

**Nomination of Amy Coney Barrett to the U.S. Supreme Court
Questions for the Record
Submitted October 16, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In your speech accepting your nomination to the Supreme Court, you discussed the judicial philosophy of the late Justice Antonin Scalia. Specifically, you stated: “[H]is judicial philosophy is mine.”

Justice Scalia believed the Affordable Care Act (ACA) is unconstitutional. You yourself have noted that he argued it “should be renamed ‘SCOTUSCare’ in honor of the Court’s willingness to ‘rewrite’ the statute in order to keep it afloat.” (Book Review, *Countering the Majoritarian Difficulty*, 32 CONST. COMM. 61, 84 (2017))

a. Do you share Justice Scalia’s judicial philosophy as applied to the ACA?

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

b. Did Chief Justice Roberts’s majority opinion in *NFIB v. Sebelius* “rewrite” the ACA in order to avoid gutting the statute? If so, please explain how the statute was rewritten by the 5-4 majority in upholding the law.

RESPONSE: Please see my response to Question 1.a.

2. The president has a legal obligation, under Article II of the Constitution, to “take Care that the laws be faithfully executed.” President Trump and his Administration have undercut the Affordable Care Act (ACA) on several occasions. He ended cost-sharing reduction payments, cut the open enrollment period dramatically, slashed funding to programs that help families sign up for coverage, and allowed substandard junk plans to be sold. (*See We’re Tracking the Ways Trump is Scaling Back Obamacare. Here are 14*, THE NEW YORK TIMES (July 11, 2018))

The ACA was passed by Congress and signed into law by President Obama. It is the law of the land.

Are the President’s efforts to undercut the ACA, including those cited above, consistent with a president’s constitutional obligation to “take Care that the laws be faithfully executed”?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

3. Last April, in the midst of the COVID-19 pandemic, the Supreme Court stayed a preliminary injunction granted by a Wisconsin district court that aimed to give voters greater flexibility in casting absentee ballots for the state’s primary election—a safe option for those who worried their health would be at risk if they voted in person.

Justice Ginsburg authored a dissent in which she criticized the Court’s majority for insufficiently accounting for the risks posed by COVID-19. She emphasized that courts and election officials must be able to “react[] to a grave, rapidly developing public health crisis.” She further noted that the Supreme Court’s “suggestion that the current situation is not ‘substantially different’ from an ‘ordinary election’ boggles the mind.” (*RNC v. DNC*, No. 19A1016 (U.S. 2020))

a. Is this year’s election “substantially different” than previous elections due to the global COVID-19 pandemic?

RESPONSE: Because this question asks about matters that are or may be the subject of litigation, it would be improper for me as a sitting judge to opine on it.

b. What flexibility do states have in altering election procedures to allow safe voting during this pandemic?

RESPONSE: Please see my response to Question 3.a.

c. Do states have a responsibility to voters to maintain ballot access in the midst of the pandemic?

RESPONSE: Please see my response to Question 3.a.

d. Do courts—including the Supreme Court—have any role to play in ensuring safe voting?

RESPONSE: The federal judiciary, which acts by adjudicating cases or controversies, protects the fundamental right to vote by fairly and impartially applying the United States Constitution and other federal laws related to voting, such as the National Voter Registration Act and the Voting Rights Act.

4. Attorney General Barr has claimed, with no credible basis to do so, that absentee ballots have a heightened susceptibility to fraud because foreign actors could print counterfeit mail-in ballots. He stated that there are “a number of foreign countries that could easily make counterfeit ballots, put names on them, [and] send them in.” (*William Barr’s State of Emergency*, THE NEW YORK TIMES MAGAZINE (June 1, 2020)) When asked to provide evidence for this claim, Barr admitted that he had none and instead stated that it was “common sense.” (*Fact Checking Barr’s Claim that It’s ‘Common Sense’ that Foreign Countries Will Counterfeit Mail-In Ballots*, CNN (Jul. 29, 2020))

President Trump has repeated these baseless assertions. He claimed that “millions of mail-in ballots will be printed by foreign countries, and others” in the upcoming General Election. He

used this claim to indicate that the results of the election may be fraudulent. (President Trump Tweet (June 22, 2020))

Elections experts and intelligence officials have roundly rejected these assertions. In August, a top official in the Office of the Director of National Intelligence stated: “We have no information or intelligence that any nation-state threat actor is engaging in any activity to undermine the mail-in vote or ballots.” (*Intel Officials Contradict Trump on Voting by Mail*, Politico (Aug. 26, 2020))

a. Do you believe that foreign entities are interfering with our elections by sending counterfeit ballots to voters and election authorities?

RESPONSE: It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure or on any subject of political controversy.

b. Do you have any reason to believe that existing means of validating ballots are insufficient?

RESPONSE: Please see my response to Question 4.a.

c. As a judge, how do you weigh evidence for the claims that parties make in court?

RESPONSE: I weigh evidence based on the credibility or persuasiveness of evidence, applying the relevant legal standards.

i. For example, would you accept the conclusions of intelligence officials?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

ii. Would you consider “common sense” to be sufficient support for a factual claim from the Attorney General of the United States?

RESPONSE: Please see my response to 4.c.i.

5. President Trump has encouraged voters to vote twice in the upcoming election. He stated: “NORTH CAROLINA: To make sure your Ballot COUNTS, sign & send it in EARLY. When Polls open, go to your Polling Place to see if it was COUNTED. IF NOT, VOTE! Your signed Ballot will not count because your vote has been posted. Don’t let them illegally take your vote away from you!” (President Trump Tweet (Sep. 12, 2020))

a. According to federal law, is it legal to vote twice in a single federal election?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Nor would it be appropriate for me to opine on the statements of any political figure or on any subject of political controversy.

b. Do you believe it is appropriate for a president of the United States to encourage voters to engage in illegal activity?

RESPONSE: Please see my response to Question 5.a.

6. In August, President Trump suggested he would station law enforcement officers at polling locations to guard against voter fraud, despite him having no evidence that voter fraud is widespread. He stated: “We’re going to have sheriffs, and we’re going to have law enforcement, and we’re going to have, hopefully, U.S. Attorneys, and we’re going to have everybody and attorney generals [sic]” at polling locations. (*Trump Pledges to Send ‘Sheriffs’ and ‘Law Enforcement’ to Polling Places on Election Day*, CNN (Aug. 21, 2020))

During your hearing, Senator Klobuchar then read you the U.S. Code section (18 U.S.C. § 594) that prohibits voter intimidation.

a. Do the Constitution or federal law give a president of the United States the authority to deploy local law enforcement officials to monitor elections?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

b. Please give a few examples of what you understand constitutes voter intimidation. What has the Supreme Court previously held in regard to voter intimidation?

RESPONSE: Under 18 U.S.C. § 594, it is unlawful to “intimidate[], threaten[], coerce[], or attempt[] to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate.” In addition, the National Voter Registration Act, 52 U.S.C. § 20511(1), makes it illegal in any election for Federal office to “knowingly and willfully intimidate[], threaten[], or coerce[], or attempt[] to intimidate, threaten, or coerce, any person for (A) registering to vote, or voting, or attempting to register or vote; (b) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or (c) exercising any right under this chapter.” In *Burson v. Freeman*, 504 U.S. 191 (1992), the plurality opinion said that States have “compelling interests in preventing voter intimidation and election fraud,” *id.* at 206.

7. In your 2016-2017 law review article *Congressional Originalism*, you wrote that “[a]dherence to originalism arguably requires, for example, dismantling the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Education*.”

In Questions for the Record submitted for your 2017 nomination to the Seventh Circuit, Senator Coons asked you whether you believed the holding in *Brown* is consistent with an originalist interpretation of the Constitution. Specifically, Senator Coons asked: “Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?”

You responded: “I have not studied the question whether *Brown* is consistent with originalism. I am aware that some scholars have argued that it is.”

Please explain this discrepancy. Why did you state that you had never studied this question when you had written about this specific question in a recent law review article?

RESPONSE: There is no discrepancy. As explained in the footnote following the sentence you reference from *Congressional Originalism*, “We identif[ied] some well-settled precedents whose consistency with the original public meaning has been challenged, but we recognize[d] that different readers will reach different conclusions about whether any given precedent in fact conflicts with the text. We d[id] not ourselves undertake to examine how any of the precedents we mention[ed] would fare under an originalist analysis. For our purposes, it [wa]s sufficient to say that it is inevitable that some well-settled precedents conflict with the original public meaning, and we use[d] the familiar examples simply to illustrate the nature of the problem posed by such a conflict.” *Congressional Originalism*, 19 U. PA. J. OF CONST. L. 1, 2 n.1 (2017). I similarly noted that in 2017, although I had not studied the question as a legal scholar, some scholars have offered detailed historical evidence to support the argument that *Brown* is in fact consistent with originalism. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). I have stated publicly in lectures that I believe *Brown* was correctly decided.

8. In *Kanter v. Barr*, the majority opinion and your dissent both recognize “that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.” In upholding 18 U.S.C. § 922(g)(1)’s ban on felons possessing firearms, the majority deferred to Congress’s policy judgment that there is “no way to know with any certainty whether” a felon is “a danger to public safety” and that “too many . . . felons whose gun ownership rights [are] restored [go] on to commit violent crimes with firearms.”

Your dissent rejected Congress’s policy judgment and instead adopted a view that the ban is “wildly overinclusive.” (see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007)) During your confirmation hearing, you said repeatedly that “[t]he policy decisions and value judgments of government must be made by the political branches elected by

and accountable to the People. The public should not expect courts to do so, and courts should not try.” (Barrett Opening Statement at 3)

Given what you said during your hearing, why in *Kanter* did you reject Congress’s policy judgment?

RESPONSE: My dissent in *Kanter* reflects my understanding of the appropriate application of both *District of Columbia v. Heller*, 554 U.S. 570 (2008), and Seventh Circuit precedent. As I explained, those precedents required the government to show “a very strong public-interest justification and a close means-ends fit” to justify a regulation that imposes a “[s]evere burden[] on the core right of armed defense.” *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019). For the reasons explained in my dissent, I concluded that the governments had not met their burdens on the facts of that case. *Id.* at 466–68.

9. During the hearing, I asked you about the *en banc* majority opinion you joined in *Kleber v. CareFusion Corporation*, which upheld the panel’s finding that the Age Discrimination in Employment Act (“ADEA”) does not protect job applicants against employment practices that disparately impact applicants based on age. As you know, this finding led the court to dismiss the age discrimination claim brought by a 58-year-old lawyer who was passed over for a job that was offered to a 29-year-old applicant with less experience. During the hearing, you explained that the question at issue in the case was “whether the prohibition on age discrimination covered applications or only employees” and that since “the statute said employees” it “didn’t cover the conduct” at issue. The majority opinion reads, “the plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims.” *Kleber v. CareFusion Corporation*, 914 F.3d 480, 485 (7th Cir. 2019) However, four judges dissented, and Judge Easterbrook noted the majority’s assertion of “plain reading” actually rests on using the phrase “any individual” in § 4(a)(2) “in dramatically different ways within the space of a few words,” which the majority does not explain. (*Id.* at 489 (Easterbrook, J., dissenting))

a. Please explain why the majority departed in *Kleber* from a canon of statutory interpretation, specifically — the presumption of consistent usage (meaning, among other things, that Congress intends courts to give the same, consistent meaning to words that is uses multiple times within the same statute)?

RESPONSE: Section 4(a)(2) makes it unlawful for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. § 623(a)(2) (emphasis added). The majority opinion in *Kleber* explains that “[r]eading § 4(a)(2) in its entirety shows that Congress employed the term ‘any individual’ as a shorthand reference to someone with ‘status as an employee.’” *Kleber v. Carefusion Corp.*, 914 F.3 480, 483 (7th Cir. 2019). Thus, although “outside job applicants have other provisions at their disposal to respond to age discrimination,” job applicants may not pursue disparate impact claims under § 4(a)(2). *Id.* at 488.

The majority opinion only addresses the two dissenting opinions' argument about analogous statutory text in *Griggs v. Duke Power Company*, but does not address the departure from the presumption of consistent usage canon of statutory interpretation. (*Id.* at 487.)

b. Why didn't the majority address the dissenting judges' charge that the majority departed from canons of statutory interpretation in its *Kleber* decision?

RESPONSE: Please see my response to Question 9.a.

c. What conditions allow a judge to depart from the canons of statutory interpretation to read the same word differently between one paragraph and the next?

RESPONSE: Please see my response to Question 9.a.

The text at issue reads: "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." (29 U.S.C. § 623(a)(2))

d. Is being hired not an "employment opportunity" by the plain meaning of that two word phrase?

RESPONSE: Section 4(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). The majority opinion in *Kleber* explains that "[r]eading § 4(a)(2) in its entirety shows that Congress employed the term 'any individual' as a shorthand reference to someone with 'status as an employee.'" *Kleber v. Carefusion Corp.*, 914 F.3 480, 483 (7th Cir. 2019). Thus, although "outside job applicants have other provisions at their disposal to respond to age discrimination," job applicants may not pursue disparate impact claims under § 4(a)(2). *Id.* at 488.

10. During the hearing, while answering questions from Senator Harris, you said "you take judicial notice of" the infectiousness of COVID-19 and that "it's an obvious fact, yes."

a. What are the standards for a judge to take judicial notice of a condition of objective fact?

RESPONSE: The Supreme Court has recognized that "Courts take judicial notice of matters of common knowledge." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 301 (1937). The Federal Rules of Evidence, Rule 201(b) provides that courts may "judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

During the hearing, you also told Senator Harris that “whether smoking causes cancer” was also judicially noticeable, but said that climate change is a “very contentious matter of public debate” and would not accept her analogy to it. However, the dangerousness of COVID-19 is disputed by many, including the President of the United States, despite overwhelming scientific consensus.

b. Why does the fact that people ignore the overwhelming consensus of climate science make climate change too contentious for judicial notice, but the same dynamic around COVID-19 does not?

RESPONSE: Senator Harris’s question was about the infectiousness, not the dangerousness, of COVID-19. The Supreme Court has described “climate change” as a “controversial subject[]” and “sensitive political topic[.]” *Janus v. Am. Fed’n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2476 (2018). As a sitting judge, it would be inappropriate for me to weigh in further on the matter.

11. Justice Ginsburg often ruled in favor of protections for individuals harmed by abusive corporate practices. In *Campbell-Ewald Company v. Gomez*, Justice Ginsburg authored a 6-3 decision that made it harder for corporations to buy their way out of class action lawsuits. (*Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016), as revised (Feb. 9, 2016)) In *AT&T Mobility v. Concepcion*, Justice Ginsburg joined a dissent against a 5-4 Justice Scalia decision that limited the ability of individuals with small claims to band together to cover the costs of litigation. (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)) Just this year, in *Seila Law v. CFPB*, Justice Ginsburg joined a dissent that argued that the majority’s decision threatened the nation’s highest consumer watchdog’s “independence from political pressure.” (*Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020))

In 2019, in *FTC v. Credit Bureau Center, LLC*, you voted against reconsidering a panel decision that held that the Federal Trade Commission (FTC) could not seek restitution for victims of consumer fraud. The panel decision overturned a 30-year-old Seventh Circuit precedent that allowed the FTC to order the return of unlawfully obtained funds to fraud victims. It also created a split with eight other circuit courts of appeal. (*See Fed. Trade Comm’n v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 426 (9th Cir. 2018), *Fed. Trade Comm’n v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014), *Fed. Trade Comm’n v. Bronson Partners, LLC*, 654 F.3d 359, 365–67 (2d Cir. 2011), *Fed. Trade Comm’n v. Magazine Sols., LLC*, 432 F. App’x 155, 158 n.2 (3d Cir. 2011), *Fed. Trade Comm’n v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010), *Fed. Trade Comm’n v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005), *Fed. Trade Comm’n v. Gem Merch. Corp.*, 87 F.3d 466, 468–70 (11th Cir. 1996), and *Fed. Trade Comm’n v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991))

a. What standard did you apply in deciding that the Seventh Circuit should not rehear a case that overturned 30years of precedent?

RESPONSE: I have taken no public position on this case. I did not write the panel opinion, nor was I on the three-judge panel that initially considered the case. The panel’s opinion was circulated to the full eleven-judge Seventh Circuit, and a majority of the

court did not vote for rehearing, so the panel’s opinion was issued. Only three of the eleven active circuit judges publicly dissented from the decision to not rehear the case, and the remaining individual judges’ votes are not made public. Federal Rule of Appellate Procedure 35 explains that “[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance. The panel in this case held that the legal remedy of restitution was not available under a provision of the Federal Trade Commission Act. The Supreme Court recently granted certiorari and is expected to review this case in the upcoming Term. *Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, No. 19-825, --- S.Ct. ---, 2020 WL 3865251 (U.S. July 9, 2020).

b. The Supreme Court granted certiorari to hear this case in the coming term. Will you commit to recusing yourself, if confirmed, from this case given your previous participation as a Seventh Circuit judge?

