Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Stephanie Davis
Nominee to be United States Circuit Judge for the Sixth Circuit
March 9, 2022

1. **You have been a District Court Judge since 2019, and you were a federal Magistrate Judge from 2016 to 2019. Accounting for your time on the District Court and as a federal Magistrate, you have more than five years of combined experience on the federal bench.**

   How has the variety of cases that you have handled as a judge helped prepare you for serving on the Sixth Circuit?

   Response: During my six years on the federal bench – just shy of four years as a magistrate judge and over two years as a district judge – I have handled a wide variety of matters and presided over actions large and small. Indeed, in aggregate, I have issued over 440 reports and recommendations and opinions. I have also handled over 5,000 proceedings in criminal matters, conducted numerous evidentiary hearings and presided over three bench trials, including a trade secrets case that ultimately resulted in the award of over $1 million in damages to the plaintiff. Moreover, I have served as a special master to the Sixth Circuit on more than one occasion, presided over more than 600 cases as a district judge and closed over 330. My civil docket has included complex commercial disputes, employment discrimination cases, consumer actions, class actions and a wide array of constitutional claims, among other things. And I maintain a robust criminal docket with both single defendant actions and larger, multi-defendant cases covering a broad array of criminal statutes and supervised release violations. The breadth of cases over which I have presided, combined with my experience in leading a chambers and managing a busy docket has given me useful perspective and well-prepared me to immediately and meaningfully contribute to the Sixth Circuit bench.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Stephanie D. Davis
Judicial Nominee to the United States Court of Appeals for the Sixth Circuit

1. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: I am unaware of any academic or scholarly definition of the term super precedent. As a sitting district judge and if confirmed to become a circuit judge I am and will be required and committed to treating all Supreme Court decisions that have not been overturned by the Supreme Court itself as precedent that I am and will be duty-bound to follow.

2. **Please answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**
   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
   j. **Was *Sturgeon v. Frost* correctly decided?**
   k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

   Response: As a sitting district judge it is generally inappropriate under the Code of Conduct for United States Judges, Canons 2A and 3A to opine on the propriety of an opinion or the constituent parts of an opinion of the Supreme Court. I view *Brown v. Board of Education* and *Loving v. Virginia*, however, to be exceptions to this general rule inasmuch as *Brown* definitively undermined the foundation upon which *Plessy v. Ferguson* had been built and supplanted it with the underpinnings for *Loving*; and neither issue has been nor appears likely to be revisited in United States courts. Moreover, I spoke publicly about *Brown* before taking on any judicial role. As such, I do not view reaffirming the correctness of these two decisions as violative of the judicial canons. The same cannot be said about the remainder; litigation continues to percolate around issues relating to the contours of the rights decided in these cases. As a district judge and if confirmed as a circuit judge, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.

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

   Response: I believe the Constitution is an enduring document; I am not familiar with Judge Jackson's quote.

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

   Response: No. Legal decisions must be grounded in the law and pertinent legal precedents.

5. **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: Judges' judgments must be grounded in law and precedent. As a district judge and as a circuit judge if I am confirmed, I will fairly and impartially, with an open mind, apply the law to the facts in every case, being careful to adhere to precedent from the Sixth Circuit Court of Appeals and the United States Supreme Court.

6. **Is climate change real?**

   Response: I am aware that this question is currently the subject of discussion between and among a broad array of individuals and groups, including policy-makers. The issue also arises in the context of litigation and is an important one for government leaders to consider. If an issue concerning climate change were raised in a case before me as a district judge and if confirmed as a circuit judge, I would consider the issue by carefully reviewing the facts and the record of the case, conducting legal research, conferring with colleagues as appropriate, and fairly and impartially applying the law to the facts of the case, being careful to adhere to precedent from the Sixth Circuit Court of Appeals and the United States Supreme Court.

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

   Response: Yes. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court ruled that parents have a liberty interest, protectable under the Substantive Due Process Clause of the Fourteenth Amendment, to direct the education of their children.

8. **Is whether a specific substance causes cancer in humans a scientific question?**

   Response: The question of whether a specific substance causes cancer is one of medical science. Thus, in the context of litigation, if the cause of a particular instance of cancer

were at issue, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and Federal Rules of Evidence 702 and 104(a), the court would be required to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" by ensuring that any proposed expert opinion on the issue reflects "scientific knowledge. . . derived by the scientific method." *Id.* at 593.

9. **Is when a "fetus is viable" a scientific question?**

   Response: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992), the Supreme Court acknowledged that while viability had been placed at a later stage in *Roe v. Wade*, 410 U.S. (1973), "advances in neonatal care [had] advanced viability to a point somewhat earlier" by the time *Casey* was decided and that it may be established as still earlier if "fetal respiratory capacity can somehow be enhanced in the future." *Casey*, 505 U.S. at 860.

10. **Is when a human life begins a scientific question?**

    Response: As the Supreme Court plurality observed in *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851.

11. **Can someone change his or her biological sex?**

    Response: Though I am not conversant in the particulars, I am aware that current medical science includes the ability to perform sex reassignment surgery.

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

    Response: It is a crime under 18 U.S.C. § 875 to transmit in interstate or foreign commerce a threat to injure another person.

13. **Does the president have the power to remove senior officials at his pleasure?**

    Response: Over the course of my six years as a federal judge, I have not had occasion to address this issue. But if confronted with such a question, I would consider the statutory provisions at issue, and any precedential authority on the issue from the Supreme Court and the Sixth Circuit, including, but not limited to, the Court's recent ruling in *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure.").

14. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

    Response: The question of what resources should be allocated to local and federal law enforcement officials is one for policy-makers and generally does not fall within the purview of the judicial branch.

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

    Response: The question of what resources should be allocated to local and federal law enforcement officials is one for policy-makers and generally does not fall within the purview of the judicial branch.

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

    Response: As a sitting district judge, I am bound by the considerations set forth in 18 U.S.C. §§ 3582(c) and 3553(a) in determining whether extraordinary and compelling circumstances exist and warrant release. Notably, § 3553(a) requires the court to consider the need to protect the public in its evaluation of such a motion.

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

    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 in defense of self and home. And in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), it held that the right is fundamental. The Court declined to establish a specific test for evaluating alleged violations of the right. But in *Tyler v. Hillsdale County Sheriff's Office*, 837 F.3d 678 (6th Cir. 2016) (*en banc*), the Sixth Circuit adopted a framework for application of intermediate scrutiny to such claims. Under *Tyler,* the court must first determine whether the challenged regulation or proposed legislation burdens a core right under the Second Amendment. If it does, then the court must ask whether it is substantially related to an important government objective, i.e. whether the government can demonstrate a "reasonable fit" between the important government objective and the challenged law. *Id.* at 693, 699. As a sitting district judge and if confirmed as a circuit judge, I will faithfully apply these, and any other pertinent precedent to questions under the Second Amendment.

18. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

    Response: Over the course of my six years as a federal judge, I have not had occasion to address this issue. But if confronted with such a question, I would consider the statutory provisions at issue, and any precedential authority on the issue from the Supreme Court and the Sixth Circuit.

19. **Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?**

    Response: As a sitting district judge and as a circuit court nominee it would be inappropriate under the Code of Conduct for United States Judges, Canons 2A and 3A to express a view on this issue, except to affirm that I will and would continue if confirmed to follow existing precedent.

20. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**
    a. **Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**
    b. **How is a burden deemed to be "substantial[]" under current caselaw?**

    Response: Under the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.,* while courts "have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)," "a law that 'operates so as to make the practice of religious beliefs more expensive'… imposes a burden on the exercise of religion." 573 U.S. 682, 710, 724 (2014). To satisfy the strictures of the Religious Freedom Restoration Act, the government must demonstrate that the subject rule or law is in furtherance of a compelling government interest and uses the least restrictive means in furthering that compelling governmental interest. 42 U.S.C §§ 2000bb-1(a) and (b). As a sitting district judge and if confirmed as a circuit judge, I will faithfully apply this, and any other pertinent precedent to questions under the Religious Freedom Restoration Act.

21. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

    Response: I am unfamiliar with this quote from Judge Reinhardt and without more context, unclear as to the meaning of the statement.

22. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

Response: There is no right to appointment of counsel in civil cases and appointment is only justified in exceptional circumstances. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981); *see also Lanier v. Bryant*, 332 F.3d 999, 1006 (6th Cir. 2003). Decisions about whether an attorney should take on representation in a given civil matter is governed by the rules of professional conduct for the state(s) in which they are licensed and typically include considerations such as whether the lawyer can perform "competently, promptly, without improper conflict of interest and to completion." Michigan Rule of Professional Conduct 1.16. Additionally, in my home state of Michigan, lawyers are required to decline representation or withdraw from matters in which a client or potential client demands that the lawyer engage in illegal conduct or conduct that violates the Michigan Rules of Professional Conduct.

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

Response: As a sitting district judge and as a circuit court nominee it would be inappropriate under the Code of Conduct for United States Judges, Canons 2A and 3A to express a view on this issue, except to affirm that I will and would continue if confirmed to follow existing precedent. In that vein, the Supreme Court recently determined that a state law provision that sought to ban aid to religious sects or institutions (a practice which I understand has come to be associated with the failed Blaine Amendment of the 1870s in which it was proposed that the Constitution be amended to include a provision barring government aid to sectarian institutions), was not neutral and thus violated the First Amendment. *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). As a sitting district judge and if confirmed as a circuit judge, I will faithfully apply this, and any other pertinent precedent to questions under the First Amendment as appropriate.

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

Response: Yes. The right to petition the government is protected by the First Amendment of the United States Constitution.

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

Response: In its decision in *Chaplinsky v. New Hampshire*, the Supreme Court determined that fighting words, which may be regulated by the government consistent with the First Amendment, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 572 (1942).

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

Response: The true threats doctrine, as set forth by the Supreme Court in *Virginia v. Black*, provides that the First Amendment allows states to ban "true threats," which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 359-360 (2003). It is not necessary that the speaker actually carry out the threat as the doctrine protects individuals and groups of individuals from the fear of violence, the disruption that may ensue from that fear, and the possibility that the threatened violence will happen.

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

Response: No as to a, b, and c.

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

Response: No, as to a, b, and c.

29. **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.**
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.**
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, as to a, b, and c.

30. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response: No, as to a, b, and c.

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

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

Response: No, as to a, b, and c.

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

Response: On December 12, 2021, attorneys from the White House Counsel's Office contacted me about a judicial vacancy on the United States Court of Appeals for the Sixth Circuit. On December 13, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with attorneys from the Office of Legal Policy at the United States Department of Justice. On February 2, 2022, my nomination was submitted to the Senate.

33. **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.

34. **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.

35. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

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

Response: No.

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

Response: No.

38. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: Please see my response to Question 32.

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

Response: I received the questions on March 9, 2022. I reviewed the questions, conducted research where necessary, gathered information regarding my current and past dockets, drafted responses, consulted with lawyers from the Department of Justice and authorized my responses to be transmitted to the Senate Judiciary.

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

Questions for the Record for Stephanie D. Davis, Nominee for the Sixth Circuit

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previousnominee 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 previouslyprovided.

If a question asks for a yes or no answer, please provide a yes or no answer first andthen 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-writtenand then articulate both the premise about which you disagree and the basis for thatdisagreement.

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 yourtentative answer as a consequence of its reasonable investigation. If even a tentativeanswer is impossible at this time, please state why such an answer is impossible andwhat 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, pleasestate the ambiguity you perceive in the question, and provide multiple answers whicharticulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

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

Response: As a sitting district judge, I approach each case with an open mind and apply the same level of diligence and rigorous analysis to every case that comes before me. I consider only the record before me, the parties' briefs, arguments made at oral argument, statutory language if applicable, binding precedent from the Supreme Court and the Sixth Circuit and absent binding precedent, persuasive authority from within and outside of my circuit. Once this review and analysis is complete, I fairly and impartially apply the law to the facts of the case. If confirmed, I would continue to apply this method to every case, regardless of the parties or issues.

I have great admiration for many past and present Supreme Court Justices based on their commitment to the law, public service, and their dedication to the legal profession. As a federal district judge, I have applied Supreme Court precedent in all of my cases for which such precedent exists. However, I have not studied the jurisprudence of individual Justices such that I can comfortably single out any particular Justice for special recognition.

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

Response: I do not subscribe to any particular label. However, I acknowledge that the application of the Constitution or any statute begins with reading the language of the law in the context of its structural components. And in certain contexts, the Supreme Court has established the manner of analysis that should be applied to various constitutional provisions. For instance, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court directed courts to analyze challenges under the Second Amendment based on the original meaning of the text. Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), in the context of analyzing the Confrontation Clause, the Court relied on its evaluation of the original meaning of the text. If confirmed, I will follow Supreme Court and Sixth Circuit precedent addressing acceptable methods of constitutional and statutory construction.

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

Response: I believe that the Constitution is an enduring document. If confirmed, I would faithfully follow Supreme Court and Sixth Circuit precedent in interpreting the Constitution.

4. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original**

public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: In *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 541 (6th Cir. 2021) (Bush, J., concurring), Judge Bush explained that when the Sixth Circuit faced a federal constitutional issue not previously decided in its circuit, it must first ask whether a holding of the Supreme Court has "direct application in a case." *Id*. (quoting *Rodriguez de Quijas v. Shearson/Am. Express*, *Inc*., 490 U.S. 477, 484 (1989)). An affirmative answer ends the inquiry. However, when a case "presents an issue of first impression that no holding of the Supreme Court can resolve," the Circuit Court looks to "[t]he ultimate touchstone of constitutionality": The Constitution itself. *Id.* (quoting *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring)). The Supreme Court has relied on original public meaning in interpreting some provisions of the Constitution. For example, in *District of Columbia v. Heller*, the Supreme Court stated that for cases involving the Second Amendment, "the public understanding of a legal text in the period after its enactment or ratification…is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). If confirmed, I would continue to follow all binding precedent, including with respect to interpretive methods.

5. **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: As a sitting district judge, I follow the interpretive methods set out in binding precedent from the Sixth Circuit and the Supreme Court. For example, in *District of Columbia v. Heller*, the Supreme Court stated that for cases involving the Second Amendment, "the public understanding of a legal text in the period after its enactment or ratification…is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). If confirmed, I would continue to follow all binding precedent, including those addressing interpretive methods.

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

Response: I believe that the Constitution is an enduring document. Article V governs the amendment process. If confirmed, I would follow Supreme Court and Sixth Circuit precedent in interpreting the Constitution.

7. **When, if ever, would it be appropriate for you to consider legislative history to help guide statutory interpretation?**

   a. **What textual tools would you exhaust before turning to congressional reports?**

   b. **What policy implications does this approach create?**

Response: As a sitting district judge, I regularly review cases involving questions of statutory interpretation. In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, persuasive opinions from other circuits, precedential decisions interpreting analogous statutes, and after exhausting other avenues, may consider legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United States* that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831 (1974) (quotation marks and citation omitted).

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

Response: Under the Religious Freedom Restoration Act (RFRA), the government "shall not substantially burden a person's exercise of religion" unless the government demonstrates that application of the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S. Code § 2000bb–1(b); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (*per curiam*). RFRA applies to "all Federal law, and the implementation of that law, whether statutory or otherwise…" 42 U.S.C. § 2000bb-3(a); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). Further, under the Free Exercise Clause of the First Amendment, laws that burden the free exercise of religion are subject to strict scrutiny where it is not facially neutral or generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993). All other laws, that are neutral and generally applicable, are subject to rational basis scrutiny. *Employment Div., Dep 't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-882 (1990).

