to enter the market." *Id.*

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

Response: Federal common law generally refers to rules of decision federal courts have formulated as part of their Article III authority to adjudicate cases and controversies. In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court established that "no federal general common law" exists. *Id.* at 78.

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: In interpreting the scope of a state constitutional right, a federal court

sitting in diversity must apply state substantive law. To do so, I would determine how the state's highest court has defined the scope of the right. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: Please see my response to Question 21.

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

Response: A state court may interpret its own statute to afford greater protections that an identical federal provision so long as doing so does not offend the United States Constitution.

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

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about the correctness or incorrectness of any binding Supreme Court decisions when such issues could come before me. However, consistent with the practice of past nominees, I am comfortable saying that *Brown v. Board of Education* was correctly decided, as the issue of de jure segregation is not likely to come before me, if confirmed.

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

Response: When federal courts have issued injunctions, they have generally relied upon Rule 65 of the Federal Rules of Civil Procedure. The Fourth Circuit has held that "[a] district court may issue a nationwide injunction so long as the court molds its decree to meet the exigencies of the particular case." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021).

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

Response: Please see my response to Question 23.

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

Response: The Fourth Circuit has reasoned that "a nationwide injunction may be appropriate when the government relies on a 'categorical policy,' and when the facts would not require different relief for others similarly situated to the plaintiffs." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021).

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 to Question 23.

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

Response: Black's Law Dictionary defines "federalism" as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and state governments." Black's Law Dictionary (11th ed. 2019). The distribution of power between the federal government and statement governments enhances liberty and freedom by limiting the federal government's power to specific grants of authority and reserving other powers for state governments.

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 to Question 5.

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

Response: Injunctive relief is appropriate where legal remedies such as damages would be inadequate to prevent an irreparable injury.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. If confirmed, I would apply this test in evaluating any claims to a fundamental right that the Supreme Court has not addressed previously.

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: Please see my response to Question 13.

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

Response: While I am not aware of any Supreme Court or Fourth Circuit precedent defining the free exercise of religion as "synonymous and coextensive with freedom of worship," the Court has held that the First Amendment embraces "two concepts,—freedom to believe and freedom to act." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

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

Response: Please see my response to Question 13.

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

Response: Please see my response to Question 15.

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: Where the Religious Freedom Restoration Act (RFRA) applies, it "operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1854 (2020).

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

Response: No.

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: Judges should faithfully apply the law to the facts of the case even if the correct application of the law runs contrary to their personal views.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: N/A.

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: No.

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

Response: I have not had occasion to conduct any quantitative or qualitative research to determine whether the criminal justice system is systemically racist nor has this question come before me during my time as an Assistant United States Attorney. If confirmed to be a United States District Judge, I would ensure that any individual who appears before me is treated fairly, regardless of their race.

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

Response: Yes.

35. How did you handle the situation?

Response: As an attorney, I am required to zealously advocate for my client's positions within the bounds of the law.

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

Response: Yes.

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

Response: *Federalist* No. 78, which discusses the nature of judicial review, would inform my view of the role of a judge.

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

Response: Pursuant to the Code of Conduct for United States Judges, it is generally inappropriate for me, as a judicial nominee, to express a personal view about an issue could come before me. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Court returned the question of abortion regulation to the people and their elective representatives, but it has not yet addressed the question of whether an unborn child is a human being.

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: To the best of my recollection, I have not.

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?

Response: During my time as Acting Chief and Deputy Chief of the Financial Crimes and Public Corruption Unit at the United States Attorney's Office for the Eastern District of Virginia, I have been responsible for editing, commenting, and providing general feedback and approval for all plea agreements, indictments, and various other court filings for the attorneys I supervise. The final work product ultimately belonged to the attorneys of record in a given matter. As a supervisor, I have reviewed dozens of pleadings and do not have a list of each filing.

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

Response: Please see my response to Question 42.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: N/A.

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: Nominees must, to the best of their ability, answer questions fully and truthfully, consistent with their ethical and professional obligations.

Questions from Senator Thom Tillis
for Jamar Kentrell Walker
Nominee to be United States District Judge for the Eastern District of Virginia

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

   Response: Yes.

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

   Response: While the term has many meanings, I define judicial activism as a judge injecting their personal views or beliefs into the decision-making process. Judicial activism is not appropriate.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No. The role of a judge is to faithfully apply the law to the facts of the case, even if the correct application of the law runs contrary to the judge's personal views.

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

   Response: The role of a judge is to faithfully apply the law to the facts of the case even if the outcome is one that runs contrary to the judge's personal views. If confirmed, I would set aside my personal views and decide each case based on the application of the law to the specific set of facts before me.

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

   Response: No.