Without opining on any particular matter pending before the Supreme Court, I note that I committed in my Senate Judiciary Questionnaire to recuse myself from matters in which I participated while a judge on the court of appeals.

12. In 2019, in *Chronis v. United States*, you ruled against a *pro se* plaintiff who was injured during a pap smear performed at a community health center. (*Chronis v. United States*, 932 F.3d 544, 545 (7th Cir. 2019)) The plaintiff filed a complaint with Centers for Medicare and Medicaid Services (CMS), which requested assistance “in receiving restitution” from the health center. You dismissed the plaintiff’s lawsuit because her complaint to CMS did not clearly articulate a claim for money damages—even though the complaint included a request for restitution. Judge Ilana Rovner, a George H.W. Bush appointee, dissented. Judge Rovner detailed the many steps the plaintiff in this case took and warned that the court “must be careful not to block access to relief for *pro se* plaintiffs” and expressed concern that if this plaintiff could not “jump through the proper hoops with her multi-page, well-documented, persistent, and multiple requests to myriad agencies, what *pro se* plaintiff would ever succeed?”

a. What standard does the Seventh Circuit apply to pro se plaintiffs with respect to the exhaustion of administrative remedies?

RESPONSE: As explained in the opinion in *Chronis*, “[t]o exhaust administrative remedies, the plaintiff must ‘have first presented the claim to the appropriate Federal agency,’ [28 U.S.C.] § 2675, so that the agency has an opportunity to meaningfully consider and address the claim prior to suit.” *Chronis v. United States*, 932 F.3d 544, 546 (7th Cir. 2019) (citing *Kanar v. United States*, 118 F.3d 527, 528 (7th Cir. 1997)). The Seventh Circuit has held that the presentment requirement “has four elements: (1) notification of the incident; (2) demand for a sum certain; (3) title or capacity of the person signing; and (4) evidence of the person’s authority to represent the claimant.” *Id.*

The panel held that “even liberally construed,” the plaintiff’s letter had failed to make a demand for a sum certain. *Id.* at 547. She had instead asked for “guidance on how to

proceed.” *Id.* at 548. *See also id.* at 547–48 (noting that the letter read as a request for “advice about how to file an administrative complaint against the Health Center”).

b. What is the difference between a request for restitution and a request for money damages?

RESPONSE: The opinion in *Chronis* did not address this question. Because this question asks about matters that could come before me in litigation, it would be improper for me as a sitting judge to opine on it.

13. As a judge on the Seventh Circuit, you have consistently applied a deferential standard to errors committed by corporations and businesses, even when these errors have harmed consumers. In one case, *Casillas v. Madison Ave. Associates*, you authored a majority opinion denying *en banc* reconsideration of a plaintiff’s FDCPA lawsuit. The plaintiff in this case owed a debt to Harvester Financial Credit Union. Madison Avenue Associates, Inc. (Madison), acting as an agent of Harvester, sent the plaintiff a demand letter. However, the demand letter sent by Madison did not inform the plaintiff, as required by the FDCPA, that any dispute over the debt or a request for information about the original creditor is ineffective unless it is made in writing. The plaintiff filed suit against Madison for its failure to warn her of the FDCPA’s “in writing” requirements. You ruled against the plaintiff and held that Madison’s failure to warn was “no harm, no foul.” A dissent joined by George H.W. Bush appointee, Judge Ilana Rovner, warned that your opinion “will make it much more difficult for consumers to enforce the protections against abusive debt collection practices that Congress conferred in the Act. That alone is troublesome.” This ruling is a departure from the strict standard you applied to the *pro se* plaintiff in the *Chronis* case.

a. Does the Seventh Circuit apply a more deferential standard to corporations than to *pro se* litigants?

RESPONSE: My decision for a unanimous panel in *Casillas* did not “apply a more deferential standard to corporations than to *pro se* litigants.” The defendant in this case sent the plaintiff a debt-collection letter that described the process for verifying a debt but did not specify that the plaintiff had to communicate in writing to trigger the statutory protections. *Casillas v. Madison Ave. Associates, Inc.*, 926 F.3d 329, 331 (7th Cir. 2019). But the Supreme Court has emphasized that “a bare procedural violation, divorced from any concrete harm” fails to “satisfy the injury-in-fact requirement of Article III.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). “Because Madison’s violation of the statute did not harm Casillas,” I concluded that there was “no injury for a federal court to redress.” 926 F.3d at 332.

b. During your confirmation hearing, you repeatedly emphasized that the role of a judge is to apply the law as written – not override the policy decisions of lawmakers. What justified your departure in this case from the policy decision made by Congress to require written notice to consumers of the process provided by the statute for verifying a debt?

RESPONSE: Please see my response to Question 13.a.

14. During the hearing, while responding to questions on *EEOC v. Autozone*, you argued that you voted against rehearing this case because Rule 35 of the Federal Rules of Appellate Procedure “constrains and limits the times in which we take the resources of the full court to rehear a case.” However, one of the conditions for rehearing is when “the proceeding involves a question of exceptional importance.” (Fed. R. App. Pro. 35(a)(2)) Three of your colleagues argued the panel opinion at issue found that a “separate-but-equal arrangement is permissible under Title VII so long as the ‘separate’ facilities really are ‘equal.’”

a. Is it your view that a panel opinion finding a “separate-but-equal arrangement is permissible” is NOT an issue of exceptional importance?

RESPONSE: Federal Rule of Appellate Procedure 35(a) explains that “[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” My vote to deny rehearing indicates only that I did not believe the petition for rehearing satisfied this elevated standard. It does not indicate that I thought that the panel decision was correct. The Seventh Circuit is deferential to its panels’ decisions.

b. Even if you disagree with the dissent’s characterization of the ruling, why weren’t the concerns of three other Seventh Circuit judges – noting that the majority opinion created a “separate-but-equal” standard -- sufficient to warrant reconsideration of the ruling?

RESPONSE: Please see my response to Question 14.a.

c. Are you aware of any other cases where Title VII or any other part of the Civil Rights Act of 1964 were found to allow “separate-but-equal” arrangements?

RESPONSE: Please see my response to Question 14.a.

15. In *Doe v. Purdue University*, you held that the plaintiff, John Doe, stated a plausible Title IX sex discrimination claim for discipline he received after he was found guilty of sexual assault by Purdue University. (*Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019)) Your opinion cited a 2011 Dear Colleague letter from the Department of Education as evidence of sex discrimination against John Doe. The letter sent to schools warned that “[t]his Administration is committed to using all its tools to ensure that all schools comply with Title IX so campuses will be safer for students across the country.” You suggested that this letter was evidence that Purdue’s prosecution of John Doe was illegitimate because the Department of Education was financially pressuring schools to “vigorously investigat[e] and punish[] sexual misconduct” and that “pressure may have been particularly acute for” Purdue’s Title IX coordinator. According to a 2019 study by the Association of American Universities, approximately 1 in 4 women and 1 in 15 men experience sexual assault as undergraduate students in college.

a. What role does the Department of Education have in remedying campus sexual assault?

RESPONSE: The role of the Department of Education in remedying campus sexual assault is determined by the political branches subject to statutory and constitutional constraints.

b. Could you please explain how the letter, which explicitly addressed the sexual assault of both women and men and committed the Department of Education “vigorously investigat[e] and punish[] sexual misconduct” perpetrated against any person, specifically “gives John a story about why Purdue might have been motivated to discriminate against males accused of sexual assault?” (*Doe*, 928 F.3d at 669)

RESPONSE: Due to the posture of this case—an appeal from the dismissal of the plaintiff’s complaint—my panel colleagues and I were required to consider the facts only as alleged by the plaintiff. Our task was “not to determine what allegations are supported by the evidence but to determine whether John [wa]s entitled to relief *if everything that he says is true.*” *Doe v. Purdue University*, 928 F.3d 652, 656 (7th Cir. 2019) (emphasis added). We recognized that “[o]ther circuits have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim,” but determined that “the letter, standing alone, is obviously not enough to get John over the plausibility line” of a Title IX claim. *Id.* at 668–69. Instead, he needed to “allege facts raising the inference that Purdue acted at least partly on the basis of sex in his particular case,” which we concluded that he did. *Id.* at 669.

c. Is it your view that, by committing to address campus sexual misconduct, the Department of Education was discriminating against men?

RESPONSE: Please see my response to Question 15.b.

16. In a November 2016 speech in Jacksonville, Florida, you said that it “seem[s] to strain the text” of Title IX to “say that Title IX demands” protections for transgender students in schools. Earlier this year, in *Bostock v. Clayton County, Georgia*, the Supreme Court held that Title VII’s prohibition on sex discrimination extended to discrimination on the basis of sexual orientation and gender identity.

a. Was *Bostock v. Clayton County* wrongly decided?

RESPONSE: *Bostock v. Clayton County* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

b. Could you please explain what statutory reading or legal theory at the time supported your 2016 interpretation that protections for transgender students in schools “seem[s] to strain the text” of Title IX?

RESPONSE: I gave the November 2016 speech you reference before I was a judge on any court. Subject to some exceptions, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681. Because the question whether Title IX protects students against discrimination based on gender identity is the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on this issue.

c. Is a person’s sexual orientation an immutable trait?

RESPONSE: Insofar as it is relevant to the disposition of legal questions, it would not be appropriate for me to opine on the immutability of sexual orientation. As I said at my hearing, however, I do not mean to imply that sexual orientation is not an immutable characteristic.

d. Is a person’s gender identity an immutable trait?

RESPONSE: Please see my response to Question 16.c.

17. In your confirmation hearing for the Seventh Circuit, you and I discussed the idea of Supreme Court “super-precedents.” During that discussion you told me:

[F]or a court of appeals, all Supreme Court precedent is super-precedent. So as I had said to Chairman Grassley, as a court of appeals judge, if I were confirmed, I would follow all Supreme Court precedent without fail. (2017 Confirmation Hearing Tr. at 32:12-16.)

Based on your answers at your Supreme Court hearing, I understand that if confirmed as a Supreme Court Justice, you would not necessarily follow all precedent “without fail.” Without commenting on particular cases, please explain why and in what circumstances you would not follow Supreme Court precedent.

RESPONSE: No justice that I am aware of throughout history has maintained the position that overruling a case is never appropriate. Otherwise, erroneous decisions like *Plessy v. Ferguson* might still be the law of the land. But as I also said at the hearing, I would faithfully apply the doctrine of stare decisis as articulated by the Supreme Court, under which courts do not disrupt settled precedent absent very good reason to do so.

18. Given that the recusal statute that binds you as a circuit court judge, 28 U.S.C. § 455, is not formally binding on Supreme Court Justices, I would like to know more about how you will approach recusal decisions.

a. Please answer yes or no. If confirmed, will you abide by the recusal statute (28 U.S.C. § 455) in deciding whether you will recuse from a case or not?

RESPONSE: The recusal statute applies to “[a]ny justice, judge, or magistrate judge of the United States.” 28 U.S.C. § 455(a).

b. Please answer yes or no. If confirmed, will you recuse yourself from cases in which:

i. Your “impartiality might reasonably be questioned”? (28 U.S.C. § 455(a).)

RESPONSE: The recusal statute provides that a justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). As I explained at the hearing, I commit to faithfully applying the law of recusal if confirmed.

ii. You have a “personal bias or prejudice concerning a party”? (28 U.S.C. § 455(b)(1).)

RESPONSE: The recusal statute provides that a justice “shall . . . disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1). As I explained at the hearing, I commit to faithfully applying the law of recusal if confirmed.

19. If confirmed, how will you ensure that your recusal decisions are open and transparent, so the American people can understand whether and why you choose to recuse or not in each case? Please be specific in describing transparency measures you will take.

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, I commit to following the recusal process and faithfully applying the law of recusal if confirmed.

20. Why did you agree that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided, but refused to say so about other Supreme Court precedents? If you have previously written about *Loving* and that is the basis for your answer, please provide a citation and explain why you did not include it in the materials you submitted along with your Senate Judiciary Questionnaire.

RESPONSE: As I stated at my hearing, I have previously stated in lectures on originalism that I believe *Brown v. Board of Education* was correctly decided. *Loving v. Virginia* follows directly from *Brown*.

21. In your article “Substantive Canons and Faithful Agency,” you gave the *Miranda v. Arizona* case as an example of “the court’s choice to overenforce a constitutional norm.” (*Substantive Canons and Faithful Agency* (2010), at 170)

Regardless of whether the choice to include *Miranda* in that category was yours or another scholar’s, are there other cases in which you think the Supreme Court has “overenforced”

a constitutional norm or right? Please list those cases. [Note: this is not a request for you to “grade” cases or opine on whether they were correctly decided.]

RESPONSE: *Miranda* was the only example I gave in the article of an overenforcing norm of judicial review because the point of this article was to consider the conflict between substantive canons and faithful agency. I concluded that some substantive canons of statutory interpretation overenforce the Constitution and observed that such canons “have some basis in the judicial power and are not squarely foreclosed by the important structural limitations that otherwise cabin that power.” 90 B.U. L. Rev. 109, 175 (2010). I identified the avoidance canon, the Charming Betsy canon, and the sovereign-immunity canons, among others, as examples of interpretive rules that overenforce constitutional norms. *See id.* 173–74.

22. In a 2010 article, you wrote that the *Miranda* warnings were an example of the Supreme Court “overenforc[ing] a constitutional norm” by developing “doctrines that go beyond constitutional meaning.” You added that the *Miranda* doctrine “inevitably excludes from evidence even some confessions freely given.” (*Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109 (2010)) In a 2017 article published in the Notre Dame Law Review, you discussed Justice Scalia’s approach to overruling precedent, and you identified certain precedents that he would have overruled. You wrote that Justice Scalia believed “*Miranda v. Arizona* should be discarded for its lack of support in ‘history, precedent, or common sense.’” (*Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017)) The *Miranda* warnings — which are widely recognized in our society — require the police to inform Americans of their constitutional rights before they are questioned. As was noted during your hearing, you have said of Justice Scalia: “His judicial philosophy is mine, too.” (Amy Barrett, Nomination Announcement (Sep. 26, 2020))

a. Do you think that the *Miranda* warnings have helped reduce instances of the police violating the constitutional rights of citizens?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to comment on the merits of any particular past decision of the Supreme Court as a matter of public policy. I can say, however, that *Miranda v. Arizona*, 384 U.S. 436 (1966), is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

b. Do you agree with Justice Scalia that requiring the police to inform Americans of their constitutional rights is contrary to “common sense”?

RESPONSE: Please see my response to Question 22.a. Additionally, as I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

c. Do you agree with Justice Scalia that *Miranda v. Arizona* should be discarded? If not, why not?

RESPONSE: Please see my responses to Questions 22.a and 22.b.

23. **Have you ever been to a prison, jail, facility for incarcerated youth, or immigrant detention center? If so, when, why, and in what capacity?**

RESPONSE: No.

24. On your Senate Judiciary Questionnaire (p. 5), you indicated you were a member of the Federalist Society from 2005–2006 and again from 2014–2017.

a. Please explain who or what led you to join the Federalist Society in 2005.

RESPONSE: I joined the Federalist Society because it gave me the opportunity to speak with groups of students, lawyers, and scholars on topics of mutual interest. The Federalist Society provides an opportunity for engagement and debate with individuals offering differing perspectives and views.

b. Please explain why you left the Federalist Society in 2006.

RESPONSE: I do not recall why I left the Federalist Society in 2006.

c. Please explain why you rejoined the Federalist Society in 2014.

RESPONSE: Please see my response to Question 24.a.

d. Please explain why you left the Federalist Society in 2017.

RESPONSE: I chose to discontinue my membership when I became a federal judge.

25. On your Questionnaire, you noted that you undertook “a single consulting project on behalf of the Gerson Lehrman Group” in May of 2014.

a. What was the nature of your work on this project and who was your ultimate client?

RESPONSE: As a professor and former law clerk to the Supreme Court, I was asked to provide the Gerson Lehrman Group with my analysis of a case then pending before the Court. To the best of my recollection, I was not informed of the ultimate client.

b. If you believe you are bound by any nondisclosure agreements, will you request that the Gerson Lehrman Group and the underlying client release you from any such agreements?

RESPONSE: Please see my response to Question 25.a.

26. On your Questionnaire, you only listed four cases that you could recall working on

during your entire time in private practice. One of those cases was *Bush v. Gore*. You noted that you traveled to Florida at the outset of the litigation and provided research and briefing assistance on behalf of George W. Bush and Dick Cheney. If you are confirmed, you would be the third justice on the Supreme Court who worked on *Bush v. Gore* — the other two being Justices Kavanaugh and Roberts. That is one-third of the Court. None of the other three cases that you listed involved election law, so that area of the law does not appear to have been a particular area of expertise of yours during your time in private practice.

Why did you choose to put aside your work at the law firm and travel to Florida to work on *Bush v. Gore*?