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

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court held that laws that incidentally burden the free exercise of religion are subject to strict scrutiny when they are not facially neutral and generally applicable. 508 U.S 520 (1993). All other laws, that are neutral and generally applicable, are subject to rational basis scrutiny. *Employment Div., Dep 't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-882 (1990); *see Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (applying *Church of the Lukumi Babalu* and *Smith*). In *Tandon v. Newsom*, however, the Supreme Court recently held that a statute is not neutral and generally applicable if it treats comparable activity between secular and religious groups differently. 141 S. Ct. 1294 (2021); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020). And in *Fulton v. City of Philadelphia*, the Court ruled that a law is not neutral and generally applicable if it allows for discretionary exceptions under the challenged law

that may allow for different treatment as between secular and religious groups. 141 S. Ct. 1868 (2021).

10. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman CatholicDiocese 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 remainopen and subjected to different restrictions in those same zones. The religiousorganizations 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 Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020), the Supreme Court granted injunctive relief to religious groups that filed § 1983 claims against the governor of New York. The plaintiffs alleged that the governor's emergency executive order imposed restrictions on houses of worship during the COVID-19 pandemic in violation of the Free Exercise Clause of the First Amendment. *Id.* at 66-67. Finding that the challenged restrictions were "not 'neutral' and of 'general applicability,'" the Court noted that "they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id.* at 67. (citation omitted). The Court held that the restrictions did not pass strict scrutiny, reasoning that while "[s]temming the spread of COVID–19 is unquestionably a compelling interest, . . . it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'" *Id.*

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that California's COVID-19-related restrictions on at-home religious gatherings violated the petitioners' free exercise rights. The Court found that that "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." *Id.* at 1297. Therefore, the Court held that the restrictions were not neutral and generally applicable and thus did not satisfy strict scrutiny. *Id.* at 1298.

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

Response: Yes.

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

Response: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729-30 (2018) dealt with the Colorado Civil Rights Commission's issuance of a

cease-and-desist order against a bakery owner, stemming from the bakery's refusal to provide a wedding cake to a same-sex couple. The Supreme Court held that the Commission showed "clear and impermissible hostility toward the sincere religious beliefs" of the bakery owner, thus violating his right to a "neutral and respectful consideration of his claims" as required by "the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id*. at 1729, 1732.

14. **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: In *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989), the Supreme Court rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." Accordingly, regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization," an individual's sincerely held religious beliefs are protected. *Id*. at 833–34.

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

Response: As indicated above, the Supreme Court has found that, regardless of whether an individual's sincerely held religious beliefs are "responding to the commands of a particular religious organization," they are protected. *Frazee*, 489 U.S. at 833-834. In the Sixth Circuit, "Courts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)). Further, the Sixth Circuit has held that "Sincerity is distinct from reasonableness. [O]nce plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations, or to say that [plaintiffs'] religious beliefs are mistaken or insubstantial." *Id.* (citations and quotations omitted).

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

Response: Regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization," an individual's sincerely held religious beliefs are protected. *Frazee*, 489 U.S. at 833-34.

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

Response: As a sitting district judge and nominee to become a circuit judge, it

would be inappropriate for me to comment on the official position of any religion.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court expanded on its *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 191 (2012) decision which recognized a ministerial exemption grounded in the Religious Clauses of the First Amendment. 140 S. Ct. 2049 (2020). The Supreme Court reasoned that an analysis of whether an employee is a minister is not limited to an employee's formal title, and that courts must analyze "what an employee does." 140 S. Ct. at 2064. Therefore, the Court held that the employment discrimination claims of two teachers against a religious school were barred by the exception, as the teachers were ministers for purposes of the exemption where they "performed vital religious duties." *Id.* at 2066.

16. **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 a city's refusal to contract with a religiously-affiliated foster care agency violated the Free Exercise and Free Speech Clauses of the First Amendment. 141 S. Ct. at 1882. The Court ruled that a law is not neutral and generally applicable if it allows for discretionary exceptions under the challenged law that may allow for different treatment as between secular and religious groups. The Court reasoned that because the city offered "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others" the city's action "cannot survive strict scrutiny, and violates the First Amendment." *Id.*

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

Response: While Justice Gorsuch agreed with the Supreme Court's decision to grant the writ of certiorari, vacate the state court's judgment, and remand for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), he provided additional guidance for the state courts and administrative authorities on remand. He emphasized that RLUIPA and the application of strict scrutiny required a more particularized analysis of the stated compelling state interest in the context of the specific facts at issue. More specifically, Justice Gorsuch explained that the question to be answered on remand "is

not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception" from that requirement to the Swartzentruber Amish *specifically*. *Mast v. Fillmore Cty., Minnesota*, 141 S. Ct. 2430, 2432 (2021) (quoting *Fulton*, 141 S. Ct. at 1881 (emphasis added in concurring opinion)).

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

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

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

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

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

    Response: The Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act provide protection for employees on the basis of race discrimination and sex discrimination. If confronted with a case involving such issues, I will faithfully apply the law, Constitution and pertinent Supreme Court and Sixth Circuit precedent(s) to the facts before me. As a sitting district judge who regularly presides over cases alleging employment discrimination it would be inappropriate for me to opine about hypotheticals that could come before the court. Judges may not forecast or foretell how they may decide a given legal issue. *See*, Code of Conduct for United States Judges, Canons 2A and 3A.

19. **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 teachings or trainings.

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

    Response: As a sitting federal district court judge, I treat every plaintiff and defendant fairly and I bring the same level of analytical rigor to every case. I am not aware of any universally accepted definition for the term "systemically racist", and I am not quite sure what it means here. However, if confirmed, I will continue to administer justice fairly and faithfully and follow all precedent from the Sixth Circuit and Supreme Court.

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

Response: As a sitting federal judge and judicial nominee, it would be inappropriate for me to comment on how the Executive Branch selects its political appointments.

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

Response: As a sitting federal judge and judicial nominee to a lower court, it would be inappropriate for me to comment on whether the size of the Supreme Court should be modified. However, if confirmed, I will continue to faithfully follow all precedent from the Supreme Court.

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

Response: Yes. 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 in defense of self and home. And in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), it held that the right is fundamental. As a sitting district judge and if confirmed as a circuit judge, I will faithfully apply these, and any other pertinent precedent to questions under the Second Amendment.

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

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 in defense of self and home. And in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), it held that the right is fundamental. I am not aware of any Supreme Court authority standing for the proposition that the right to bear arms receives lesser protections than any other specifically enumerated individual rights.

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

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 in defense of self and home. And in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), it held that the right is fundamental. I am not aware of any Supreme Court authority standing for the proposition that the right to bear arms receives lesser protections than the right to vote.

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

Response: The Constitution states that the President must "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. As a sitting federal judge and judicial

nominee, given that such controversies may come before the federal courts, it would be inappropriate for me to comment on whether the President's refusal to enforce a law violates the Constitution. *See*, Code of Conduct for United States Judges, Canons 2A and 3A.

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

Response: According to *Bond v. United States*, 572 U.S. 844, 865 (2014), "prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." "For purposes of the APA, substantive rules are rules that create law," while in contrast "[i]nterpretive rules merely clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or regulation means." *First National Bank v. Sanders*, 946 F.2d 1185, 1188-89 (6th Cir. 1991) (quoting *S. California Edison Co. v. Fed. Energy Regulatory Comm'n*, 770 F.2d 779, 783 (9th Cir. 1985)). Whether a particular act constitutes prosecutorial discretion or a substantive administrative rule change is an issue currently percolating in the federal courts. Accordingly, it would be inappropriate for me, as a sitting judge and judicial nominee, to comment on this issue. *See*, Code of Conduct for United States Judges, Canons 2A and 3A.