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

   Response: If confirmed, I will follow all Supreme Court and Fourth Circuit precedent, which includes the Supreme Court's Second Amendment jurisprudence. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: If confirmed, I would evaluate such a challenge by following Supreme Court and Fourth Circuit precedent, including *Bruen*, *McDonald*, and *Heller*, as well as the Court's precedent on the constitutionality of COVID-19 restrictions. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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 qualified immunity cases by following Supreme Court and Fourth Circuit precedent. The Supreme Court has held that "qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted)

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

    Response: As a judicial nominee, it would not be appropriate for me to comment on whether qualified immunity provides "sufficient" protection for law enforcement officers. If confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent when analyzing qualified immunity cases.

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

    Response: Please see my response to Question 10.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

    Response: As a judicial nominee, it would not be appropriate for me to comment on the Supreme Court's decisions in patent eligibility cases. As a district judge, if confirmed, I would faithfully follow Supreme Court and Fourth precedent in patent matters.

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

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

Response: As a judicial nominee, it would be inappropriate for me to analyze factual hypotheticals on matters that may come before me. However, if confirmed, I would faithfully apply all Supreme Court and Fourth Circuit precedent in patent litigation. For example, I am aware that the Supreme Court has provided guidance to lower courts in adjudicating matters of patent eligibility in cases such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

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?

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

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?

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

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?

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

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?

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

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?

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

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?

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

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?

Response: Whether certain provisions of the law should or should not exist is a question for policymakers. As a judicial nominee, it would be inappropriate for me to opine on matters of policy. If confirmed, I would faithfully apply all Supreme Court and Fourth Circuit precedent.

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?

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

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

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

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: Please see my responses to Question 13(a) and Question 13(h).

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: During my time as an Assistant United States Attorney, I have supervised at least one matter involving issues of copyright law. Because the matter is an ongoing criminal investigation, I cannot provide additional details.

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

Response: To the best of my recollection, I have not worked on any matters involving the Digital Millennium Copyright Act.

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

Response: During my time as an Assistant United States Attorney, I have supervised at least one matter involving criminal liability regarding the hosting of unlawful content posted by users. Because the matter is an ongoing criminal investigation, I cannot provide additional details.

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

Response: To the best of my knowledge, I have been involved in a few matters involving First Amendment and free speech issues, primarily during my time as a law clerk in the Eastern District of Virginia. While clerking, I also had occasion to work on a number of patent litigation matters, including issues surrounding claim construction.

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: Courts first determine Congressional intent by looking to the text of the statute itself. If the text is clear and unambiguous, the inquiry ends, and the Court should apply the plain, ordinary meaning without analyzing legislative history. If, however, the text is unclear or ambiguous, the Supreme Court has held that legislative history may be considered; however, "[l]egislative history is meant to clear up ambiguity, not create it." *Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011). The Supreme Court has determined that contemporaneous committee reports are more probative of legislative intent than other forms of legislative history, such as "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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: If confirmed, I would evaluate this question by researching and analyzing Supreme Court and Fourth Circuit precedent. Generally, agency interpretations of their own regulations are entitled to deference only to the extent their reasoning for the interpretation is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the potential resolution of a matter that may come before the court.

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: The role of a district judge is to apply the law as written. In interpreting the DMCA, like any other statute, the inquiry involves reviewing the applicable statute and binding precedent.

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

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

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

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

Response: In the Eastern District of Virginia, "[c]ivil actions for which venue is proper in this district shall be brought in the proper division, as well." *See* Rule 3(C) of the Local Rules for the United States District Court for the Eastern District of Virginia. "The venue rules stated in 28 U.S.C. § 1391 *et seq.* shall be construed as if the terms 'judicial district' and 'district' were replaced with the term 'division.'" *Id.* While I have not served as a judge, during my time as an Assistant United States Attorney in the Eastern District of Virginia, I have not become aware of any mechanism by which parties can request a case be heard within a particular division.

Questions regarding the appropriate response to these issues are best left to policymakers.

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

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

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

Response: If confirmed, I would focus on adjudicating only those matters that were assigned to me.

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

Response: Please see my responses to Question 18(a) and Question 18(c).

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: Issues of this magnitude should be addressed by the relevant court of appeals in the circuit where the conduct occurred.

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

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

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

Response: As a judge, if confirmed, my focus would be on adjudicating only those matters that come before me without regard for the specific types of cases I am assigned. Thus, I would endeavor to ensure that everyone who appears before me is treated fairly, and I would work hard to get up to speed on new matters so that litigants could be confident that they are appearing before a competent, informed decisionmaker.

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

Response: Please see my response to Question 20.

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: Please see my response to Question 20.

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: All judges are dutybound to follow the law and comply with their ethical responsibilities, including those found in the Code of Conduct for United States Judges. If I am confirmed, I will abide by those principles and faithfully apply the law. As a judicial nominee, however, I do not believe that it would be appropriate for me to comment on the conduct of other judges.

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

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