RESPONSE: As I mentioned in my Senate Judiciary Questionnaire, I provided research and briefing assistance in *Bush v. Gore* for about a week at the outset of the litigation. My former law firm, Baker Botts, L.L.P., represented George W. Bush, and I worked on the case in Florida as part of my work at the firm. I did not continue working on the case after my return to Washington, D.C.

27. During your hearing, you stated your belief that no one is above the law, including the President. But you declined to say whether the President can pardon himself of criminal charges.

I understand that you will not opine on whether the President can pardon himself. My question is, if the President could pardon himself, what laws, if any, would restrict his behavior?

RESPONSE: Article II, Section 2 of the Constitution provides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Because the scope of the pardon power could be the subject of litigation, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to opine further on the matter.

28. According to multiple news reports, you failed to include at least 15 items that were responsive to Question 12 of the Senate Judiciary Questionnaire.

a. Please describe with particularity the process you used to respond to Question 12 of the Senate Judiciary Questionnaire.

RESPONSE: I worked diligently to provide the Committee with comprehensive answers to the Senate Judiciary Questionnaire. I, and others acting on my behalf, reviewed my personal files, including my calendars and correspondence, as well as publicly available resources. As part of that process, I provided the Committee with a list of 127 talks or speeches and produced 1,793 pages. At all times, I sought to complete the Questionnaire fully and completely.

b. One news outlet found at least 13 speeches you omitted from your Senate Judiciary Questionnaire by reviewing Notre Dame’s event calendars. Did you

consult these calendars in preparing your response to the Senate Judiciary Questionnaire?

RESPONSE: In letters filed with the Committee on October 9 and October 16, out of an abundance of caution, I identified eight events that may be responsive to Question 12.d of the Senate Judiciary Questionnaire. All of these events took place many years ago, and four of them took place at least 13 years ago. My personal records did not reflect my participation in these events, many of which involved informal meetings with small groups of students during my time as a full-time faculty member at Notre Dame Law School.

As I indicated in response to Question 28.a above, I, and others acting on my behalf, reviewed publicly available resources in compiling my Senate Judiciary Questionnaire. Upon being made aware of additional events that may be responsive, I promptly notified the Committee, consistent with the practice of all recent nominees to the Supreme Court, each of whom filed supplements to their Questionnaire.

29. During your confirmation hearing, you stated that same-sex couples had a reliance interest in the *Obergefell v. Hodges* decision.

Does that reliance interest extend to all of the rights, benefits, and obligations of marriage as conferred by the federal government? And as conferred by state and municipal governments?

RESPONSE: *Obergefell* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. Because issues concerning the scope of *Obergefell* are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on those issues.

30. You noted in a 2019 speech that some rights must be “utterly nonnegotiable” as a constitutional matter. Thanks to cases like *Brown v. Board of Education*, which set forth a national, constitutional rule against racial segregation, racial equality in schools does not differ by geography. A child in one state is not subjected to segregated schools while a child in the state next door attends integrated schools.

You acknowledged in a 2013 speech that if *Roe v. Wade* were overturned, the next day “abortion would be neither legal nor illegal throughout the United States. Instead, the states and Congress would be free to ban, protect, or regulate abortion as they saw fit.” 19 states already have laws on the books that would immediately ban abortion if *Roe* was overturned.

a. Should a woman’s access to reproductive healthcare differ by geography?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Nor would it be appropriate for me to offer an opinion on matters of public policy.

b. Is it just for a woman’s reproductive freedom to depend on the state she happens to live in?

RESPONSE: Please see my response to Question 30a.

31. In 2018, in a 2-1 opinion, a three-judge panel of Republican appointees to the Seventh Circuit struck down an amendment to Indiana’s parental consent and judicial bypass law that required parents to be notified before pregnant, unemancipated minors could obtain abortions without parental consent. (*Planned Parenthood of Indiana & Kentucky, Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019), cert. granted, judgment vacated sub nom. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020)) The panel majority affirmed the district court’s ruling striking down the law before it took effect and, in doing so, relied heavily on the district court’s factual findings. The panel found that “any particular obstacle to exercising the right to choose to end a pregnancy does not exist in a vacuum. Cumulative effects are relevant, especially in an environment in which very few clinics and physicians perform abortions in Indiana. The deterrence shown in this record must be understood in the larger context of the logistical puzzle that the Indiana bypass statute already requires minors to solve.”

The State of Indiana requested *en banc* review by the Seventh Circuit of the panel’s decision. The Seventh Circuit denied that request and you and four other judges dissented. The dissent you joined argued that the Seventh Circuit should have granted a rehearing *en banc* given “the existing unsettled status of pre-enforcement challenges in the abortion context.” The dissent also argued that “[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.” In reality, courts routinely enjoin abortion restrictions before they take effect.

a. Do you believe that abortion restrictions can only be challenged after they go into effect?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process. I note, however, that the Supreme Court’s standing doctrine permits pre-enforcement challenges in certain instances. “An injury sufficient to satisfy Article III must be ‘concrete and particularized’ and ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’ An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal citations omitted).

b. Earlier this year, in *June Medical Services v. Russo*, Chief Justice Roberts blocked an unconstitutional abortion restriction in Louisiana from taking effect. Was Chief Justice Roberts wrong?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

**Questions for the Record for Senator Patrick Leahy, Senate Judiciary Committee,
Hearing on the Nomination of The Honorable Amy Coney Barrett
to be an Associate Justice of the Supreme Court of the United States
October 12-15, 2020**

1. In your confirmation hearing you would not acknowledge that communities of color disproportionality face restrictions and obstacles when they are casting their ballot.

a. **Now that you have heard the statistics and had time to reflect, do you recognize that communities of color have a harder time accessing the ballot than you or me?**

RESPONSE: The right to vote is a fundamental right. Because questions about ballot access are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

2. Even in *Shelby County v. Holder*, Chief Justice Roberts wrote that “[v]oting discrimination still exists; no one doubts that.”

a. **Do you recognize that voter discrimination still exists?**

RESPONSE: As you note, the Supreme Court has stated that “voting discrimination still exists.” *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2013). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

3. During your confirmation hearing you committed to me that no one is above the law. Yet, when I asked you if the President has an absolute right to pardon himself you refused to answer citing the issue may be before you and you cannot opine.

a. **If a president can pardon himself for a crime he has committed how is he not above the law?**

RESPONSE: Article II, Section 2 of the Constitution provides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Because the scope of the pardon power could be the subject of litigation, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to opine further on the matter.

b. **Do you agree that the Supreme Court, since *Calder v. Bull*, has recognized the common law concept that a man cannot be a judge in his own case?**

RESPONSE: In *Calder v. Bull*, Justice Chase stated that “a law that makes a man a Judge in his own cause” is an example of “[a]n ACT of the Legislature (for I cannot call

it a law) contrary to the great first principles of the social compact, [that] cannot be considered a rightful exercise of legislative authority.” 3 U.S. (3 Dall.) 386, 388 (1798).

4. During your hearing I asked if you would commit, if confirmed, to recusing yourself from any election-related decisions the Court might have to decide following the election next month. You declined to commit. You did, however, commit to “faithfully apply the law of recusal, and part of that law is to consider any appearance questions.”

a. **Do you agree that an appearance of a conflict alone could require recusal under the recusal statute?**

RESPONSE: The recusal statute provides that a justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a).

b. **What types of appearances of conflicts or appearances of partiality should judges or justices evaluate when considering recusal?**

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

5. During your hearing I asked if you agreed if the Emoluments Clause serves as an anti-corruption clause in our Constitution, and you said you wouldn’t characterize it as such, and said it was “designed to prevent foreign countries from having influence.” But during the 1787 Constitutional Convention, Governor Edmund Randolph said that the Emoluments Clause “was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.” Governor Randolph also emphasized that through the Emoluments Clause the President “is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.”

a. **Do you agree the Constitution’s drafters specifically intended the Emoluments Clause to *both* prevent corruption and foreign influence?**

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge and as a judicial nominee to opine on it.

b. **What does the Constitution require that a president do prior to receiving an emolument?**

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge and as a judicial nominee to opine on it.

6. As an originalist, when analyzing the Second Amendment you've looked to its "text, history, and tradition." The Second Amendment starts with "A well-regulated militia, being necessary to the security of a free State."

a. **How does the "well-regulated militia" phrase affect the meaning of the Second Amendment in your view?**

RESPONSE: As I discussed at the hearing, *District of Columbia v. Heller*, 554 U.S. 570 (2008), holds that the Second Amendment protects an individual right to keep and bear arms for self-defense. *Heller* said that the phrase "[a] well regulated Militia, being necessary to the security of a free State," is a "prefatory clause" that "announces a purpose," but "does not limit or expand the scope of the operative clause." *Id.* at 577–78.

7. The Second Amendment protects the right of the people to keep and bear arms. I am a supporter of this right. But it says nothing about an individual's right to build arms.

a. **As an originalist, would you agree that a plastic firearm created with an at-home 3-D printer – using technology not even fathomable 200 hundred years ago – could be restricted without creating any Second Amendment issues?**

RESPONSE: Because the Second Amendment's application to restrictions on 3-D printing could be the subject of litigation, it would be inappropriate for me as a sitting judge to opine on the issue.

b. **Is the government limited by the historical scope of gun regulations even in the face of advancing technologies like 3-D printing that could potentially empower millions to manufacture guns from their homes?**

RESPONSE: Please see my response to Question 7.a.

8. The Eighth Amendment prohibits the imposition of "excessive fines" on criminal defendants.

a. **What did the Founders consider to be an excessive fine?**

RESPONSE: The Supreme Court has addressed the Excessive Fines clause, including in *United States v. Bajakajian*, 524 U.S. 321 (1998). Because the scope of the clause could be the subject of future litigation, it would be improper for me as a sitting judge to opine on it.

b. **How does an originalist evaluate what may be "excessive" today?**

RESPONSE: Please see my response to Question 8.a.

9. **To what extent do you believe the Reconstruction-era amendments reflect the government as a protector of equality and individual liberty as oppose to a threat to equality and individual liberty?**

RESPONSE: The Reconstruction-era amendments are among the most important constitutional developments in our Nation’s history for protection of equal treatment and individual liberty by the government.

10. **What sources would a judge look to for the original public meaning when interpreting the 13th Amendment’s grant of congressional power (“Congress shall have the power to enforce this article by appropriate legislation”)?**

RESPONSE: The Supreme Court has stated that “[b]y the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free” and that “[t]o keep that promise, Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (quotation marks omitted).

11. In his dissent in *Blyew v. United States*, Justice Joseph Bradley offered his perspective on what the 13th Amendment was intended to accomplish. As retold in “The Second Founding: How the Civil War and Reconstruction Remade the Constitution” by Eric Foner: “Slavery, Bradley observed, ‘extended its influence in every direction, depressing and disenfranchising the slave and his race in every possible way.’ Abolition meant not merely ‘striking off the fetters’ but destroying ‘the incidents and consequences of slavery’ and guaranteeing the freed people ‘the full enjoyment of civil liberty and equality.’”

a. **Please state whether you agree with this understanding of the origins of the 13th Amendment, and why.**

RESPONSE: I have not read Eric Foner’s book and thus have not had occasion to consider the specific formulation of the Thirteenth Amendment discussed above. But similar to my response to Question 9 (discussing the Reconstruction-era amendments), the Thirteenth Amendment is a vitally important amendment that abolished slavery throughout the United States.

12. In the same book, Foner wrote that the 14th Amendment “asserted federal authority to create a new, uniform definition of citizenship and announced that being a citizen — or, in some cases, simply residing in the country — carried with it rights that could not be abridged. It proclaimed that everyone in the United States was to enjoy a modicum of equality, ultimately protected by the national government.”

a. **Please state whether you agree and why.**

RESPONSE: I have not read Eric Foner’s book and thus have not had occasion to consider the specific formulation of the Fourteenth Amendment discussed above. That said, the plain text of the Fourteenth Amendment requires equal protection of the laws for all persons within the jurisdiction of the United States.

13. **Under an originalist’s interpretation, does the Constitution guarantee birthright citizenship?**

RESPONSE: The Fourteenth Amendment provides, inter alia, that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Because the meaning of this provision is the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

14. **Putting aside any Supreme Court precedent, does an originalist’s approach to interpreting the Constitution and specifically the 14th Amendment allow the federal government to prohibit sex discrimination?**

RESPONSE: The Supreme Court has applied the Fourteenth Amendment to discrimination based on sex, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996), and it has interpreted the Due Process Clause of the Fifth Amendment as “contain[ing] an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups,” *Washington v. Davis*, 426 U.S. 229, 239 (1976). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

15. You’ve written that Justice Scalia refused to “accept the body of precedent” ruling that the “Due Process Clause guarantees certain...liberties rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.” Stated more simply, Justice Scalia didn’t believe in and refused to recognize substantive due process rights. You’ve been very clear that you share Justice Scalia’s approach to the law.

a. **As a Justice, would you also refuse to accept Supreme Court precedent that ruled that the Due Process Clause guarantees certain liberties and not just certain procedural protections?**

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

b. **You once observed that under Chief Justice Rehnquist’s *Glucksberg* opinion and approach, the Court will only recognize a substantive due process right “if there has been a long tradition in America” of protecting that right. How do you determine what has and hasn’t been a ‘long tradition in America?’**

RESPONSE: The Supreme Court has stated that “in all due process cases” it examines “our Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

c. **Three years from now the *Roe* decision will be in its 50th year, marking five decades of protecting a woman’s right to choose. Is that a ‘long tradition?’**

RESPONSE: I am aware of no Supreme Court case that defines the term “long tradition” in this particular context, but the core holding of *Roe* regarding a woman’s right to terminate a pregnancy has been affirmed by the Supreme Court many times.

16. Justice Kennedy wrote in *Planned Parenthood v. Casey* that “At the heart of liberty is the right to define one’s own concept of existence.”

a. **Do you agree with Justice Kennedy in this case?**

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b. **Does “the right to define one’s own concept of existence” mean that states cannot pass laws discriminating against LGBTQ Americans?**

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Litigants in future cases are entitled to a fair and impartial judge who has not committed to rule on their case in any particular way.

17. During your hearing I asked whether you knew of the Alliance Defending Freedom’s decades-long efforts to recriminalize homosexuality when you presented five times at their Blackstone Legal Fellowship program between 2011 and 2015. You testified that you were not aware of such efforts.

a. **When did you learn that the Blackstone program was funded by ADF?**

RESPONSE: To the best of my recollection, I learned that ADF funded the Blackstone program either when I received the honorarium for my presentation, or maybe when I saw the signature line in an e-mail.

b. **When did you learn that ADF participated in efforts – by supporting specific legal causes or policies, or offering public support – either to maintain laws prohibiting same-sex intimacy or to recriminalize homosexuality?**

RESPONSE: I have no specific knowledge of the efforts you describe.

18. The 20th Amendment states that “The terms of the President and the Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin.”

a. **Do you agree that the 20th Amendment requires a peaceful transition of power whereby the President and Vice President must vacate their office on January 20th if they lose an election?**

RESPONSE: The 20th Amendment to the Constitution provides that “[t]he terms of the President and the Vice President shall end at noon on the 20th day of January, . . . and the terms of their successors shall then begin.” As I stated during the hearing, one of the beauties of America from the beginning of the republic is that we have had peaceful transfers of power.

b. **Is a president who refuses to commit to a peaceful transition of power or to vacate office after losing an election a threat to our constitutional order?**

RESPONSE: Please see my response to Question 18.a.

19. In 1802, Thomas Jefferson expressed that by declaring in the Constitution that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, the American people had built “a wall of separation between church and State.”

a. **Do you agree that the Constitution establishes a wall of separation between church and state? How are the two separated? And how can the two intersect under our constitutional system?**

RESPONSE: The First Amendment to the Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Although the Court once referred to the Establishment Clause as enacting a “wall of separation” in *Reynolds v. United States*, 98 U.S. 145, 164 (1878), it has more recently explained “that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs,” *Espinoza v. Montana Dep’t of Rev.*, 140 S. Ct. 2246, 2254 (2020). Similarly, the Court has explained that the Establishment Clause is not offended where “government acts with the proper purpose of lifting a regulation that burdens the exercise of religion.” *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987). As I stated at the confirmation hearing, the Founders protected the free exercise of religion because religious liberty was considered fundamental.