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

Response: "The Federal Death Penalty Act (FDPA) sets out a comprehensive scheme by which federal district courts adjudicate, review, and impose death sentences." *United States v. Tsarnaev*, No. 20-443, 2022 WL 626692, at *9 (U.S. Mar. 4, 2022) (citing 18 U.S.C. §§ 3591 *et seq*.). The FDPA provides that a defendant found guilty of certain offenses "shall be sentenced to death if, after consideration of the factors set forth in" the Act, "it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." 18 U.S.C. § 3591(a). I am not aware of any authority either found in the Constitution or statute permitting the President to unilaterally eliminate the FDPA.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, the Supreme Court held that petitioners were likely to succeed on the merits of their claim that the Centers for Disease Control and Prevention exceeded its statutory authority, 42 U.S.C. § 264(a), in imposing a nationwide eviction moratorium. 141 S. Ct. 2485, 2486 (2021) *(per curiam*). Further, the court held that that the balance of equities weighed against a stay of judgment pending appeal. *Id*. at 2490. The Court concluded that, "If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." *Id*.

Senator Josh Hawley
Questions for the Record

Stephanie Davis
Nominee, U.S. Court of Appeals for the Sixth Circuit

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

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

    Response: I am not familiar with this quote from Justice Marshall. As a district judge and as a circuit nominee, I deem it my responsibility to faithfully apply the law and precedent to the facts of each case that is before me in a fair and impartial manner.

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

    Response: All federal judges should adhere to this oath, as codified in 28 U.S.C. § 453.

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

Response: Under *Pullman* abstention, first formulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), federal courts should abstain from a decision when "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). In the Sixth Circuit, Pullman abstention is "appropriate only where state law is unclear *and* a clarification of that law would preclude the need to adjudicate the federal question." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (emphasis in original).

Under *Burford* abstention, first formulated in *Burford v. Sun Oil Co*., 319 U.S. 315 (1943), federal courts sitting in equity "must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcend 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," assuming timely and adequate state-court review is an option. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (internal quotations and citation omitted). In the Sixth Circuit, the "key question" for judges examining whether Burford abstention is appropriate "is whether an erroneous federal court decision could impair the state's effort

to implement its policy." *Saginaw Housing Comm'n Bannum, Inc*., 576 F.3d 620, 626-628 (6th Cir. 2009) (citation omitted).

Under *Younger* abstention, first formulated in *Younger v. Harris*, 401 U.S. 37 (1971) and expanded in both *Exxon Mobil Corp. v. Saudi Basic Industries Corp*., 544 U.S. 280 (2005) and *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), federal courts abstain from cases that are already pending in state proceedings. The Sixth Circuit follows the test adopted in *Middlesex,* permitting abstention where: "(1) state proceedings are currently pending; (2) the proceedings involve an important state interest; and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise his constitutional claims." *Doe v. Univ. of Ky*., 860 F.3d 365, 369 (6th Cir. 2017).

Under *Colorado River* abstention, first formulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), a federal court may dismiss or stay a federal action in deference to pending parallel state court proceedings, based on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817. In the Sixth Circuit, a court must consider and balance: (1) whether the state court has assumed jurisdiction over any *res* or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. *Romine v. Compuserve Corp*., 160 F.3d 337, 340-41 (6th Cir. 1998) (citations omitted).

Under *Rooker-Feldman* abstention, first formulated in *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923), lower federal courts are barred from conducting appellate review of final state court judgments because 28 U.S.C. § 1257 vests sole jurisdiction to review such claims in the Supreme Court. In the Sixth Circuit, Rooker-Feldman abstention applies "only where a state-court loser initiates an action in federal district court, complaining of injury caused by a state court judgment, and seeks review and rejection of that judgment." *In re Cook,* 551 F.3d 542, 548 (6th Cir. 2009).

Under *Thibodaux* abstention, first formulated in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), a federal court sitting in diversity jurisdiction may choose to abstain so that a state court may decide issues "intimately involved with [the state's] sovereign prerogative." 360 U.S. 25, 28; *see also Superior Beverage Co., Inc. v. Schieffelin & Co*., 448 F.3d 910, 913 (6th Cir. 2006).

Under ecclesiastical abstention, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson v. Jones*, 80 U.S. 679, 727 (1871); *see also Hutchison v. Thomas*, 789 F.2d 392,

395 (6th Cir. 1986).

3. **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: Please see my answer to Question 3.

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

   Response: As a sitting district judge and as a circuit judge, if confirmed, I will interpret the Constitution in accordance with the methods employed by the Supreme Court in interpreting its various provisions. For instance, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Court directed courts to analyze challenges under the Second Amendment based on the original public meaning of the text. Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), in the context of analyzing the Confrontation Clause, the Court's relied on its evaluation of the original meaning of the text. If confirmed, I will follow Supreme Court and Sixth Circuit precedent addressing acceptable methods of constitutional interpretation.

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

   Response: As a sitting district judge, I regularly review cases involving questions of statutory interpretation. In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, the context of the provision in relation to the overall statutory scheme, persuasive opinions from other circuits, precedential decisions interpreting analogous statutes, and after exhausting other avenues, may consider legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United States* that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831 (1974) (quotation marks and citation omitted). I would therefore carefully follow all binding precedent and guidance regarding legislative history.

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

      Response: The Supreme Court has advised that some legislative history is

more probative of legislative intent than others. In *Garcia v. United States*, the Supreme Court stated that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." 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: It is not appropriate to consult the law of foreign nations when interpreting the provisions of the U.S. Constitution.

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

Response: In *Glossip v. Gross*, 576 U.S. 863 (2015), the Supreme Court held that a state's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a feasible, readily implemented alternative procedure that would significantly reduce a substantial risk of severe pain. *Glossip v. Gross*, 576 U.S. 863 (2015) (citing *Baze v. Rees*, 553 U.S. 35 (2008)); *see also Middlebrooks v. Parker,* 15 F. 4th 784 (6th Cir. 2021) (applying *Glossip* and *Baze)*.

7. 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. In *Glossip v. Gross*, the Supreme Court stated that the petitioners making a facial challenge, "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims." 576 U.S. 863, 867 (2015). And in *Bucklew v. Precythe*, the Court ruled that an inmate bringing an Eighth Amendment method-of-execution in an as-applied challenge must demonstrate that an alternative method of execution that is "feasible," can be "readily implemented," and that it entails a reduced risk of pain. 139 S. Ct. 1112, 1127 (2019). Plus, an inmate must show that the government, with no legitimate penological reason, has refused to adopt the alternative method. *Id.* at 1125.

8. 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. In *District Attorney's Office for the Third Judicial Dist. v. Osborne*, the Supreme Court rejected a petitioners' request to recognize a "freestanding and

far-reaching constitutional right of access to this new type of evidence" and further stated that "that there is no such substantive due process right." 557 U.S. 52-56, 72-73 (2009).

9. 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.

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

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court held that laws that incidentally burden the free exercise of religion are subject to strict scrutiny where they are not facially neutral or generally applicable. 508 U.S. 520 (1993). All other laws that are neutral and generally applicable are subject to rational basis scrutiny. *Employment Div., Dep 't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-882 (1990); *see Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (applying *Church of the Lukumi Babalu* and *Smith).* In *Tandon v. Newsom*, however, the Supreme Court recently held that a statute is not neutral and generally applicable if it treats comparable activity between secular and religious groups differently. 141 S. Ct. 1294 (2021); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020). And in *Fulton v. City of Philadelphia*, the Court ruled that a law is not neutral and generally applicable if it allows for discretionary exceptions under the challenged law that may allow for different treatment as between secular and religious groups. 141 S. Ct. 1868 (2021).

11. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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 10.

12. 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: In the Sixth Circuit, "Courts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 725). Further, the Sixth Circuit has held that "Sincerity is distinct from reasonableness.

[O]nce plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations, or to say that [plaintiffs'] religious beliefs are mistaken or insubstantial." *Id.* (citations and quotations omitted).

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

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

Response: In *District of Columbia v. Heller* the Supreme Court held that with respect to firearms, the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008).

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

Response: No.

14. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: I believe Justice Holmes clarified this statement when he added that the "Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting).

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

Response: *Lochner v. New York*, 198 U.S. 45 (1905) was mostly abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). As a district judge and if confirmed as a circuit judge, I am duty-bound to apply current precedent.

15. 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: As a district court judge, I am bound to follow all Supreme Court precedent. I am not aware of any cases that have not been formally overruled that I believe are no longer good law.

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

Response: Yes.

16. 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: Please see my answer to Question 16(c).

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

Response: Please see my answer to Question 16(c).

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: As a federal district court judge, I am bound to follow precedent from the Supreme Court and the Sixth Circuit. The Supreme Court held in *United States v. Grinnell Corp*. that the offense of monopolization under the Sherman Act has two elements: (1) "the possession of monopoly power in the relevant market"; and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 384 U.S. 563, 570-71 (1966). In *Re/Max Intern., Inc. v. Realty One, Inc*., the Sixth Circuit stated a test for determining monopolistic power: "The first is by presenting direct evidence showing the exercise of actual control over prices or the actual exclusion of competitors. [] The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. 173 F.3d 995, 1016 (6th Cir. 1999).

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

Response: In *Rodriguez v. Fed. Deposit Ins. Corp*., the Supreme Court stated that "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's legislative Powers in

Congress and reserves most other regulatory authority to the States." 140 S. Ct. 713, 717 (2020) (quotations omitted). The Court also observed that there is no federal general common law, instead "only limited areas exist in which federal judges may appropriately craft the rule of decision" such as admiralty disputes or controversies between states. *Id.* (citations and quotations omitted).

18. 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 *Lindenberg v. Jackson Nat'l Life Ins. Co*., the Sixth Circuit advised that "[f]aithful application of a state's law requires us to anticipate how the relevant state's highest court would rule in the case, and in doing so we are bound by controlling decisions of that court." 912 F.3d 348, 364 (6th Cir. 2018). The Sixth Circuit further advised that "[w]here…the state's appellate courts have not addressed the issue presented, we must predict how the [state's highest] court would rule by looking to all the available data" and that federal courts should be extremely cautious about adopting substantive innovation in state law. *Id.* (citations and quotations omitted). In *Conlin v. Mortg. Elec. Registration Sys., Inc*., the Sixth Circuit held that where federal jurisdiction is based on diversity, to resolve issues of Michigan state law, for example, "we look to the final decisions of that state's highest court, and if there is no decision directly on point, then we must make an Erie guess to determine how that court, if presented with the issue, would resolve it." 714 F.3d 355, 358-359 (6th Cir. 2013). *See Erie 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 18.

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

The U.S. Constitution states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, ¶ 2. The Constitution is therefore binding on all U.S. states and territories.

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

Response: As a sitting district judge it is generally inappropriate under the Code of Conduct for United States Judges, Canons 2A and 3A to opine on the propriety of an opinion or constituent parts of an opinion of the Supreme Court. I view *Brown v. Board of Education* and *Loving v. Virginia*, however, to be exceptions to this general

rule inasmuch as *Brown* definitively undermined the foundation upon which *Plessy v. Ferguson* had been built and supplanted it with the underpinnings for *Loving*; and neither issue has been, nor appears likely, to be revisited in United States courts. Moreover, I spoke publicly about *Brown* before taking on any judicial role. As such, I do not view reaffirming the correctness of *Brown* as violative of the judicial canons. As a district judge and if confirmed as a circuit judge, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.

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

Response: Federal Rule of Civil Procedure 65 governs the procedures for issuance of an injunction. The relief granted by an injunction should "be no more burdensome to the defendant than necessary to provide complete relief to the [plaintiff]." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (injunctive relief was permitted in case in which court certified a nationwide class).

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

Response: In *Califano v. Yamasaki*, the Supreme Court held that "[i]f a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties." 442 U.S. 682, 702 (1979).

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

Response: In *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court held that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." 561 U.S. 139, 165 (2010). In *Trump v. Int'l Refugee Assistance Project*, the Supreme Court upheld a nationwide injunction as necessary to grant the requested relief. 137 S. Ct. 2080, 2088-89 (2017). The Sixth Circuit has exercised caution in issuing nationwide injunctions under certain circumstances, such as when the injunctive relief may run counter to the substantive law of another jurisdiction and is "percolating" throughout other jurisdictions. *See, e.g., Gun Owners of America, Inc.*, 992 F.3d 446 (6th Cir. 2021); *cf, Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987) (upholding nationwide injunction where it was likely that other states would rule consistent with the district court).

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

Response: Please see my answer to Question 20(a).

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

Response: In *Bond v. United States*, the Supreme Court stated that the "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." 564 U.S. 211, 221 (2011). Further, the Court held that "[f]ederalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* at 222.

23. 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 2.

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

Response: As a sitting district court judge, I am bound to follow Supreme Court and Sixth Circuit precedent regarding injunctive relief. In the Sixth Circuit, courts consider four factors to determine when determining whether to issue a preliminary injunction: "(1) whether the party moving for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest." *D.T. v. Sumner Cty. Schs*., 942 F.3d 324, 326 (6th Cir. 2019) (citations omitted).

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

Response: In *Washington v. Glucksberg*, the Supreme Court stated that it has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition…and implicit in the concept of ordered liberty…" 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). The Supreme Court then collected and described "a long line of cases" that held that the liberty specially protected by the Due Process Clause includes certain rights, including: "the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952); and to abortion, *Casey*, supra." *Id.*

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

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

Response: Please see my answer to Question 10.

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

Response: In *Burwell v. Hobby Lobby Stores, Inc*., the Supreme Court held that the "exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons." 573 U.S. 682, 710 (2014) (internal citation and quotations omitted). And in *Lee v. Weisman*, the Supreme Court held that the "In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." 505 U.S. 577, 591 (1992).

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 10.

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 12.

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: Under the Religious Freedom Restoration Act ("RFRA"), as amended, the government "shall not substantially burden a person's exercise of religion" unless the government demonstrates that application of the burden is: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S. Code § 2000bb–1(b). RFRA applies to "all Federal law,

and the implementation of that law, whether statutory or otherwise…" 42 U.S.C. § 2000bb-3(a).

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: Yes. Here are the citations to dispositive decisions I have recommended or issued relating to the listed issues: *Byrd v. Haas*, Case No. 17-11427 (E.D. Mich. Aug. 8, 2018), R&R adopted (ECF No. 58); *Coleman v. Snyder*, No. 17-11730, 2018 WL 4854106 (E.D. Mich. Aug. 3, 2018), R&R adopted, 2018 WL 4103364 (E.D. Mich. Aug. 29, 2018); *Maye v. Klee*, No. 14-10864, 2017 WL 9802821 (E.D. Mich. Mar. 3, 2017) & 2018 WL 3259786 (E.D. Mich. Jan. 24, 2018), R&Rs adopted, 2018 WL 1384234 (E.D. Mich. Mar. 19, 2018), aff'd, 915 F.3d 1076 (6th Cir. 2019); *Bullard v. Sundstrom*, No. 16-12918, 2017 WL 4080551 (E.D. Mich. Aug. 14, 2017) R&R adopted, 2017 WL 4073958 (E.D. Mich. Sept. 14, 2017); *Conway v. Purves*, No. 13-10271, 2016 WL 11474792 (E.D. Mich. Aug. 1, 2016), R&R adopted, 2016 WL 5027597 (E.D. Mich. Sept. 20, 2016).