20. In *Sims v. Hyatte*, you dissented from the majority opinion, agreeing that the evidence of hypnosis undermined confidence in the verdict of guilt, yet you voted to uphold Mr. Sims’ conviction on the grounds that it wasn’t “objectively unreasonable” for the state court to allow the verdict to stand. The Supreme Court has long recognized that suppressing strong and non-cumulative evidence related to credibility is material under *Brady*; especially where, as in *Sims*, that witness is the linchpin of the prosecution’s case. We know about the fallibility of eyewitness evidence, and the unreliability of hypnosis. According to the Innocence

Project, eyewitness misidentification is the leading contributing factor to wrongful conviction in DNA-based exoneration cases, plaguing nearly 70 percent of the more than 375 wrongful convictions proven through post-conviction DNA testing. And scientific research continues to highlight the precarious nature of eyewitness evidence, which is even more problematic in the face of hypnosis.

a. **Please explain why you believed it was not objectively unreasonable for the state court to allow the verdict to stand?**

RESPONSE: In my dissent in *Sims*, I applied the standard of review mandated by Congress under the Antiterrorism and Effective Death Penalty Act of 1996. The Supreme Court has recognized that to meet that standard a petitioner must show that an error was “beyond any possibility for fairminded disagreement.” *Sims v. Hyatte*, 914 F.3d 1078, 1094 (7th Cir. 2019) (Barrett, J., dissenting) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In my view, the petitioner in *Sims* had not shown that the state court’s application of *Brady*’s materiality standard met that threshold. I concluded that “[w]ith a solid on-scene description, multiple untainted photo-array identifications, and an in-court identification by the victim—not to mention *Sims*’s suspicious behavior and proximity to the scene of the crime—a fair-minded jurist could be confident in the jury’s verdict, even if we are not.” *Id.* at 1098–99.

21. I have been alarmed by the Trump administration’s attacks on clean air and his rollbacks of the regulations that even enjoy industry support, like the Clean Power Plan and auto fuel efficiency standards. Those efforts to increase emissions and dangerous pollutants are now particularly appalling in the midst of a respiratory disease that has killed over 200,000 Americans and impacted millions more. The science of climate change and the public health crisis that it presents is even more convincing than it was when the Supreme Court decided *Massachusetts v. EPA*, giving the EPA authority to regulate greenhouses gasses and act on climate change under the Clean Air Act.

a. **Do you have any reason to dispute the scientific consensus on human-caused climate change?**

RESPONSE: As I discussed at the hearing, my views on the subject are not relevant to my job as a judge. If a case comes before me involving environmental regulation, I will carefully review the record and apply the relevant law to the facts before me. Furthermore, the Supreme Court has described “climate change” as a “controversial subject[.]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

b. **Do you believe the Environmental Protection Agency has been granted too much authority and flexibility to protect the American public from the threats facing their environment?**

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge, it would be inappropriate for me to offer an opinion on the matter.

c. **Should those whose enjoyment of natural resources is protected by an environmental law have as equal access to the courts as industries regulated by that same law?**

RESPONSE: As a judge, I decide each case based on the law and the factual evidence in the record before me. I apply the law without considering the status of a party.

22. In a 2018 case regarding federal jurisdiction over wetlands—*Orchard Hill Building Co. v. United States Army Corps of Engineers*—you joined a decision that rejected a finding of Clean Water Act jurisdiction over wetlands that were holding up a development project. The Court determined that the Corps had failed to demonstrate that a “significant nexus” existed between the 13 acres of wetlands on the construction site, alone or in combination with other area wetlands, and the Little Calumet River 11 miles away.

a. **Both your mentor, Justice Scalia, and you have taken narrow views of the federal government’s ability to protect clean water and protect wetlands. Wetland scientists in Vermont and across the country continue to affirm that even waters and wetlands which lack a direct surface connection to so-called navigable waters significantly impact the larger aquatic ecosystems downstream. What is your view of the federal government’s jurisdiction, with respect to the Commerce Clause and the Clean Water Act, to regulate waterways and watersheds?**

RESPONSE: In *Orchard Hill Building Co. v. United States Army Corps of Engineers*, 893 F.3d 1017 (7th Cir. 2018), I joined a unanimous opinion vacating the Army Corps of Engineers’ determination that 13 acres of privately owned wetlands were jurisdictional “waters of the United States.” The controlling opinion in *Rapanos v. United States* maintains that “the Corps’ jurisdiction over [such] wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.” 547 U.S. 715, 779 (2006) (Kennedy, J.). As the opinion in *Orchard Hill* explained, the Corps had not provided the necessary evidence to satisfy the “significant nexus” standard. *Orchard Hill Building*, 893 F.3d at 1019.

As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues like the proper scope of federal authority under the Commerce Clause and the Clean Water Act. Such questions can only be answered through the judicial process.

b. **What other factors would you want to consider in deciding whether to narrow the definition of Waters of the United States under Clean Water Act jurisdiction. Should economic outcomes for affected industries be decisive? The ecological condition of receiving waters?**

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

23. As technology continues to evolve and becomes increasingly intertwined with our daily lives, the implications for Americans' privacy rights are extraordinary.

a. **Can you outline what you believe the holdings of *Katz* and *Carpenter* to be?**

RESPONSE: In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court held that the government violated the Fourth Amendment when it recorded the defendant's conversations in a public phone booth. Justice Harlan's concurrence announced a "twofold requirement" for the Fourth Amendment's protections: "first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Supreme Court has recognized Justice Harlan's concurrence as establishing the controlling test. See *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979). In *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018), the Supreme Court held that an individual had a reasonable expectation of privacy in cell-site location information that the government obtained through his wireless carrier.

b. **The third-party doctrine seems to be somewhat incompatible with the digital age, where individuals expose nearly everything—in most cases unknowingly—to third party servers. What is left of the Fourth Amendment if the Third Party doctrine stands?**

RESPONSE: Because the scope of the third-party doctrine is the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

c. **Justice Scalia often limited 4th Amendment privacy questions to the concept of trespass, rather than conducting a reasonable expectation of privacy analysis under *Katz*. Would you also apply a trespass framework to the Fourth Amendment? Do you think such an approach to 4th Amendment protections is suited to protecting Americans in the digital age?**

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals, nor on a matter of public policy.

24. In *Marbury v. Madison*, Chief Justice John Marshall described how government officials are bound by judicial orders by expressing how even "in Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." When I asked you whether a President must comply with the Supreme Court order, you responded that "courts have neither force nor will" to "enforce our own judgments." I fear your unwillingness to assert that the President is bound by Supreme Court decisions invites trouble from any President who may be inclined to test the proposition. For example, President Andrew Jackson said he was not bound by the decisions of the Supreme Court because "the opinion of

the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”

a. **Do you agree with President Jackson’s perspective that the President is “independent” of the opinions of judges and therefore does not have to abide by them?**

RESPONSE: Under Article III, “[t]he judicial Power of the United States” is vested in the Supreme Court and the inferior federal courts established by Congress. Federalist No. 78 explains: “The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” Thus, the Supreme Court may have the final word as a matter of law, but it lacks control over how the political branches respond to it.

b. **Do you believe that a President who refuses to comply with the Supreme Court’s decision on a case is a threat to our constitutional order?**

RESPONSE: Please see my response to Question 24.a.

c. **Even if the Supreme Court cannot technically enforce its orders, do you think it is nonetheless important for Supreme Court to assert unequivocally that the President is bound by its decisions?**

RESPONSE: Please see my response to Question 24.a.

25. One of the most important roles of a Supreme Court justice is to decide issues related to executive power and the separation of powers in our government.

a. **Do you believe that *Youngstown* is settled law? Outside of *Youngstown*, what would you consider in assessing potential overreaching by the Executive?**

RESPONSE: In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring), Justice Jackson laid out the “familiar tripartite scheme” that the Supreme Court has since called “the accepted framework for evaluating executive action”:

First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.*, at 637. In such a

circumstance, Presidential authority can derive support from “congressional inertia, indifference or quiescence.” *Ibid.* Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.” *Id.*, at 637–638.

Medellin v. Texas, 552 U.S. 491, 524–25 (2008) (quoting *Youngstown*, 343 U.S. at 635–38). In assessing issues of executive power, I would consider any precedent, including *Youngstown*, that is applicable to the facts of the case.

b. What is your stance on the “unitary executive” theory? Do you view the executive branch as a co-equal branch of the US government, or “first among equals?”

RESPONSE: Article II provides that “[t]he executive Power shall be vested in a President of the United States of America.” Under our system of separation of powers, each branch of the federal government checks and balances the other branches.

c. What restrictions do you see on a president’s authority under Executive Order 12333 to conduct surveillance activities not authorized by Congress?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

d. What restrictions do you see, generally, on a president’s ability to conduct surveillance activities when those activities are governed by statutes that have expired?

RESPONSE: Please see my response to Question 25.c.

26. Presidents frequently invoke an expansive view of “national security” as justification for their executive actions, such as when President Trump justified applying tariffs or banning transgender Americans from serving in the military in the name of national security. In both of those examples, actual studies carried out by the executive agencies themselves did not demonstrate any national security threat that could be addressed by the President’s action.

a. Should the courts wholly defer to the President on the definition of “national security” in the absence of a clear legal definition? What about in the case of a clear legal definition?

RESPONSE: In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring), Justice Jackson laid out the “familiar tripartite scheme” that the Supreme Court has since called “the accepted framework for evaluating executive action”:

First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.*, at 637. In this circumstance, Presidential authority can derive support from “congressional inertia, indifference or quiescence.” *Ibid.* Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.” *Id.*, at 637–638.

Medellin v. Texas, 552 U.S. 491, 524–25 (2008) (quoting *Youngstown*, 343 U.S. at 635-38). To the extent that this question asks about any particular application of *Youngstown*, it would not be appropriate for me, as a sitting judge and a judicial nominee, to offer an opinion on abstract legal issues or hypotheticals.

b. When the President and the agencies legally charged with executing a particular law of the United States that includes a national security exception disagree on whether a national security need exists, can a clear national security justification be said to exist?

RESPONSE: Please see my response to Question 26.a.

c. Is it necessary that a national security waiver be written into a law for the President to waive certain provisions on national security grounds?

RESPONSE: Please see my response to Question 26.a.

27. Studies have found that judges often favor wealthy litigants over those living in poverty, resulting in significant negative consequences for low-income people.

a. Do you believe judges’ socioeconomic bias, whether implicit or explicit, is a concern?

RESPONSE: Every federal judge swears an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. This solemn promise is extremely important to me. As a judge on the Seventh Circuit, I have always worked hard to ensure that bias has no place in my decisions, and I will continue that effort if confirmed to the Supreme Court.

b. What steps should judges take to address their socioeconomic bias?

RESPONSE: Please see my response to Question 27.a.

28. Recently, the federal government has been accused of conducting forced, unnecessary hysterectomies on immigrant women at ICE facilities. Sadly, the United States government has a long history of sterilizing disabled individuals, African Americans, and Native Americans, among others. When she was an attorney, Justice Ginsburg represented Susan Struck, a woman who served in the Air Force and objected to getting an abortion due to Air Force rules prohibiting pregnant women from serving.

a. **Do you believe that when the government forcefully sterilizes women or requires them to get an abortion, it is violating a woman’s right to privacy and right to choose under the U.S. Constitution?**

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. I note, however, that in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Supreme Court held that a state statute permitting the forced sterilization of certain criminal convicts violated the Equal Protection Clause of the Fourteenth Amendment. In emphasizing the strict scrutiny that applied to such a law, the Court stated that “[m]arriage and procreation are fundamental to the very existence and survival of the race” and that the “power to sterilize, if exercised, may have subtle, far reaching and devastating effects” that “forever deprive[]” the person of a “basic liberty.” *Id.* at 541.

29. In *Yafai v. Pompeo*, you ruled that the court should defer to the visa decisions of executive branch officials under the broad doctrine of “consular non-reviewability.” The dissenting opinion took issue with your approach, saying that it could potentially sanction “purely arbitrary” visa decisions and abdicates the judiciary’s “responsibility to ensure that such decisions, when born of laziness, prejudice, or bureaucratic inertia, do not stand.” But The Trump administration habitually misleads the courts on immigration issues. It has misled courts by claiming there was no policy of family separation. It even formally admitted to making false statements in court while defending its effort to expel New York residents from the Trusted Travelers program.

a. **Should a court’s deference to executive branch decisions under the doctrine of “consular non-reviewability” be impacted at all when executive branch officials repeatedly make false or misleading claims to the courts?**

RESPONSE: The doctrine of consular non-reviewability says that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court has identified a limited exception to this doctrine when a visa denial implicates a constitutional right of an American citizen and the consular official has failed to provide a “facially legitimate and bona fide reason” for the denial. *Kleindeinst v. Mandel*, 408 U.S. 753, 770 (1972).

Because the doctrine of consular non-reviewability is the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

30. In *Cook County v. Wolf*, the Department of Homeland Security acknowledged that its controversial public charge rule could cause immigrants to avoid seeking medical care in the middle of a pandemic out of fear that getting medical care through a government program could cost them their green cards. This was one of the few instances where this administration was honest with the court about the harmful consequences of its immigration policies. That acknowledgement weighed heavily on the majority's ruling to block the implementation of the public charge rule in that case. You dissented in that case.

a. **Do you acknowledge that, since the implementation of the public charge rule, some immigrants have avoided getting medical care through government programs out of fear that it could impact their likelihood of obtaining a green card?**

RESPONSE: In my dissent in *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020), I acknowledged plaintiffs' evidence that the rule was causing "noncitizens to drop or forgo public assistance," *id.* at 235. But I also explained that "immigrants are dropping or forgoing aid out of misunderstanding or fear because, with very rare exceptions, those entitled to receive public benefits will never be subject to the public charge rule." *Id.* The government has petitioned for certiorari in Cook County. *See* Pet. for Writ of Cert., *Wolf v. Cook Cty.*, No. 20-450 (Oct. 7, 2020). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

b. **In what circumstances, if any, should a judge consider the real-world consequences of taking a certain legal position or interpreting the law in a specific way?**

RESPONSE: As a general matter, judges should make their decisions based on the law, including the text of the relevant statutes and precedents, leaving policy consequences and policy decisions to the political branches. A judge may consider practical consequences when the governing law applicable to the judge's decision so permits.

31. A federal statute, 8 U.S.C. § 1158, provides that "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum...."

a. **Do you agree that this statute, by its very text, plainly means that asylum seekers can lawfully make asylum claims anywhere along the U.S. border as long as they are physically present or have arrived in the U.S.?**

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

32. In your recent opinion for *Doe v. Purdue University* you argue the Department of Education’s Dear Colleague letter to College and Universities and Purdue’s subsequent compliance was evidence of anti-male bias.

a. **Do you believe the Department of Education’s efforts to enforce survivor’s rights is evidence of bias against men?**

RESPONSE: Due to the posture of this case—an appeal from the dismissal of the plaintiff’s complaint—my panel colleagues and I were required to consider the facts only as alleged by the plaintiff. Our task was “not to determine what allegations are supported by the evidence but to determine whether John [wa]s entitled to relief *if everything that he says is true.*” *Doe v. Purdue University*, 928 F.3d 652, 656 (7th Cir. 2019) (emphasis added). We recognized that “[o]ther circuits have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim,” but determined that “the letter, standing alone, is obviously not enough to get John over the plausibility line” of a Title IX claim. *Id.* at 668–69. Instead, he needed to “allege facts raising the inference that Purdue acted at least partly on the basis of sex in his particular case,” which we concluded that he did. *Id.* at 669.

b. **Only 12 percent of college student survivors report sexual assault to police. How can we prevent cases like Purdue from having a chilling effect on students who think about reporting for recourse?**

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge and as a judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

c. **How should universities balance sexual assault survivor’s rights with due process for the accused?**

RESPONSE: See my response to Question 32.b.

33. In February 2012, you signed onto a “statement of protest” against the administrative accommodation to the contraception coverage requirement in the Affordable Care Act. This statement claimed that the accommodation is an “assault on religious liberty and the rights of conscience” and that it “coerces religious institutions and individuals” to purchase insurance policies that include abortion services.

a. **Is an individual’s access to healthcare services under the law always, in all circumstances, subservient to other individuals’ religious liberty interests? As a judge, how do you balance the two?**

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process. But the Supreme Court has stated,

“Congress, in enacting [the Religious Freedom Restoration Act of 1993], took the position that ‘the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.’ 42 U.S.C. § 2000bb(a)(5). The wisdom of Congress’s judgment on this matter is not our concern.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735–36 (2014).

34. You joined the dissent in *Planned Parenthood v. Commissioner* that refers to a law, specifically the “Sex Selective and Disability Abortion Ban” as the “eugenics law.” The majority referred to this law by its official name, but the dissent you joined did not. While you said at your hearing that the dissent “didn’t reach any conclusion itself with respect to [the Sex Selective and Disability Abortion Ban]” the invocation of the term ‘eugenics’—and the history and controversy surrounding it—certainly implies a certain perspective on the law.

a. **Why did you join a dissent that referred to this law with such a pejorative?**

RESPONSE: While I did not author the dissent, I joined it because I agreed with the substance of the argument.

35. The Supreme Court has provided a framework for determining whether or not to overrule a prior holding. In *Planned Parenthood v. Casey*, Justice O’Connor described the “prudential and pragmatic considerations” that a court should consider when determining whether or not to overrule a prior case. The opinion explains that the Court should ask “whether the rule has proved to be intolerable simply in defying practical workability...whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation...whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine...or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.”

a. **Do you believe that the Supreme Court should take all of the prudential and pragmatic considerations laid out by Justice O’Connor in *Planned Parenthood v. Casey* into account when deciding whether or not to overrule a precedent?**

RESPONSE: As a precedent of the Supreme Court, the discussion of stare decisis in the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), should be taken into account.

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**Written Questions from Senator Richard J. Durbin to Judge Amy Coney Barrett
October 16, 2020**

For questions with subparts, please respond to each subpart separately.

1. You have described yourself as an originalist. In your 2017 law review article “Originalism and Stare Decisis,” you say that “many claim that originalism cannot account for important precedents, including the New Deal expansion of federal power, the administrative state, and *Brown v. Board of Education*.”

You went on to say that “[t]he thrust of the stare decisis-based critique of originalism is that ‘if [originalists] were to vote their principles, their preferred approach would produce instability, chaos, and havoc in constitutional law.’” You claim “[t]his threat is vastly overstated, because no originalist Justice will have to choose between his principles and the kind of chaos critics predict.” You say this is because “the Court’s discretionary jurisdiction generally permits it to choose which questions it wants to answer” and that “[t]his in and of itself keeps the most potentially disruptive challenges to precedent off the Court’s docket.”

As an example, you say “[e]ven if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.”

Judge Barrett, will you commit that, if you are confirmed to the Supreme Court, there is “no chance” that you would vote to grant certiorari if a petitioner asked the Court to revisit the 1937 case, *Helvering v. Davis*, that held that the Social Security Act is constitutional?

RESPONSE: *Helvering v. Davis* is a binding precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

2. In your October 2016 law review article “Congressional Originalism,” you discuss the conflict between originalism and precedent. You say “[a]dherence to originalism arguably requires, for example, the dismantling of the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Education*.”

a. What did you mean when you said that adherence to originalism arguably requires the dismantling of the administrative state?

RESPONSE: As explained in the footnote following that sentence, “We identif[ied] some well-settled precedents whose consistency with the original public meaning has been challenged, but we recognize[d] that different readers will reach different conclusions about whether any given precedent in fact conflicts with the text. We d[id] not ourselves undertake to examine how any of the precedents we mention[ed] would fare under an originalist analysis. For our purposes, it [wa]s sufficient to say that it is

inevitable that some well-settled precedents conflict with the original public meaning, and we use[d] the familiar examples simply to illustrate the nature of the problem posed by such a conflict.” *Congressional Originalism*, 19 U. Pa. J. of Const. L. 1, 2 n.1 (2017).

b. What did you mean when you said that adherence to originalism arguably requires the invalidation of paper money?

RESPONSE: Please see my response to Question 2.a.

c. What did you mean when you said that adherence to originalism arguably requires the reversal of *Brown v. Board of Education*?

RESPONSE: Please see my response to Question 2.a.

3. In your 2020 essay in the Case Western Reserve Law Review entitled “Assorted Canards of Contemporary Legal Analysis: Redux,” you note that originalists “insist that judges must adhere to the original public meaning of the Constitution’s text,” but you also note that originalists like Justices Scalia and Thomas often disagreed on what the original public meaning was and that your friend, Judge Amul Thapar, teaches a class he describes as “Scalia vs. Thomas.” You say that “even card-carrying originalists don’t always wind up at the same spot, and it oversimplifies originalism to expect that they always will.”

a. How would you advise a judge or justice to choose among different interpretations of the original public meaning?

RESPONSE: Originalism requires a judge to apply his or her best understanding of the original public meaning of a constitutional provision.

b. Leaving aside constitutional provisions that have been amended, does the original meaning of constitutional provisions change or evolve over time, or is it fixed and immutable?

RESPONSE: The law stays the same until it is lawfully changed, although its provisions are applied to new circumstances. For example, the Fourth Amendment, which was adopted in 1791 and protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” can apply to modern technology like cell phones.

c. Are there any provisions in the Constitution where the original meaning is currently unclear? If so, which provisions?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

d. Are there any provisions in the Constitution where you believe controlling Supreme Court precedent has incorrectly articulated the provision’s original meaning, and if so, which provisions?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

4. In your 2017 article “Originalism and Stare Decisis,” you say: “If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny.” You discuss how the Supreme Court’s discretionary jurisdiction “generally permits it to choose which questions it wants to answer,” and you say “[t]his in and of itself keeps the most potentially disruptive challenges to precedent off the Court’s docket.”

In the case *California v. Texas*, in which Republican attorneys general and the Trump Administration are urging the Court to strike down the Affordable Care Act, certiorari has already been granted.

If you are confirmed to the Supreme Court this month, as President Trump and Senate Republicans want, you would not have the off-ramp of denying certiorari to avoid issuing a decision that would “cause chaos” by overturning a law that hundreds of millions of Americans depend on for their healthcare and that impacts one-fifth of the American economy during a pandemic. **Without commenting on the specifics of *California v. Texas*, when the Court has already accepted a case that could “cause chaos,” what other options or off-ramps are then available to a justice to avoid such an outcome?**

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

5. In your 2017 article “Countering the Majoritarian Difficulty,” you say that in his majority opinion in *NFIB v. Sebelius*:

Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute. He constructed the penalty imposed on those without health insurance as a tax, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did—as a penalty—he would have had to invalidate the statute as lying beyond Congress’s commerce power.

You went on to say that “*NFIB v. Sebelius* might be explained by the fact that Chief Justice Roberts has not proven himself to be a textualist in matters of statutory interpretation” and that “deference to a democratic majority should not supersede a judge’s duty to apply clear text.”

You have described yourself as a textualist, and your criticism of the Chief Justice’s *NFIB* opinion hinges on your disagreement with the Court majority’s view of the plausible meaning of the words in the statute. **How much deference, under the principles of stare decisis and**

precedent, do future justices owe to the Court’s majority view of the plausible meaning of a law’s statutory text?

RESPONSE: As I explained at my hearing, in that part of the article I was discussing Chief Justice Robert’s approach to statutory interpretation and agreeing with the Chief Justice’s own characterization that his interpretation was the “less natural” reading of the text. See *NFIB v. Sebelius*, 567 U.S. 519, 562 (2012) (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance. . . . The question is not whether [reading the mandate as a tax] is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”). *NFIB v. Sebelius* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

6. In *King v. Burwell*, the Supreme Court rejected a lawsuit that would have blocked millions of Americans from receiving tax credits to help them pay for health insurance on a federal exchange under the Affordable Care Act. The case turned on the phrase “an Exchange established by the State,” a phrase which Chief Justice Roberts’ majority opinion said “is properly viewed as ambiguous.” Chief Justice Roberts said the following about how courts should interpret the laws that Congress enacts:

If the statutory language is plain, we must enforce it according to its terms. But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is “‘to construe statutes, not isolated provisions.’

After finding the relevant statutory text to be ambiguous, the Chief Justice determined that the intent and structure of the ACA compelled allowing the tax credits, noting that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”

Without commenting on the specifics of this case, do you agree with the Chief Justice that “oftentimes the meaning or ambiguity of certain words or phrases may only become evident when placed in context”?

RESPONSE: I agree that the meaning of a word or phrase may become evident when placed in context.

7. You said in a June 25, 2015 radio interview that in the *King v. Burwell* case: “I think the dissent has the better of the legal argument.” **Despite your view of the dissent’s merits, would you say that *King v. Burwell* is settled law?**

RESPONSE: *King v. Burwell* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

8. In your 2017 article “Countering the Majoritarian Difficulty,” you say:

“[T]he harm inflicted by the Supreme Court’s erroneous interference in the democratic process is harder to remedy than the harm inflicted by an ill-advised statute. The Supreme Court’s constitutional mistakes are extremely difficult to correct; one can hope only for a change of heart, a change of personnel, or a change by constitutional amendment.”

Is a “change of personnel” at the Supreme Court a sufficient justification for the Court correcting a case that the new personnel views as a mistake?

RESPONSE: No; I have stated the opposite. In *Precedent and Jurisprudential Disagreement*, I argued that “the preference for continuity disciplines jurisprudential disagreement. Absent the presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new majorities could brush away a prior decision without explanation. If only the votes mattered, a reversal would represent an act of will more akin to a decision made by the political branches.” 91 TEX. L. REV. 1711, 1722 (2013).

9. On July 23, 2019, President Trump said at a speech, “I have an Article II, where I have the right to do whatever I want as president.” **Is that statement legally accurate? Please explain why or why not.**

RESPONSE: Article II provides in part that “[t]he executive Power shall be vested in a President of the United States of America.” Because the scope of the executive power is a frequent subject of litigation, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to opine further on the matter.

10. On November 27, 2017, President Trump tweeted “I won the popular vote if you deduct the millions of people who voted illegally.” On January 27, 2017, he tweeted “Gregg Phillips and crew say at least 3 million votes were illegal. We must do better!” Also in January 2017, the Associated Press reported that President Trump asserted in a meeting with Congressional leaders that 3 million to 5 million illegal votes were cast in the 2016 election.

In your 2017 hearing, I asked you in writing: “Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?” You responded: “This is a political issue about which I cannot ethically opine.” You then cited Canon 5 of the Code of Conduct for U.S. Judges which says that “[a] judge should not engage in any other political activity.”

a. Why did you think it was not ethical to say whether you agreed with President Trump’s claim as a factual matter?

RESPONSE: As I discussed at the hearing, it would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure.

b. Why is it political activity to say whether you agreed as a factual matter with President Trump’s claim on illegal voting?

RESPONSE: Please see my response to Question 10.a.

c. President Trump has repeatedly and publicly attacked the legitimacy of mail-in balloting—a practice that many states are depending on to ensure that Americans can safely exercise their fundamental right to vote in light of the COVID-19 pandemic. For example, on September 12, the President tweeted “The unsolicited mail in ballot scam is a major threat to our democracy.” In contrast, FBI Director Christopher Wray said on September 24 that the FBI has “not seen, historically, any kind of coordinated national voter fraud effort in a major election, whether by mail or otherwise.” **Are you willing to at least acknowledge that President Trump has made claims about voting that are not supported by facts?**

RESPONSE: Please see my response to Question 10.a.

11.

a. What does the term “settled law” mean to you?

RESPONSE: “Settled law” is used by different people to mean different things. Any precedent entitled to respect under the doctrine of stare decisis could be characterized as settled law.

b. Are decisions of the Supreme Court ever firmly “settled,” or are they always up for potential revision or reconsideration on the grounds that the decisions are inconsistent with the original meaning of the Constitution?

RESPONSE: Please see my response to Question 11.a.

12. At your 2017 hearing, I submitted to you questions in writing about the Judicial Crisis Network. I wrote:

During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

I then asked you three questions.

First, I asked Question 10a: “Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?” You answered: “I am unaware of any outside groups or special interests having made donations on my behalf. I have not and will not solicit donations from anyone. Indeed, doing so would be a violation of my ethical responsibilities as a judicial nominee.”

I then asked: “Would you discourage donors from making such undisclosed donations?” You answered: “See answer to question 10a.”

I then asked: “If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?” You answered: “See answer to Question 10a.”

a. On October 7, the Judicial Crisis Network announced that it has “launched a new ad campaign as part of an all-out effort to confirm Judge Amy Coney Barrett to the Supreme Court. JCN has spent \$7.3 million to date on the grassroots mobilization effort so far. The group expects to spend at least \$10 million on the effort.” The Judicial Crisis Network still does not provide transparency about its donors. **I recognize that you yourself have not solicited donations from anyone—however, will you call for the Judicial Crisis Network and its donors to make their donations public so you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?**

RESPONSE: I am unaware of what particular activities private groups and individuals might be undertaking to advocate for or against my confirmation. If I am confirmed, any public advocacy for or against my confirmation will be irrelevant to my decision-making as a judge. I will continue to be an independent jurist and act in accordance with all applicable recusal rules, as I have during my tenure on the Seventh Circuit.

b. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?**

RESPONSE: Please see my response to Question 12.a.

c. **Would you discourage donors from making such undisclosed donations?**

RESPONSE: Please see my response to Question 12.a.

13. Last week, *The Washington Post* published a powerful op-ed written by Alphonso David, the president of the Human Rights Campaign, and Jim Obergefell, the plaintiff in the landmark *Obergefell v. Hodges* case that made marriage equality the law of the land.

Mr. Obergefell and Mr. David noted in their op-ed that the ruling in this historic case came down to one vote—and two of the justices in the five-justice majority are no longer on the Court. In light of the Court’s shift, Mr. Obergefell and Mr. David discussed their fears for what lies ahead for LGBTQ individuals and families. They wrote:

We fear, with good reason, a Supreme Court—whose increasingly rightward bent could likely not be curbed for decades—whose clear goal would be to undermine years of progress.

An attack on LGBTQ rights could lead to allowing business, government contractors and even government employees to treat us as second-class citizens. Taxpayer-funded emergency shelters could refuse to place married same-sex couples in family housing, and adoption and foster care agencies could turn their backs on youths in need rather than certify the homes of same-sex couples. And they could gut access to affordable health care for a community that already faces disproportionate obstacles to care.

The concerns they raise are valid. On the very first day of the Court’s new term, Justices Thomas and Alito criticized the *Obergefell* decision in an opinion denying cert in a different case.

Judge Barrett, in a 2016 speech at the Jacksonville University Public Policy Institute, you characterized the *Obergefell* case as a “who decides question.” You noted that “the majority [was] saying it was a right guaranteed by the Constitution and therefore... the states weren’t free to say that marriage had to be between a man and a women.” You went on to say that in contrast, “the dissent’s view was that it wasn’t for the court to decide, that the Constitution didn’t speak to the question, and so that it was a change that should occur through the legislative process.”

Do you stand by your reading of *Obergefell* as a question of “who decides,” between the Constitution and state legislatures?

RESPONSE: In the speech you reference, I described the positions articulated by the majority and the dissent in *Obergefell*. But as I explained at the hearing, *Obergefell* clearly holds that there is a constitutional right to same-sex marriage.

14. In his dissent in *Obergefell*, Justice Scalia also looked at this as a question of who decides. He decried the majority’s decision, saying:

We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text . . . Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

However, just because the authors of the 14th Amendment may not have imagined that it was aimed at same-sex marriage does not mean that the broad terms that they purposely chose – due process and equal protection – do not protect marriage equality. As Mr. Obergefell and Mr. David noted in their op-ed last week, by recognizing that the Constitution guaranteed the right to marriage for same-sex couples and providing “equal dignity in the eyes of the law,” the majority in *Obergefell* ensured that same-sex couples no longer had to rely on “‘skim-milk’ marriages— marriages in which, depending on state laws, we were not recognized as the families that we are; we could not file taxes jointly, or make medical decisions for one another, or, after a death, be treated legally as the surviving spouse.” In other words, a patchwork of varying state laws simply could not offer the same fundamental, federal protections of the Constitution to LGBTQ individuals and their families.

Mr. Obergefell and Mr. David concluded their op-ed with this call:

For the past four years—and despite confirmations of hundreds of conservative judges around the country—some of us concluded that the equality of our marriages and the everyday rights that we have fought so hard for were now precedent and that we would be left alone. We also told ourselves that widespread support from our neighbors, colleagues and families would deter attacks. None of us can feel that way anymore. We must vote as if our lives depend on it. We do not make this argument lightly. It is clear that this is not a drill; this is a real emergency.

Judge Barrett, do you understand why Mr. Obergefell and Mr. David consider the current moment to be an emergency for the rights of LGBTQ Americans?

RESPONSE: As I discussed at the hearing, I fully respect the rights of the LGBTQ community, and I reject discrimination on any basis.

Nomination of Judge Amy Coney Barrett
To Be an Associate Justice of the Supreme Court of the United States
Questions for the Record
Friday, October 16, 2020
QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. In 2015, the Supreme Court decided *King v. Burwell*, 576 U.S. 988 (2015), which preserved an Obama administration regulation that allowed people who bought health insurance on federal exchanges to receive subsidies. Recently disclosed internal memoranda¹ from the Lynde and Harry Bradley Foundation, which has funded climate change denial,² attacks on public sector unions,³ and other conservative causes, states “the *King* statutory interpretation case itself was brought with Bradley support by the Competitive Enterprise Institute” (CEI). CEI’s website also stated that CEI “is coordinating and funding both the *King v. Burwell* case and the D.C. Circuit *Halbig v. Burwell* case.”⁴ The Bradley Foundation explained that, “[s]hould the challenge succeed . . . Congress would have to ‘start over’ on health care again”⁵

The Supreme Court’s Rule 29.6 requires, “Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation’s stock. If there is no parent or publicly held company owning 10% or more of the corporation’s stock, a notation to this effect shall be included in the document.” However, the plaintiffs in *King* presented themselves to the Court as four individuals, and did not list any connection to CEI or the Bradley Foundation. Do you think Rule 29.6 provides sufficient relevant information to a justice when deciding a case?