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

a. What do you understand this statement to mean?

Response: I believe this statement to mean that a Judge should not rule based on their personal views but rather by applying the law to the facts of each case.

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

a. If yes, please provide appropriate citations.

Response: I understand this question to request information relating to my role as a lawyer as opposed to judicial rulings. No.

29. 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.

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

Response: As a sitting federal district court judge, I treat every plaintiff and defendant fairly and I bring the same level of analytical rigor to every case. I am not aware of a universally-accepted meaning for the term "systemic racism" and thus cannot be sure what it means here. Regardless, if confirmed, I will continue to administer justice fairly and follow all precedent from the Sixth Circuit and Supreme Court.

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

Response: As a sitting district judge, I am duty-bound to faithfully apply the law and all Supreme Court precedent to the cases that are before me, considering only the arguments of the parties and items in the record of the case.

32. How did you handle the situation?

Response: Please see my response to Question 31.

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

Response: Yes.

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

Response: I am unable to single out one particular Federalist Paper above all others as having most shaped my views of the law.

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

Response: Under *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), the Supreme Court affirmed that viability remains the touchstone upon which the appropriate legal analysis of the state's interest is based. I am bound by Supreme Court and Sixth Circuit precedent on all such matters. If confirmed, I will continue to follow precedent and apply the law to the facts of every case.

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

Response: No.

37. 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.

38. 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.

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

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

Response: No.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

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

Response: I understand the duty of candor to require nominees to adhere to the oath to which they swear before testifying, by truthfully answering the questions put to them before the Senate Judiciary Committee. I upheld that oath during the hearing, and have provided truthful answers to these questions for the record.

Questions for the Record for Stephanie Dawkins Davis
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 Kennedy
Questions for the Record
Judge Stephanie Davis

1. **Please describe your judicial philosophy**.

   Response: As a district judge, I approach each case with an open mind and apply the same level of diligence and rigorous analysis to every case that comes before me. I consider only the record before me, the parties' briefs, arguments made at oral argument, statutory language if applicable, binding precedent from the Supreme Court and the Sixth Circuit and absent binding precedent, persuasive authority from within and outside of my circuit. Once this review and analysis is complete, I fairly and impartially apply the law to the facts of the case. If confirmed, I would continue to apply this method to every case, regardless of the parties or issues.

2. **Do you believe in the concept of a "living Constitution"?**

   Response: I believe that the Constitution is an enduring document. If confirmed, I would follow Supreme Court and Sixth Circuit precedent in interpreting the Constitution.

3. **Of the three, would you describe your judicial philosophy more as originalist, textualist, or living Constitutionalist?**

   Response: I do not subscribe to any particular label. However, I acknowledge that the application of the Constitution or any statute begins with reading the language of the law in the context of its structural components. And in certain contexts, the Supreme Court has established the manner of analysis that should be applied to various constitutional provisions. For instance, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Court directed courts to analyze challenges under the Second Amendment based on the original meaning of the text. Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), in the context of analyzing the Confrontation Clause, the Court's relied on its evaluation of the original meaning of the text. If confirmed, I will follow Supreme Court and Sixth Circuit precedent addressing acceptable methods of constitutional and statutory construction.

4. **Please explain how you would reason through a case involving matters of statutory or constitutional interpretation if strict textualism would compel reaching an absurd result.**

   Response: Please see my response to Question 3. Additionally, as a sitting district judge, I regularly review cases involving questions of statutory interpretation. In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, the context of the provision in relation to the overall statutory scheme, persuasive opinions from other circuits, precedential decisions interpreting analogous statutes, and after exhausting other avenues,

may consider legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United States* that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831 (1974) (quotation marks and citation omitted). I would therefore carefully follow all binding precedent and guidance regarding legislative history.

5. **What weight, if any, would you give to legislative history when interpreting a statute?**

   Response: Please see my response to Question 4.

6. **What is your interpretation of the Ninth Amendment, and what role does it play in the constitutional "right to privacy"?**

   Response: The Ninth Amendment to the U. S. Constitution provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Supreme Court referred to and relied, in part, on the Ninth Amendment in concluding that the Connecticut law at issue in that case encroached upon the right to marital privacy, which, while not a right expressly enumerated in the Constitution, is nonetheless "a right of privacy older than the Bill of Rights – older than our political parties, older than our school system." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). In doing so, the Court declined to construe the Constitution in a manner that would deny a right – there, marital privacy – deemed to have been retained by the people.

Senator Mike Lee Questions
for the Record
Stephanie Davis, Nominee to be United States Circuit Judge for the SixthCircuit

1. How would you describe your judicial philosophy?

Response**:** As a district judge, I approach each case with an open mind and apply the same level of diligence and rigorous analysis to every case that comes before me. I consider only the record before me, the parties' briefs, arguments made at oral argument, statutory language if applicable, binding precedent from the Supreme Court and the Sixth Circuit and absent binding precedent, persuasive authority from within and outside of my circuit. Once this review and analysis is complete, I fairly and impartially apply the law to the facts of the case. If confirmed, I would continue to apply this method to every case, regardless of the parties or issues.

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

Response**:** As a sitting district judge, I regularly review cases involving questions of statutory interpretation. In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, the context of the provision in relation to the overall statutory scheme, persuasive opinions from other circuits, precedential decisions interpreting analogous statutes, and after exhausting other avenues, may consider legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United States* that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831 (1974) (quotation marks and citation omitted). I would therefore carefully follow all binding precedent and guidance regarding legislative history.

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

Response**:** As a sitting district judge and as a circuit judge, if confirmed, I will interpret the Constitution in accordance with the methods employed by the Supreme Court in interpreting its various provisions. For instance, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Court directed courts to analyze challenges under the Second Amendment based on the original public meaning of the text. Similarly, in *Crawfprd v. Washington*, 541 U.S. 36 (2004), in the context of analyzing the Confrontation Clause, the Court relied on its evaluation of the original meaning of the text. If confirmed, I will follow Supreme Court and Sixth Circuit precedent addressing acceptable methods of constitutional and statutory construction.

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

Response**:** Please see my response to Question 3.

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**:** Please see my response to Question 3. Additionally, the Supreme Court recently held in *Bostock v. Clayton Cty., Ga.,* that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response**:** Article III of the Constitution empowers the federal judiciary to decide "Cases" and "Controversies," U.S. Const. art. III, § 2, a limitation which takes into account "the proper—and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). To establish standing, a plaintiff has the burden to establish that he has suffered (1) an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial ruling." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016); *See also, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

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

Response**:** The Constitution provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art 1, § 8, cl. 3. It also grants Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof." U.S. Const. art I, § 8, cl. 18. And it provides for the power to enforce the provisions of the Fourteenth Amendment where it states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

The Supreme Court has addressed the scope of congressional powers under both the

Commerce Clause and the Fourteenth Amendment. *See United States v. Lopez*, 514 U.S. 549 (1995); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Nat'l Federation of Ind. Bus. v. Sebelius*, 567 U.S. 519 (2012); *City of Boerne v. Flores*, 521 U.S. 507 (1997). Moreover, it has recognized the existence of certain implied powers. *See, e.g. McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) (concluding that "the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective."). Such implied powers were first recognized in *McCullough v. Maryland,* 17 U.S. 316 (1819), where the Supreme Court held that the Necessary and Proper Clause grants Congress the implied powers to implement the express powers of Congress contained in the Constitution. If confirmed, I would faithfully apply these and other precedents to the facts of any case where such questions are raised.