RESPONSE: This question calls for my views on a matter of public policy concerning the Supreme Court’s rules. As a sitting judge, it would not be appropriate for me to offer an opinion on the matter.

¹ Lynde and Harry Bradley Foundation, Summary of Judicial Education Project Grant Proposal for Feb. 24, 2015 Meeting, *available at* <https://www.documentcloud.org/documents/7223993-2015-Bradley-Summary-Judicial-Education-Project.html>.

² Colin Schultz, *Meet the Money Behind the Climate Denial Movement*, Smithsonian, Dec. 23, 2013, *available at* <https://www.smithsonianmag.com/smart-news/meet-the-money-behind-the-climate-denial-movement-180948204/>.

³ Mary Bottari, *Bradley Foundation Bankrolls Attacks on Unions*, PR Watch, May 8, 2017, *available at* <https://www.prwatch.org/news/2017/05/13239/bradley-foundation-bankrolls-attacks-unions>.

⁴ Competitive Enterprise Institute, *SCOTUS Announces Review of CEI’s Healthcare Case: King v. Burwell*, Nov. 7, 2014, <https://cei.org/content/scotus-announces-review-cei%E2%80%99s-healthcare-case-king-v-burwell>.

⁵ See Bradley Foundation, *supra*.

2. Would you be troubled to learn after a case was decided that the parties had been funded by an organization to which you had a financial or other personal connection?

RESPONSE: Please see my response to Question 1.

3. Should parties be required to disclose who is funding the litigation? If not, why not?

RESPONSE: Please see my response to Question 1.

4. Would you support changing the Supreme Court Rules to require disclosure in such a case?

RESPONSE: Please see my response to Question 1.

5. The Supreme Court's Rule 37.6 requires, "Except for briefs presented on behalf of amicus curiae listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." The Judicial Education Project (JEP) "supported the preparation of *amicus* briefs" in *King v. Burwell*.⁶ When the case reached the Supreme Court, JEP's Carrie Severino co-authored and signed *amicus* briefs that were filed on behalf of Senators John Cornyn, Ted Cruz, Orrin Hatch, Rob Portman and Marco Rubio; and Representatives Dave Camp and Darrell Issa.⁷ JEP requested \$200,000 from the Bradley Foundation to subsidize its *amicus* work in *King* and *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).⁸

a) Should an organization that seeks and obtains funding to support its filing *amicus* briefs in specific cases disclose that information to the Court?

RESPONSE: Please see my response to Question 1.

b) In your opinion, is it relevant for a judge or justice to know when a party and an *amicus* have received funding from the same organization for the same case?

RESPONSE: Please see my response to Question 1.

⁶ See Bradley Foundation, *supra*.

⁷ Brief for Amici Curiae Senator John Cornyn, Senator Ted Cruz, Senator Orrin Hatch, Senator Mike Lee, Senator Rob Portman, Senator Marco Rubio, and Congressman Darrell Issa in Support of Appellants and Reversal, *King v. Burwell*, No. 14-1158 (Mar. 10, 2014), *available at* 2014 WL 915936; Brief of Amici Curiae Senators John Cornyn, Ted Cruz, Orrin Hatch, Rob Portman and Marco Rubio; and Representatives Dave Camp and Darrell Issa in Support of Petitioners, *King v. Burwell*, No. 14-114 (Sept. 3, 2014), *available at* 2014 WL 4370712.

⁸ See Bradley Foundation, *supra*.

6. In January 2020 Committee on Codes of Conduct of the Judicial Conference of the United States circulated a draft advisory opinion that recommended judges not hold membership in either the Federalist Society and the American Constitution Society. You signed a March 18, 2020 letter arguing that the Committee should withdraw this draft opinion. Why did you sign that letter?

RESPONSE: I signed the letter because I agreed with the substance of the letter. I refer you to the reasoning set forth therein.

7. The letter stated that “to the best of our collective knowledge—the Federalist Society has never, in its several decades of existence . . . filed an amicus brief, or otherwise advocated any policy change.” It has been reported that Leonard Leo, then Executive Vice President of the Federalist Society, was instrument in orchestrating financial support for one or more amicus briefs in cases before the Supreme Court.⁹ I request that you read the article referenced in the previous footnote. Have you read that article?

RESPONSE: I have not read that article. I therefore cannot comment on its factual assertions, characterizations, and positions.

8. Given Leo’s role in arranging for the Bradley Foundation to fund JEP’s amicus work, do you think the statement in that letter remains accurate?

RESPONSE: Please see my response to Question 7.

9. With respect to Question 7, should it matter that in the real world the Federalist Society is widely if not invariably viewed as a partisan organization?

RESPONSE: Please see my response to Questions 6 and 7.

10. Without transparency about who are the real parties in interest funding litigation and amicus briefs, how can judges make fully informed recusal decisions?

RESPONSE: Numerous legal rules and standards govern judges’ recusal obligations. If confirmed, I will fully and faithfully apply the law of recusal, including 28 U.S.C. § 455. In any case in which the law requires me to recuse, I will do so.

11. As we discussed at your hearing, in one high profile case this Supreme Court term, *Google LLC. v. Oracle America Inc.* (No. 18-956), a group called the Internet Accountability Project (IAP) filed an amicus brief supporting Oracle’s position. Bloomberg subsequently reported that Oracle, one of the parties to the case, had donated between \$25,000 and \$99,999 to IAP last year. IAP did not disclose the fact that they had been funded directly by Oracle, one of the parties to the litigation, and the Supreme Court’s rules did not require such disclosure. As a

⁹ Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo—Federalist Society Leader, Promoter of Amy Barrett*, Exposed by CMD, Oct. 10, 2020, available at <https://www.exposedbycmd.org/2020/10/10/snapshot-secret-funding-amicus-briefs-tied-leonard-leo-federalist-society-leader-promoter-amy-barrett/>.

general matter do you think it is appropriate for an amicus to file a brief in a case where it directly receives funding from one of the parties?

RESPONSE: As I stated at my hearing, I was unaware of this information until you shared it with me. Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

12. As a justice, would you find it relevant information that a party, in addition to making its case directly, had provided funding for amicus briefs in support of its position?

RESPONSE: Please see my response to Question 11.

13. Do you have any concerns that Supreme Court Rule 37.6, either by its terms or through lax enforcement, appears to allow amicus filers to avoid disclosing funding they receive from parties?

RESPONSE: Please see my response to Question 11.

14. Following your nomination hearing to the Seventh Circuit in 2017, Sen. Durbin asked you in questions for the record about your views on the millions of dollars the Judicial Crisis Network (JCN) spent to support the confirmation of Justice Gorsuch. Sen. Durbin asked you, “Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?” You said, “I am unaware of any outside groups or special interests having made donations on my behalf. I have not and will not solicit donations from anyone.” You did not condemn the practice.¹⁰ JCN and other groups with undisclosed funders are spending millions of dollars in support of your nomination.¹¹ Are you concerned that these ads could be funded by special interests that have matters pending or coming before the Supreme Court?

RESPONSE: I am unaware of what particular activities private groups and individuals might be undertaking to advocate for or against my confirmation. If I am confirmed, any public advocacy for or against my confirmation will be irrelevant to my decision-making as a judge. I will continue to be an independent jurist and act in accordance with all applicable recusal rules, as I have during my tenure on the Seventh Circuit.

15. In 2017, Sen. Durbin asked you to commit to discouraging donors from making such undisclosed contributions. You declined to do so. Will you do so now? If not, why not?

RESPONSE: Please see my response to Question 14.

¹⁰ Questions for the Record from Sen. Dick Durbin to Amy Coney Barrett, Joan Larsen, & Eric Dreiband, Sept. 13, 2017, <https://www.judiciary.senate.gov/download/barrett-responses-to-durbin-questions-for-the-record>.

16. In 2017, Sen. Durbin asked you if you would call for those donors to make their donations public so that you could make recusal decisions. You declined to do so. Will you do so now? If not, why not?

RESPONSE: Please see my response to Question 14.

17. Can you explain why anyone would want to spend millions of dollars to ensure that you are confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 14.

18. Does this massive anonymous spending create reputational risk for the Court?

RESPONSE: Please see my response to Question 14.

19. President Trump has justified his unprecedented rush to fill Justice Ginsburg's seat during an ongoing election by saying that he needs a full nine-justice Court to decide the outcome of any potential election challenge. Specifically, he stated: "I think this [election] will end up in the Supreme Court and I think it's very important that we have nine justices, and I think the system's going to go very quickly . . . I think this scam that the Democrats are pulling, it's a scam, this scam will be before the United States Supreme Court and I think having a 4-4 situation is not a good situation."¹² Sen. Ted Cruz,¹³ among others, has made similar statements, indicating that he believes the election will be decided by the Court, not the voters.

a) What happens if the Supreme Court needs to decide an election case with only eight justices?

RESPONSE: Under 28 U.S.C. § 1, "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." If the Supreme Court is equally divided on a question, the Court's practice is to enter a judgment of affirmance. *Neil v. Biggers*, 409 U.S. 188, 191-92 (1972).

b) What happens in the event of a 4-4 tie?

RESPONSE: Please see my response to Question 19.a.

20. How many justices were on the Court during the 2016 election?

RESPONSE: There were eight sitting justices on the Supreme Court on November 8, 2016.

¹² Peter Baker, *Trump says he wants a conservative majority on the Supreme Court in case of an Election Day dispute*, N.Y. Times, Sept. 23, 2020, <https://www.nytimes.com/2020/09/23/us/elections/trump-supreme-court-election-day.html>.

¹³ *Id.*

21. How many justices are required to form a quorum on the Court?

RESPONSE: Under 28 U.S.C. § 1, “The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”

22. Are you aware of the Court having any difficulty resolving election disputes during the 2016 election?

RESPONSE: I have no knowledge of the Supreme Court’s deliberations regarding any election disputes during the 2016 election.

23. Senator Ted Cruz has said that “the reason we need a fully functioning court is to have nine justices who can resolve any dispute and ensure that the law and Constitution are followed.”¹⁴ He asserted that a court with only eight justices, “lacks the constitutional authority to decide anything.”¹⁵ Do you agree with Senator Cruz’s understanding of the Court’s authority?

RESPONSE: It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure or on any subject of political controversy.

24. If Senator Cruz is correct that a court with only eight justices “lacks the constitutional authority to decide anything,” why was the Supreme Court able to resolve constitutional cases in 2016?

RESPONSE: Please see my response to Question 23.

25. In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), the Supreme Court stated that the Due Process Clause of the Constitution requires a judge to recuse herself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case . . . when the case was pending or imminent.” The inquiry is “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”

Politico reported last month that the Trump campaign has hired a “massive legal network” consisting of dozens of attorneys to help support current and potential legal challenges in key battleground states.¹⁶ The Trump campaign has taken legal action against several states, including New Jersey, Nevada, North Carolina, Iowa, Pennsylvania, and Montana, over their

¹⁴ James Doubek, *Sen. Ted Cruz Says Judge Amy Coney Barrett ‘Will Make A Strong Justice’*, KPBS, Sept. 29, 2020, <https://www.kpbs.org/news/2020/sep/29/sen-ted-cruz-says-judge-amy-coney-barrett-will/>.

¹⁵ *Id.*

¹⁶ Anita Kumar, *Trump readies thousands of attorneys for election fight*, *Politico*, Sept. 27, 2020, <https://www.politico.com/news/2020/09/27/trump-legal-network-election-day-fight-422035>.

plans to more easily allow voters to cast their ballot by mail. Trump stated that an election dispute “will be before the United States Supreme Court very quickly.”¹⁷

Do you agree that President Trump had significant influence over your nomination to this seat on the Supreme Court?

RESPONSE: Pursuant to Article II, Section 2 of the Constitution, the President has the power to nominate “Judges of the supreme Court.” U.S. Const. art. II, § 2.

26. Do you agree President Trump would have “a personal stake” in an election dispute over his reelection campaign?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

27. Do you agree that cases challenging vote-by-mail and other election issues that have bearing on the 2020 presidential election are “pending or imminent”?

RESPONSE: Please see my response to Question 26.

28. Do you think objective observer would believe a judge in your position is “likely to be neutral” in deciding an election dispute involving President Trump?

RESPONSE: Please see my response to Question 26.

29. If a lawsuit anticipated in Question 19, or another election case brought by President Trump or his campaign, comes before you as a Supreme Court justice, will you commit to recusing yourself from the case?

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, I cannot commit to any particular conclusion on questions of recusal. Such questions can only be answered through the judicial process. I can, however, commit that I will faithfully apply the law of recusal.

30. In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), the Supreme Court stated that the Due Process Clause of the Constitution requires a judge to recuse herself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case . . . when the case was pending or imminent.” The inquiry is “not

¹⁷ Peter Baker, *Trump says he wants a conservative majority on the Supreme Court in case of an Election Day dispute*, N.Y. Times, Sept. 23, 2020, <https://www.nytimes.com/2020/09/23/us/elections/trump-supreme-court-election-day.html>.

whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’

In two linked cases—*Americans for Prosperity Foundation v. Becerra* and *Thomas More Society v. Becerra*—the Supreme Court is being asked to consider the constitutionality of the California’s requirement that certain nonprofits turn over their IRS Form 990 Schedule B, which discloses their major donors’ names and addresses. Two nonprofit groups, the Americans for Prosperity Foundation (AFPF) and Thomas More Society challenged the disclosure requirement, arguing that it violates their First Amendment rights. The district court issued an injunction, but the Ninth Circuit reversed. Petitioning for certiorari, the groups are seeking a constitutional ruling that the disclosure requirement abridges their freedoms of speech and association outside the election context—essentially seeking a constitutional right keep their donors’ identities secret.

The petitions have been pending since August 2019. At least seventy-five groups filed amicus briefs supporting AFPF’s position in the case and urging the Court to grant the case. According to one report, “two Charles Koch foundations and two donor-advised fund sponsors heavily used by Koch gave \$35.3 million to the AFP Foundation and groups that submitted amicus briefs for the foundation’s donor transparency case.” After being relisted several times, the Solicitor General was invited to submit a brief in each of the two cases.

AFPF is the 501(c)(3) arm of the libertarian think tank AFP, funded primarily by the Koch network. AFP spent at least \$1 million on advertising to help confirm Justice Gorsuch, and announced a seven-figure campaign to help confirm Justice Kavanaugh. In September, AFP announced that it had mounted a “Full Scale Campaign to Confirm Judge Amy Coney Barrett.” AFP characterized its campaign as “a significant national ad campaign focusing on eleven key states to scale its activists’ efforts to urge their senators to confirm Judge Amy Coney Barrett to the Supreme Court.” It also organized a campaign of over 200,000 “grassroots” letters to senators to support your confirmation.

If you are confirmed, do you agree that AFP’s “Full Scale Campaign to Confirm” you would have had significant influence over your elevation to the Supreme Court?

RESPONSE: Please see my response to Question 26.

31. Does AFP have “a personal stake” in the *AFPF v. Becerra* litigation?

RESPONSE: Please see my response to Question 26.

32. Do you agree that the *AFPF v. Becerra* litigation is “pending or imminent” at the Supreme Court?

RESPONSE: Please see my response to Question 26.

33. Will you commit to recuse, if confirmed, from the *AFPF v. Becerra* litigation?

RESPONSE: Please see my response to Question 29.

34. Have you communicated with anyone affiliated with Americans for Prosperity about your nomination to the Supreme Court?

RESPONSE: While I am unsure of each individual who may be “affiliated” with Americans for Prosperity, to the best of my knowledge, no.

35. Have you discussed the *AFPF v. Becerra* or *Thomas More Society v. Becerra* cases with anyone affiliated with AFP or AFPF? Please specify.

RESPONSE: While I am unsure of each individual who may be “affiliated” with AFP or AFPF, to the best of my knowledge, no.

36. Have you discussed the *Thomas More Society v. Becerra* cases with anyone affiliated with AFP or AFPF? Please specify.

RESPONSE: Please see my response to Question 35.

37. Leonard Leo, the former executive vice president of the Federalist Society and current co-chairman of the group, “has played a role in Trump's judicial selection process since the campaign and is again a part of making the president's newest list.”¹⁸ You were a member of the Federalist Society from 2005-2006 and again from 2014-2017.

a. Why did you stop your membership?

RESPONSE: I do not recall why I stopped my membership in 2006. I chose to discontinue my membership in 2017 when I became a federal judge.

b. Why did you restart your membership in 2014?

RESPONSE: I have been a member of the Federalist Society because it gave me the opportunity to speak with groups of students, lawyers, and scholars on topics of mutual interest. The Federalist Society provides an opportunity for engagement and debate with individuals offering differing perspectives and views.

38. According to your Financial Disclosures, in 2017 you received \$7,000 in “honorarium” from the Federalist Society. What was this money for?

RESPONSE: As reported in my Financial Disclosure Report, I received three honoraria for speaking engagements for the Federalist Society. I have not accepted an honorarium since I became a judge in late 2017.

¹⁸ Tyler Olson, *An inside look at how Trump's Supreme Court list is made: 'A tremendous investment of time'*, Fox News, June 10, 2020, <https://www.foxnews.com/politics/behind-the-scenes-of-how-trumps-supreme-court-list-is-made>.

39. Will you continue receiving honoraria from the Federalist Society or other organizations if you are confirmed as a Justice? Why or why not?

RESPONSE: Please see my response to Question 38.

40. According to your Questionnaire, you rarely attended a Federalist Society event before 2014. Before your nomination to the Seventh Circuit in 2017, you had never attended the Federalist Society's national convention. However, from 2016-2020, you spoke at nearly two dozen Federalist Society events across the country, including the Federalist Society's national convention. Why did you begin speaking at so many Federalist Society events?

RESPONSE: I have greatly enjoyed speaking to law students, legal practitioners, and other people interested in the law in many different contexts, including at Federalist Society events, when my schedule permits it.

41. According to your 2018 financial disclosure report, the Federalist Society also paid for you to take six trips to speak at Federalist Society events in your first year as a federal appeals court judge. Specifically, they paid for you to attend events in: New York City; Hillsdale, Michigan; Palo Alto, CA; New Haven, CT; and two events in DC. Based on your travel reporting form, it looks like you were reimbursed nearly \$10,000 in travel expenses for these trips. Is that correct? Please confirm the exact amount.

RESPONSE: My publicly filed financial disclosure reports identify the reportable reimbursements I have received.

42. According to your 2019 financial disclosure report, the Federalist Society paid for you to take four trips to speak at Federalist Society events. Specifically, they paid for you to go to events in Charlottesville, VA; New Orleans; D.C.; and Philadelphia. Based on your travel reporting form, it appears the Federalist Society reimbursed you nearly \$5,000 for these trips. Is that correct? Please confirm the exact amount.

RESPONSE: My publicly filed financial disclosure reports identify the reportable reimbursements I have received.

43. Will you continue attending events with your travel paid for by the Federalist Society if confirmed as a Justice? Why or why not?

RESPONSE: My decision to attend any event put on by any organization will be made on the basis of numerous factors, but I will ensure that my attendance comports with all ethical rules and disclosure requirements.

44. Do you know if you are on the Federalist Society's "Approved Speakers List"? If so, how did you learn that? Do you have any idea how the Federalist Society selects speakers to be approved?

RESPONSE: I am unfamiliar with the Federalist Society's "Approved Speakers List."

45. Since becoming a judge, how many of the law clerks you have hired have been members of the Federalist Society?

RESPONSE: I do not know how many of the law clerks I have hired have been members of the Federalist Society.

46. Is membership in the Federalist Society something you look for when hiring clerks?

RESPONSE: I take a holistic approach to hiring law clerks, evaluating the potential clerk's entire application and supporting materials to determine whether that person is the best fit for the job. I have never required membership in any organization for a potential law clerk. This approach has led to a diverse group of current and former law clerks, and it is a practice I intend to continue on the Seventh Circuit and, if I am confirmed, on the Supreme Court.

47. Will you look to hire clerks who are members of the Federalist Society if confirmed as a Justice?

RESPONSE: Please see my response to Question 46.

48. Will you take ideology or political affiliation into consideration when hiring law clerks? Do you believe such information is relevant to whether someone will be an effective law clerk?

RESPONSE: I take a holistic approach to hiring law clerks, evaluating the potential clerk's entire application and supporting materials to determine whether that person is the best fit for the job. This approach has led to a diverse group of current and former law clerks, and it is a practice I intend to continue on the Seventh Circuit and, if I am confirmed, on the Supreme Court.

49. Justice Scalia allegedly hired "counter-clerks," that is, clerks who did not share his ideology, to help improve his decision-making. Have you ever hired a counter-clerk? Do you plan on hiring any in the future?

RESPONSE: Please see my response to Question 48.

50. A colleague of yours on a circuit court has bemoaned to me the practice of judges "auditioning" for elevation in their written opinions. Would you agree that judicial opinions written to appeal to forces controlling judicial selection are a disservice to the parties to the case in question?

RESPONSE: As I stated at my hearing, when I write an opinion, I read every word from the perspective of the losing party. I ask myself: How would I view the decision if one of my children was the party I was ruling against? Even though I would not like the result, would I understand that the decision was fairly reasoned and grounded in the law? That is the standard I set for myself in every case, and it is the standard I will follow as long as I am a judge on any court.

51. Last year, the *Washington Post* published an investigative report documenting that over the course of just three years, Federalist Society Board co-chair Leonard Leo raised over \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts.¹⁹ If you haven't read that article, I ask that you do read it before answering the following questions. Have you read the article?

RESPONSE: I have not read that article. I therefore cannot comment on its factual assertions, characterizations, and positions.

52. Were you previously aware of this reporting documenting a quarter billion dollars in anonymous spending to change the composition of the courts?

RESPONSE: Please see my response to Question 51.

53. Do you believe anonymous spending related to judicial nominations risks corrupting the integrity of the judiciary, or at the very least causing the appearance of corruption?

RESPONSE: Please see my response to Question 51.

54. Is it a problem that there is no transparency about who is behind the efforts described in Question #51, or what interests they may have before the court? If not, why not?

RESPONSE: Please see my response to Question 51.

55. Are you personally acquainted with Leonard Leo?

RESPONSE: I have met Leonard Leo.

56. If yes, how do you know Leonard Leo?

RESPONSE: I have interacted with Leonard Leo at various legal conferences and events.

57. Have you ever discussed any aspect of your Supreme Court nomination with Leonard Leo, directly or through intermediaries, either before or after your nomination?

RESPONSE: A few months after my name was in the news in connection with the vacancy filled by Justice Kavanaugh, I had a brief conversation with Mr. Leo at a legal conference. In that conversation, he warned me of some of the difficulties of a Supreme Court confirmation process, including the attacks on my family and faith that I might expect were I to be nominated to fill a future vacancy. I have not spoken with Mr. Leo since this vacancy arose.

¹⁹ Robert O'Harrow Jr. & Shawn Boburg, *A conservative activists behind-the-scenes campaign to remake the nation's courts*, Wash. Post, May 21, 2019, <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>

58. The Washington Post article cited in Question #53 described another group, JCN, as “a key part of [Leo’s] efforts.” As the article describes, “the ties between JCN and Leo are opaque. JCN’s office is on the same hallway as the Federalist Society in a downtown Washington building, though JCN’s website and tax filings list a mailing address at a different location, an address shared by multiple companies.” JCN’s president is Carrie Severino. According to Fox News, Severino was directly involved the Trump administration’s “list process” of developing Trump’s Supreme Court shortlist.

RESPONSE: I am unfamiliar with the facts you are describing.

59. Are you personally acquainted with Carrie Severino?

RESPONSE: I have met Carrie Severino.

60. Have you ever discussed any aspect of your Supreme Court nomination with Carrie Severino, directly or through intermediaries, either before or after your nomination?

RESPONSE: Ms. Severino wished me well following the announcement of my nomination.

61. Have you communicated with anyone at JCN about your nomination?

RESPONSE: No.

62. Has anyone from JCN prepared you for any media appearances?

RESPONSE: No.

63. Axios reported that, in late 2017, former White House counsel Don McGahn and conservative movement leader Leonard Leo walked into the Oval Office and presented Trump with five additional judges to supplement his 2016 list of potential Supreme Court picks.²⁰ You were one of them. Do you have any idea how you ended up that list?

RESPONSE: No.

64. Did anyone tell you that you would be on the list before it was submitted to the White House.

RESPONSE: No.

65. Did you discuss it with Leonard Leo or anyone affiliated with the Federalist Society?

²⁰ Jonathan Swan, Alayna Treene & Sam Baker, *Trump prepares to announce Amy Coney Barrett as Supreme Court replacement*, Axios, Sept. 25, 2020, <https://www.axios.com/trump-supreme-court-amy-coney-barrett-justice-052ae9cd-fd12-42f0-a4d1-5a1ae8de4e40.html>

RESPONSE: No.

66. Did you discuss it with Carrie Severino or anyone affiliated with JCN?

RESPONSE: No.

67. During Brett Kavanaugh's nomination proceedings, did anyone at the White House discuss with you the possibility of your being nominated for that vacancy?

RESPONSE: Before Justice Kavanaugh's nomination, I spoke with the President, Vice President, and members of the Office of the White House Counsel about the possibility of my being nominated for the vacancy created by Justice Kennedy's retirement.

68. Did anyone at the White House ever meet with you in person to discuss your being nominated for the vacancy left by Justice Kennedy's retirement? If so, please indicate who met with you and the circumstances of that meeting.

RESPONSE: Please see my response to Question 67.

69. Axios reported that in early 2020, Leonard Leo left his position as vice president at the Federalist Society to co-found CRC Advisors. Leo told Axios that he planned to use his new organization to "funnel tens of millions of dollars into conservative fights around the country," including "a minimum of \$10 million issue advocacy campaign focusing on judges in the 2020 cycle."²¹ CRC Advisors looks to be a continuation of an earlier media relations firm called CRC Strategies, or Creative Response Concepts.

a) Has anyone from CRC Advisors, CRC Strategies, or Creative Response Concepts met with you about your nomination?

RESPONSE: To my knowledge, no one with whom I have met during this nomination process has been an officer or employee of those groups.

b) Has anyone from CRC Advisors, CRC Strategies, or Creative Response prepared you for any media appearances?

RESPONSE: Please see my response to Question 69.a.

70. When Justice Scalia passed away, he was at a Texas hunting lodge owned by manufacturing magnate John Poindexter. One of Poindexter's companies, the Mic Group, was a defendant in an age discrimination lawsuit filed by a former employee who unsuccessfully

²¹ Jonathan Swan & Alayna Treene, *Leonard Leo to shape new conservative network*, Axios, Jan. 7, 2020, <https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html>.

petitioned the Supreme Court for review the year before Justice Scalia's passing.²² This trip would likely never have been disclosed under the Court's limited disclosure requirements. Do you agree that when a Supreme Court justice accepts hospitality from someone who has interests before the Court, that could undermine public faith in the impartiality of that justice?

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge and as a judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

71. In Question #70, I am not suggesting Justice Scalia violated the Court's disclosure requirements. My concern is that they are inadequate. Will you commit to refuse any gifts, even if they are personal hospitality, from someone who has business before the Court?

RESPONSE: If confirmed, I will fully and faithfully apply all ethical rules and rules regarding gifts, and I will consult my colleagues as to the factors they use in determining to accept or refuse a gift.

72. If not, will you commit to disclosing all such gifts, even if the practice under the rules do not require you to?

RESPONSE: Please see my response to Question 71.

73. During your hearing, you testified that it would be "inappropriate" for a judge to meet privately with amici "while the case in which they've written a brief is pending before that judge. Why is it "inappropriate" for a judge to meet privately with amici "while the case in which they've written a brief is pending"?

RESPONSE: As I said at my hearing, it would be inappropriate to allow the amici to have access to the judges privately to try to make their case.

74. Will you commit, if confirmed, not to meet privately with parties or amici who have interests pending before the Court?

RESPONSE: I will follow all applicable rules regarding such communications. Please also see my response to Question 73.

75. At your hearing I described the line of cases in which Justice Alito repeatedly questioned, in dicta, the validity of the 1977 case *Aboud v. Detroit Board of Education*. If it is inappropriate for you as a nominee to offer any hints, previews, or forecasts as to your views on cases that might come before you, or to signal your approval or disapproval of the Court's precedents, why is it appropriate for a sitting justice to signal in dicta his disapproval of selected Court precedent?

²² Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. Times, Feb 28, 2016, <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html>.

RESPONSE: The Ginsburg rule—no hints, no previews, no forecasts—applies to nominees for judicial office, not to judges engaged in the judicial function of deciding specific cases and writing opinions. The Supreme Court has always acknowledged that there are circumstances in which it must be able to reverse precedent. Part of the judicial decision-making process may require applying the doctrine of stare decisis to determine whether, in an appropriate case, to overrule a precedent.

76. When is it appropriate for a circuit judge to question Supreme Court precedent, as did Judge Sykes (in an opinion you joined) calling for the Supreme Court to reconsider precedent that was “incompatible with current First Amendment doctrine”²³?

RESPONSE: A circuit court must always “follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions,” even in those instances in which the case “appears to rest on reasons rejected in some other line of decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). In those instances, it may be appropriate for a circuit judge to indicate to the Supreme Court that there is a question about the continuing vitality of an applicable precedent that the Supreme Court ought to clarify. But the circuit judge may not decline to apply the precedent that directly controls.

77. It has been reported that Supreme Court justices may sponsor outside groups to use Supreme Court facilities for private events.²⁴ There is no requirement that these sponsorships be made public. We learned through social media posts that Justice Alito, for example, sponsored a Federalist Society event in 2018. Do you believe that public disclosure of a decision by a justice to allow an outside group to use the Supreme Court event would improve public confidence in the Court?

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge and as a judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

78. Will you commit today to making public the name of any organization that you sponsor to have a private event at the Supreme Court?

RESPONSE: I will follow all applicable rules regarding such activities.

79. When, if ever, should appellate tribunals like the Supreme Court engage in fact-finding when hearing cases under their appellate jurisdiction?

RESPONSE: At least as a general matter, appellate tribunals, including the Supreme Court, do not engage in fact-finding. If I were faced with a case in which appellate fact-finding were requested, I would carefully review the parties’ arguments and consult with my colleagues in determining whether such fact-finding would be warranted.

²³ *Price v. City of Chicago*, 915 F. 3d 1107, 1117 (7th Cir. 2019).

²⁴ Mark Sherman, *Who Made the New Drapes? It’s Among High Court’s Mysteries*, AP News (Nov. 29, 2019), <https://apnews.com/a1781172562243a8acd91804a5c8ad10>

80. The Supreme Court often relies in opinions on factual assertions made in amicus briefs. It sometimes asserts these facts as true, citing only an amicus brief. Such factual claims are often untested and unreliable.²⁵ Are you troubled by this practice? Would you take any steps to avoid relying on such unreliable claims if confirmed as a justice?

RESPONSE: Under certain circumstances, amicus briefs can be helpful to judges. But judges must ensure that their decisions are not based on untested and unreliable factual claims, whether those claims come from amicus briefs or any other source.

81. Does the fact that the Supreme Court often relies in opinions on factual assertions made in amicus briefs highlight the concern about the identities and interests of amici being known?

RESPONSE: Please see my response to Question 80.

82. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court held that the First Amendment does not permit limits on independent political expenditures by corporations, even if those expenditures expressly advocate for the election or defeat of a candidate for political office. What evidence from the founding era suggests the Founders believed that corporations had the same First Amendment rights as individuals?

RESPONSE: The opinions in *Citizens United v. FEC* discuss the evidence and sources of authority on which the respective opinions relied.

83. Justice Kennedy premised the *Citizens United* majority opinion on the following finding: “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” On what basis did he make this finding?

RESPONSE: Please see my response to Question 82.

84. If evidence came to light revealing that independent expenditures do lead to quid pro quos, or that they do undermine confidence in democracy, would that be grounds for reconsidering *Citizens United*?

RESPONSE: As I discussed at my hearing, if a case came before me that raised the question whether a precedent of the Supreme Court should be overruled, I would follow the doctrine of stare decisis as articulated by the Court.

85. Justice Kennedy also found in *Citizens United* that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” What evidence was in the record supporting this finding?

RESPONSE: Please see my response to Question 82.

²⁵ See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2769&context=facpubs>.

86. As a general matter, do you believe unsupported factual assertions belong in Supreme Court opinions? Why or why not?

RESPONSE: No.

87. Let me ask you about three cases, *Bell Atlantic v. Twombly*, *Ashcroft v. Iqbal*, and *AT&T Mobility v. Concepcion*. *Twombly* and *Iqbal* heightened the pleading standard, which made it easier for defendants to get cases thrown out of court before discovery. *Concepcion* made it harder for groups of harmed individuals to get judicial relief by approving coercive mandatory arbitration clauses. The effect of all of these cases is to undermine access to a jury, a right preserved by the Seventh Amendment. Not one of these cases references the Seventh Amendment. In comparison, *Heller v. District of Columbia*, referenced the Second Amendment more than 100 times.

a) Is there something about the Seventh Amendment that makes it less important in judicial analysis than, say, the Second Amendment?

RESPONSE: *Twombly*, *Iqbal*, *Concepcion*, and *Heller* are all precedents of the Supreme Court entitled to respect under the doctrine of stare decisis. As Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b) In your view, why shouldn’t the Seventh Amendment provide more of a basis to protect the right of people to have their day in court?

RESPONSE: Please see my response to Question 87.a.