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

Response**:** In *Woods v. Cloyd W. Miller Co.,* 333 U.S. 138, 144 (1938), the Supreme Court held that the "Question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Thus, in evaluating such an action I would look to Supreme Court and Sixth Circuit precedent to determine the manner of analysis to be applied. If there is no precedent directly on point, then I would look to how the Supreme Court has evaluated similar acts, including whether the law is inconsistent with other parts of the Constitution or precedent.

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 held that fundamental liberty interests that are "objectively rooted in the history and traditions of our nation" and "implicit in the concept of ordered liberty" are protected under the Due Process Clauses of both the Fifth and the Fourteenth Amendments. *Id*. at 720-21. (internal citations and quotations omitted).

10. What rights are protected under substantive due process?

Response**:** The Supreme Court has found that the fundamental liberty interests protected by the Due Process Clause include the right to direct the education and upbringing of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to marital privacy and use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to terminate a pregnancy under certain circumstances, *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833 (1992); and the right to

interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

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**:** Whereas the cases listed in response to Question 10 are Supreme Court precedent that remain good law, it is my understanding that much of the Court's holding in *Lochner v. New York* was abrogated by the Court's holding in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Indeed, the Court acknowledged as much in declaring that the "doctrine that prevailed in *Lochner*. . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). As a district judge and pending circuit judge nominee, I am duty-bound to apply Supreme Court precedent concerning the noted rights.

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

Response**:** In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court acknowledged that Congress's powers under the Commerce Clause are broad, but not limitless. The Court held that Congress is restricted to regulating three categories of activity under the Commerce Clause: (1) "use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" including activities that threaten such instrumentalities, persons or things; and (3) activities that "substantially affect interstate commerce." *Id.* at 558-59.

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

Response**:** A suspect class can be comprised of members who "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" and the group is "a minority or politically powerless." *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). For example, the Supreme Court has designated race, national origin, religion and alienage as suspect classifications. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response**:** The checks and balances and separation of powers are fundamental to the goal of ensuring that we remain a government of the people and by the people. By refusing to lodge all authority in any one branch of government, the framers provided built-in protection against abuse of power. *See Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020).

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

Response**:** As in any case, I would review the facts, evidence and arguments of the parties and apply the analysis dictated by Supreme Court and Sixth Circuit precedent on the issue. Some examples of precedents evaluating whether one branch improperly assumed authority not granted to it by the Constitution include: *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response**:** Empathy should play no role in a judge's decision-making. A judge's duty is to faithfully apply the law to the facts of the case before her in a fair and impartial manner without fear or favor.

Patience and understanding, which I believe are by-products of empathy can, however, positively affect the efficient operations of the court and public confidence in the judicial system if judges exhibit such traits in their day-to-day interactions with court staff and members of the public with whom they come into contact.

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

Response**:** It is not appropriate for a judge to do either. A judge's role is to faithfully apply the law to the facts of the case before her. In doing so, she must engage in rigorous analysis, applying all precedential authority in a fair and impartial manner.

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**:** As a district judge and a circuit court nominee, it would be inappropriate for me to opine as to the propriety of actions taken or to be taken by the Supreme Court. See the Code of Conduct for United States Judges, Canons 2A and 3A.

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

Response**:** As I understand it, judicial review refers broadly to the judiciary's authority to decide cases and controversies involving actions by the legislative and executive branches of government. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Judicial supremacy refers to the power of the Supreme Court to act as the final arbiter on the meaning of the U.S. Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

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**:** While I have read books about and many quotes from President Lincoln, I am unfamiliar with the quote stated in this question. Moreover, the decision-making process for elected officials in determining how best to discharge their duties, which primarily involves policy-making, is beyond the purview of the judiciary, unless it is raised in the context of a case or controversy before the court. As such, it would be inappropriate for me as a district judge and a circuit nominee to forecast or foretell how the court might evaluate a given action or provide an advisory opinion in that regard. See Judicial Canon 3A.

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**:** I have not recently reviewed Hamilton's statement in this regard and have not had occasion to evaluate it. Having said that, I am mindful that judges must limit themselves to the facts and evidence before them in accordance with the law and precedent applicable in a given case.

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

Response**:** Lower court judges must adhere to all applicable precedent. Each case must be evaluated on its own merits and within the strictures of law and precedent.

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

orientation or gender identity) play in the judges' sentencing analysis?

Response**:** None. In addition to calculating the advisory sentencing range pursuant to the United States Sentencing Guidelines, the factors that sentencing judges must take into consideration are listed in 18 U.S.C. § 3553(a). They include, amongst other things, the need for punishment, the nature and circumstances of the offense, deterrence, avoiding sentencing disparities between defendants who engaged in similar conduct, the need to protect the public and other factors. None of the factors listed in Question 23 are contained in the sentencing statute.

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 ruralareas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you defineequity?

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

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

Response**:** Please see my response to Question 24.

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

a. Response**:** The Equal Protection Clause of the Fourteenth Amendment provides that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

27. How do you define "systemic racism?"

Response**:** I am unaware of any universally-accepted definition of systemic racism and I have not independently formulated one of my own.

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

Response**:** Black's Law Dictionary (11th ed. 2019) 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."

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

Response**:** I do not have a definition for systemic racism and therefore, have no basis for comparing the two concepts.

Senator Ben Sasse
Questions for the Record for Stephanie Dawkins Davis
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
March 2, 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. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: As a district judge, I approach each case with an open mind and apply the same level of diligence and rigorous analysis to every case that comes before me. I consider only the record before me, the parties' briefs, arguments made at oral argument, statutory language if applicable, binding precedent from the Supreme Court and the Sixth Circuit and absent binding precedent, persuasive authority from within and outside of my circuit. Once this review and analysis is complete, I fairly and impartially apply the law to the facts of the case. If confirmed, I would continue to apply this method to every case, regardless of the parties or issues.

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

   Response: I do not subscribe to any particular label. However, I acknowledge that the application of the Constitution or any statute begins with reading the language of the law in the context of its structural components. And in certain contexts, the Supreme Court has established the manner of analysis that should be applied to various constitutional provisions. For instance, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Court directed courts to analyze challenges under the Second Amendment based on the original meaning of the text. Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), in the context of analyzing the Confrontation Clause, the Court's relied on its evaluation of the original meaning of the text. If confirmed, I will follow Supreme Court and Sixth Circuit precedent addressing acceptable methods of constitutional and statutory construction.

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

Response: Please see my response to Question 4.

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

   Response: I believe that the Constitution is an enduring document. If confirmed, I would follow Supreme Court and Sixth Circuit precedent in interpreting the Constitution.

7. **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 great admiration for many past and present Supreme Court Justices based on their commitment to the law, public service and their dedication to the legal profession. As a federal district judge, I have applied Supreme Court precedent in all of my cases for which such precedent exists. However, I have not studied the jurisprudence of individual Justices such that I can comfortably single out any particular Justice for special recognition.

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

   Response: The Sixth Circuit has declared: "Stare decisis is more than a principle…it is the rule." *Kerman v. C.I.R.*, 713 F.3d 849, 866 (6th Cir. 2013). Judges in the Sixth Circuit cannot overrule a decision of another panel, and the prior panel's decision "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Circuit court sitting] en banc overrules the prior decision." *Id.* (*quoting Salmi v. Sec'y of Health & Human Servs*., 774 F.2d 685, 689 (6th Cir. 1985)). *See also* Federal Rules of Appellate Procedure 35.

9. **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 8.

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

    Response: As a sitting federal judge, I regularly review cases involving questions of statutory interpretation. In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, persuasive opinions from other circuits, precedential decisions

interpreting analogous statutes, and after exhausting other avenues, may consider legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United States* that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831 (1974) (quotation marks and citation omitted). I am not sure what the phrase "general principles of justice" means. However, aside from the factors listed above, I do not believe it is appropriate to use other extrinsic factors to interpret the text of a statute.

11. 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: As a district court judge, I follow the sentencing factors set forth by Congress in 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). If confirmed, I will continue to follow this sentencing statute, as well as any applicable precedent from the Supreme Court and Sixth Circuit.

Questions from Senator Thom Tillis
for Stephanie Davis
Nominee to be United States Circuit Judge for the Sixth Circuit

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

   Response: Yes

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

   Response: The term judicial activism likely has different meanings for different people. But I understand it to apply when a judge makes a legal decision based on her own personal policy views, or when the judge's decision exceeds the scope of the factual or legal issues before her. The Code of Conduct for United States Judges, Canon 3 requires judges to be faithful to the law and not be swayed by other influences. Therefore, 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. The Code of Conduct for United States Judges, Canon 3 expressly states that "A judge should perform the duties of the office fairly, impartially and diligently."

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

   Response: No. The role of a judge is to fairly, impartially, and diligently apply the law to the facts of the case before her.

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

   Response: Yes. Judicial decision-making should not be outcome-focused. Instead, judges must arrive at the result based on the law and applicable precedent.

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: 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 in

defense of self and home. And in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), it held that the right is fundamental. The Court declined to establish a specific test for evaluating alleged violations of the right. But in *Tyler v. Hillsdale County Sheriff's Office*, 837 F.3d 678 (6th Cir) (*en banc*), the Sixth Circuit adopted a framework for application of intermediate scrutiny to such claims. Under *Tyler,* the court must first determine whether the challenged regulation or proposed legislation burdens a core right under the Second Amendment. If it does, then the courts asks whether it is substantially related to an important government objective, i.e. whether the government can demonstrate a "reasonable fit" between the important government objective and the challenged law. *Id.* at 693, 699. As a sitting district judge and if confirmed as a circuit judge, I will faithfully apply these, and any other pertinent precedent to questions under the Second Amendment.

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: In evaluating any policy relating to handguns, I would review the facts and record of the case and apply any binding precedent applicable to the claimed constitutional right. As it stands, the Supreme Court recently held oral argument in the case of *New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, in which it is evaluating a state law under which some applications to carry a pistol outside of the home were denied. Additionally, in the relatively recent decision of *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court evaluated government restrictions relating to COVID-19 in relation to the Free Exercise Clause of the First Amendment. Other challenges to such restrictions continue to percolate in courts throughout the country. Under the Code of Conduct for United States Judges, Canon 3 a judge should refrain from making public comment on the merits of any matters pending or impending in any court. Thus, as a sitting judge and a judicial nominee it would be inappropriate for me to comment on the merits of issues being currently litigated.

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: During my tenure both as a United States Magistrate Judge and a United States District Judge I have addressed the application of qualified immunity many times. In each instance, I review the facts of the case, evidence and arguments of the parties and apply the analysis dictated by Supreme Court precedent on the issue. Specifically, the Supreme Court has established a two-part test to determine whether qualified immunity is applicable to a particular situation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The first part of the test involves determining whether the facts of the case, viewed in the light most favorable to the plaintiff, "show the officer's conduct violated a constitutional right." *Id*. If the first question is resolved in the affirmative, then the court should decide "whether the right was clearly established." *Id*. "[C]learly established means that, at the

time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotations omitted). The right must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted. *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Indeed, "courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Moderwell v. Cuyahoga Cnty., Ohio*, 997 F.3d 653, 660 (6th Cir. 2021) (citation omitted). On the other hand, it "defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508–09 (6th Cir. 2012). An official action, therefore, need not have previously been held unlawful, but "in the light of pre-existing law the unlawfulness must be apparent." *Wilson*, 526 U.S. at 615 (quoting *Anderson*, 483 U.S. at 640). If both parts of the qualified immunity test are resolved in the affirmative, then the doctrine of qualified immunity does not apply, and the case can proceed. The court may address the two factors in whichever order it deems appropriate based on several factors, not the least of which is judicial economy. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

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

Response: The Supreme Court has set forth the parameters of the application of qualified immunity as discussed in my response to Question 9 and I am duty-bound to apply that precedent in any case brought before me in which the defense is raised. Thus, if I held any personal views about the level of protection the defense affords, they would be irrelevant to interpreting and applying the law.

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. 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: I have presided over a small number of copyright cases as a district judge, but none that have progressed beyond discovery. I have decided one dispositive motion in such cases: *Law Enf't Officers Sec. Unions v. Int'l Unions, Sec. Police & Fire Pros. of Am.*, No. 20-12544, 2021 WL 3667220 (E.D. Mich. Aug. 18, 2021).

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

Response: I handled one discovery issue in a case involving the Digital Millennium Copyright Act ("DMCA") as a magistrate judge in the following case: *Design Basics, LLC v. DJW & Assocs. of Michigan, Inc.*, No. 17-12272, 2019 WL 7584399 (E.D. Mich. Aug. 6, 2019). And I issued an opinion and order on a motion to dismiss as a district judge in the following case involving a DMCA claim: *Law Enf't Officers Sec. Unions v. Int'l Unions, Sec. Police & Fire Pros. of Am.*, No. 20-12544, 2021 WL 3667220 (E.D. Mich. Aug. 18, 2021).

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

Response: None.

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: I have addressed First Amendment and free speech issues principally in the context of adjudicating prisoner claims brought under 42 U.S.C. § 1983 and non-prisoner cases brought against government officials.

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

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

Response: In interpreting the text of any statute, I first begin with the statutory language to determine whether it is ambiguous. If the language is unambiguous, then the analysis is over and I apply the plain meaning of the statute. If there is ambiguity, then I look to Supreme Court and Sixth Circuit precedent, canons of statutory construction, persuasive opinions from other circuits, precedential decisions interpreting analogous statutes, and after exhausting other avenues, then legislative history – giving the most weight to committee reports. I would also remain mindful of the Supreme Court's observation in *Huddleston v. United*

States that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." 415 U.S. 814, 831(1974) (quotation marks and citation omitted).

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

Response: The form of the advice and analysis dictates how it is treated. If the advice and analysis is in the form of an agency interpretation that did not derive from a formal adjudication or notice-and-comment rulemaking, then the analysis is entitled to respect but not deference. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that "policy statements, agency manuals and enforcement guidelines . . . do not warrant *Chevron*-style deference" from courts interpreting the statute, but instead are "entitled to respect . . . to the extent that those interpretations have the power to persuade.") (internal quotations and citations omitted).

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 current district judge and judicial nominee, it would be inappropriate for me to opine on this issue of what appears to be a policy consideration.

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

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

Response: In interpreting the DMCA, judges must utilize the same tools that are available to them in interpreting all statutes: the statutory language, precedential opinions, the canons of statutory construction, persuasive authority from other circuits, precedential authority interpreting similar statutes and, if necessary, legislative history.

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

Response: Judges are duty-bound to apply precedent from the Supreme Court and the Circuit in which they sit.

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

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

Response: The district in which I sit does not permit such requests, but rather assigns cases to a given division based upon the filer's county of residence. Thus, I am unfamiliar with the scheme described.

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

Response: See my Response to Question 15(a)

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

Response: See my Response to Question 15(a)

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

Response: I do not have any information suggesting that the phenomenon described in the question is an issue within the Sixth Circuit where I presently, and if confirmed, will continue to sit. Nor have I studied the issue such that I have developed an informed judgment on the matter.

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: See my response to Question 16.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you

support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in? Should such a rule apply only where a single judge sits in a division?

Response: Please see my response to Question 15(a).

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

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

Response: As a sitting district judge and circuit nominee, it would be inappropriate for me to comment on a matter that may arise before me. A judge must not forecast, foretell or provide advisory opinions on legal issues that may be raised before her. See, Code of Conduct for United States Judges, Canon 3.

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

Please see my response to Question 17(a).