88. Your legal writings and speeches have focused on a frame of legal analysis called originalism, in which a judge must look to the public meaning of the Constitution at the time of its ratification. Based on your scholarly research while a law professor, do most originalists believe that *Roe v. Wade*, 410 U.S. 113 (1973) was correctly decided? Do you know of any originalist who believes that?

RESPONSE: As I said at my hearing, while originalists may have a similar approach to constitutional interpretation, they are a very diverse lot, and do not necessarily agree. I could not purport to speak on behalf of all originalists.

89. Please name a case where Justice Scalia found that a restriction on abortion access was unconstitutional.

RESPONSE: I have not reviewed every judicial decision in which Justice Scalia was presented with such arguments, so I am not able to answer this question.

90. Based on your scholarly research while a law professor, what would be an originalist defense of *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down a ban on interracial

marriages based, in part, on its finding that the Fourteenth Amendment's Due Process Clause includes the right to marry? Do you find that defense compelling? Is the "right to marry" in the text of the Fourteenth Amendment's Due Process Clause?

RESPONSE: As I explained at the hearing, *Loving* followed directly from *Brown v. Board of Education*, and both were correctly decided.

91. If there were no compelling originalist defense of *Brown*, would you be more inclined to conclude that *Brown* was wrongly decided, or that originalism is a flawed constitutional theory? Please explain your answer.

RESPONSE: Please see my response to Question 90.

92. Do you agree with originalists who endorse a "color-blindness" approach to the Equal Protection Clause, under which even benignly motivated attempts to correct the harms of racial discrimination are constitutionally suspect? What is the historical support for such a view?

RESPONSE: As I stated at my hearing, the Equal Protection Clause prohibits discrimination on the basis of race. The Supreme Court has "insisted on strict scrutiny [of racial classifications] in every context, even for so-called 'benign' racial classifications." *Parents Involved in Community Schools v. Seattle Sch. Dist.*, 551 U.S. 701, 741 (2007) (quotation marks and citation omitted). As Justice Kagan explained, it is not appropriate for a judicial nominee to "grade" or give a "thumbs-up or thumbs-down" to particular cases.

93. Do you think originalism supports Justice Ginsburg's majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996)? Why or why not?

RESPONSE: *United States v. Virginia* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

94. Does originalism support treating any discrimination on the basis of gender unconstitutional under the Equal Protection Clause?

RESPONSE: In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Virginia Military Institute's male-only admissions policy violated the Fourteenth Amendment's Equal Protection Clause. The Court's decision in *Virginia*, as well as the many other Supreme Court decisions subjecting classifications based on sex to heightened scrutiny, are precedents of the Supreme Court entitled to respect under the doctrine of stare decisis.

95. In her Supreme Court confirmation hearing, in response to a question from Sen. Hank Brown, Justice Ginsburg told the Senate Judiciary Committee that a woman's right to choose "is something central to a woman's life, to her dignity. It's a decision that she must make for herself. And when the Government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices."²⁶

²⁶ Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. Times, Sept. 18, 2020, <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html>.

a) Do you agree with that statement?

RESPONSE: Justice Ginsburg explained that she felt freer to comment on certain issues because she had written on them. It would be inappropriate for me to give my personal views because I would not want any litigant to have the misimpression that my personal views would have any effect on my legal rulings.

b) Given that Justice Ginsburg believed that making such a commitment was consistent with the “Ginsburg rule,” if you decide not to answer the above, please explain your decision not to answer.

RESPONSE: Justice Ginsburg explained that she felt freer to comment on certain issues because she had written on them. It would be inappropriate for me to give my personal views because I would not want any litigant to have the misimpression that my personal views would have any effect on my legal rulings.

96. In the 2019-20 Supreme Court term, gun rights advocates asked the Court to hear eleven Second Amendment challenges to gun safety regulations, including assault weapons prohibitions and requirements of “good cause” to obtain concealed carry permits.²⁷ According to conservative pundits, “the justices had their pick of the litter,” “a slew of excellent cases” that would allow the Court to further expand the Second Amendment.²⁸ When the Supreme Court declined to hear ten of those challenges—and ruled that the eleventh was moot--commentators were outraged at “another abdication by the court.”²⁹

In the one of those eleven cases on which the Court granted certiorari, *N.Y. State Rifle and Gun Club v. City of New York*, No. 18-280, Petitioners, represented from frequent Supreme Court advocate Paul Clement, argued “[t]he project this Court began in *Heller* and *McDonald* cannot end with those precedents.” (Pet. Reply at 2.) You testified: “I think judges should not have projects, and they should not have campaigns. They should decide cases.” Is it your view that the Supreme Court has engaged in a Second Amendment “project”? If so, what do you understand that project to be?

RESPONSE: *Heller* and *McDonald* are precedents of the Supreme Court entitled to respect under the doctrine of stare decisis. As Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

²⁷ See Jamie Ehrlich, *10 cases that could change how the Supreme Court looks at the Second Amendment*, CNN, May 26, 2020, available at <https://www.cnn.com/2020/05/26/politics/supreme-court-second-amendment/index.html>.

²⁸ See Amy Swearer, *Justices Continue Long, Shameful Silence on Second Amendment*, The Heritage Foundation, June 18, 2020, available at <https://www.heritage.org/node/22270375/print-display>.

²⁹ *Id.*

97. One of your responsibilities as a justice will be to participate in decisions on which cases are reviewed on the merits by the Court. What considerations will be relevant to you in making a decision to vote in favor of granting certiorari for a case?

RESPONSE: Under Supreme Court Rule 10, a “petition for a writ of certiorari will be granted only for compelling reasons.” If confirmed, I would give due consideration to each of the factors set forth in Rule 10, the arguments of the parties, and the views of my colleagues.

98. How will you be influenced by the number and identities of amicus briefs filed for or against the Court granting certiorari?

RESPONSE: The number and identities of amicus briefs filed for or against the Court granting certiorari, standing alone, will not influence my decisions. To the extent that amicus briefs persuasively highlight particular reasons why a case is or is not worthy of the Court’s consideration, I will consider those reasons.

99. If a petition for certiorari is supported by a large number of amicus briefs, what weight would that play your consideration of the petition?

RESPONSE: Please see my response to Question 98.

100. If *Roe v. Wade* is overturned, could a state pass a law making it a felony for a woman to get an abortion?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

101. If *Roe* is overturned, could a state pass a law making it a felony for a woman to get an abortion even in cases of rape, incest, or if the life of the mother is at risk?

RESPONSE: Please see my answer to Question 100.

102. If *Roe* is overturned, could a state ban in vitro fertilization procedures for women wishing to become mothers?

RESPONSE: Please see my answer to Question 100.

103. Under an originalist theory of interpretation, would there be any constitutional problem with a state making abortion a capital crime, thus subjecting women who get abortions to the death penalty?

RESPONSE: Please see my answer to Question 100.

104. In 2012, you signed a letter organized by the Becket Fund about the ACA's birth control benefit and religious exemptions to it.³⁰ The letter you signed inaccurately describes some forms of FDA-approved birth control as "abortion-inducing drugs" and emergency contraception as "embryo-destroying." If *Roe v. Wade* is overturned, could a state pass a law making it a felony for a woman to use FDA-approved emergency contraception or other forms of birth control?

RESPONSE: Please see my answer to Question 100.

105. If *Roe v. Wade* is overturned, could a state prosecute a woman who uses such FDA-approved drugs for murder?

RESPONSE: Please see my answer to Question 100.

106. In your academic writing, you discussed the notion of "super precedent" and argued that "Stare decisis is not what holds a super precedent in place, for the force of a super precedent does not derive from the Court's refusal to overrule it. Rather, it stays in place largely because it stays off the Court's agenda."³¹ Does this mean that you believe there are no "super precedents" that would not lose that status as soon as a litigant filed a challenge in court seeking to overturn them? Do you believe there are any categories of precedent that deserve the status of "super precedent" notwithstanding a litigant's attempt to overturn them?

RESPONSE: "Super precedent" is not a doctrinal term but, rather, a term used in legal scholarship that generally refers to how the public treats the precedents of the Court. In *Congressional Originalism*, I noted that litigants are unlikely to spend resources relitigating super precedents, lower courts will summarily reject challenges to them, and there generally are no reasons for the Supreme Court to grant certiorari to consider overruling them. Thus, the article noted that the "hypothetical" of a Supreme Court justice who must consider overruling a super precedent "is contrived" because, for example, "no Supreme Court Justice will have to face the question whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided."

107. In *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), you joined an opinion upholding a Chicago ordinance establishing a buffer zone between protestors and abortion clinics. However, the opinion you joined stated that "[a]bortion clinic buffer-zone laws 'impose serious burdens' on core speech rights" and made it clear that the reason you were upholding the was because "*Hill* [*v. Colorado*, 530 U.S. 703 (2000)] . . . remains binding on us." The opinion went on to say that *Hill* was "incompatible with current First Amendment doctrine" and invited the plaintiffs to bring a Supreme Court challenge: "Only the Supreme Court can bring harmony

³⁰ Amy Coney Barrett, U.S. Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (2017), [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf); The Becket Fund, Unacceptable (Feb. 27, 2011), available at <https://www.scribd.com/document/83046828/Unacceptable-2-27-11am-2>.

³¹ Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. Pa. J. Const. L. 1, 3 (2016).

to these precedents. The district judge correctly dismissed the facial First Amendment challenge.”

You have ruled on cases touching on issues from criminal violations to employment discrimination to access to justice. Many of the opinions you have written or joined have been guided by controlling Supreme Court precedent. Have you ever written or joined another opinion that questions Supreme Court precedent and encourages the parties to challenge it?

RESPONSE: As I stated at my hearing, the Supreme Court sets the precedent and all lower courts must follow it. As a judge, I have faithfully applied Supreme Court and Seventh Circuit precedent.

108. Do you agree with Senator Lee that “[d]emocracy isn’t the objective” of the American constitutional system, “liberty, peace, and prosperity are”?

RESPONSE: It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure or on any subject of political controversy.

109. At the White House event announcing your nomination, attendees did not practice social distancing and were not masked, at both the outdoor announcement and the indoor reception. We have subsequently learned that this ceremony was a “super-spreader” event, and that a number of attendees have become infected. When did you learn that the details of the event, including that attendees would be seated closely to each other, indoors and unmasked?

RESPONSE: I was not aware of the particular details of the event in advance.

110. Did the event meet your Circuit’s standards and protocols for COVID-19 safety?

RESPONSE: The Seventh Circuit Court of Appeals’ Continuity of Operations Plan and associated orders and guidance of the court are rules and guidelines for the operation of that Circuit.

111. Did the event meet District of Columbia standards and protocols for COVID-19 safety?

RESPONSE: Inquiries about the conduct of events at facilities operated by the Executive Branch are better directed to appropriate officials within the Executive Branch.

112. Did you express any reservations about these plans to White House staff or others?

RESPONSE: My decision to attend the announcement of my nomination was a personal one.

113. Did you consider refusing to participate in the events due to their unsafe conditions? Why didn’t you?

RESPONSE: Please see my response to Question 112.

114. The President signed an executive order on September 24 that he claims will protect people with preexisting conditions.³² Indiana University law professor David Gamage has said that, “Were the court to hold the Affordable Care Act unconstitutional, the executive order would still do nothing, because it has no enforcement power.”³³ Would you agree with that statement?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on the interpretation or effect of particular government measures or actions that could be the subject of future litigation.

115. Can any President force private insurance companies to cover people with preexisting conditions through an executive order?

RESPONSE: It would not be appropriate for me, as a sitting judge and as a judicial nominee, to opine on abstract legal issues or hypotheticals.

116. Are you aware of the so-called “unitary executive theory”? What does it hold to be true?

RESPONSE: I am generally aware of the unitary executive theory. There are several versions of the theory, but I believe it most broadly refers to the idea that the President is the head of the executive branch, supervises the leadership of executive agencies, and is ultimately responsible for taking care that the laws be faithfully executed.

117. Is the “unitary executive theory” currently good law in accordance with Supreme Court precedent? Please explain.

RESPONSE: Because issues concerning the scope of presidential power may be the subject of litigation, it would be improper for me as a sitting judge to opine further on this theory.

118. If so, what specific case(s) determined that the “unitary executive theory” is correct?

RESPONSE: Please see my response to Question 117.

119. In her memoir, Justice Sandra Day O’Connor wrote about how Justice Thurgood Marshall’s experience as an NAACP lawyer prepared him to serve as a Supreme Court Justice: “Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.”³⁴

³² Executive Order on An America-First Healthcare Plan, Sept. 24, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-america-first-healthcare-plan/>.

³³ Jon Greenberg, *Trump’s Executive Order on Preexisting Conditions Lacks Teeth, Experts Say*, Buffalo News, Sept. 28, 2020, https://buffalonews.com/lifestyles/health-med-fit/trump-s-executive-order-on-preexisting-conditions-lacks-teeth-experts-say/article_e3fa5f0b-bd62-55d3-87d7-2e484364b411.html.

³⁴ Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 133 (2004).

While you have received awards for your teaching and scholarship, it does not appear that you have a similar depth of experience in representing real clients confronting real problems in real courtrooms. All of your legal experience during law school was at law firms. After graduation, you clerked and then worked in private practice at a law firm for just two years before becoming an academic.

a) Have you ever run for or held elected office, as Justice O'Connor did?

RESPONSE: As I indicated in response to Question 15.a of the Senate Judiciary Questionnaire filed with this Committee on September 29, no.

b) Have you ever worked as staff in the U.S. Congress or another legislature, as Justices Breyer and Thomas did?

RESPONSE: My answer to Question 6 of the Senate Judiciary Questionnaire filed with this Committee on September 29 sets forth my full employment history since graduating from college.

c) Have you ever worked in the Executive Branch, as Justices Scalia and Thomas did?

RESPONSE: Please see my response to Question 119.b.

d) Have you ever prosecuted a case, as Justices Sotomayor and Alito have?

RESPONSE: Please see my response to Question 119.b.

e) Have you ever worked as a public defender or legal aid attorney?

RESPONSE: Please see my response to Question 119.b.

120. In your Senate Judiciary Committee Questionnaire, you state that you participated in one civil jury trial, as second chair.

a) Have you ever tried a civil case as first chair?

RESPONSE: Please see my response to Question 16.d of the Senate Judiciary Questionnaire filed with this Committee on September 29.

b) Have you ever tried a criminal case?

RESPONSE: Please see my response to Question 120.a.

121. Have you ever counseled a client as they make a decision about their case that will affect the course of their lives, such as whether to go to trial or accept a plea agreement or settlement offer?

RESPONSE: During my employment at Miller, Cassidy, Larocca & Lewin L.L.P. and Baker Botts L.L.P., I performed the responsibilities commensurate with my experience at the time.

122. Have you ever argued a case before a state or federal court of appeals?

RESPONSE: Please see my response to Question 16.e of the Senate Judiciary Questionnaire filed with this Committee on September 29.

123. Have you ever argued a case before the Supreme Court, as Justice Kagan did while Solicitor General?

RESPONSE: Please see my response to Question 122.

124. Have you ever represented an indigent client?

RESPONSE: It is my recollection that while at Miller, Cassidy, Larocca & Lewin L.L.P., and Baker Botts L.L.P., I participated in *pro bono* work handled by these firms, although I do not have records of the specific *pro bono* matters I handled.

125. In your Senate Judiciary Committee Questionnaire, you were asked to list “the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record.” You only listed three cases. Why did you not list more?

RESPONSE: As I stated in response to Question 17 of the Senate Judiciary Questionnaire, although I worked on many litigation matters during my time as an associate at Miller Cassidy and then Baker Botts, I no longer have records of the matters upon which I worked. Based upon my recollection and searches of publicly available records conducted by others on my behalf, I identified only three significant litigated matters that I personally handled.

126. At this hearing and at your confirmation hearing for the Seventh Circuit, you have described the significant influence that Judge Laurence Silberman of the D.C Circuit has had in your professional development and in teaching you about the role of the federal courts. Judge Silberman has taken senior status, which means he remains covered by the Code of Judicial Conduct. It has been reported that while a judge, Judge Silberman was a “guide and advisor” to David Brock for his book *The Real Anita Hill*.³⁵ If confirmed, would you consider it appropriate to provide information, guidance or other advice to authors writing books on political matters?

RESPONSE: Please see my response to Question 78.

³⁵ Michelle Goldberg, The partisan “mastermind” in charge of Bush’s intel probe,” Salon, Feb. 11, 2004.

127. It has also been reported that Mr. Brock received funding for *The Real Anita Hill* from the Bradley Foundation, among others.³⁶ We discussed the Bradley Foundation during your confirmation hearing. Do you have any relationship with the Bradley Foundation? If so, please describe.

RESPONSE: No.

128. Are you familiar with the Bradley Prize? If so, please explain.

RESPONSE: No.

129. In 2015, Judge Silberman wrote an op-ed in the Wall Street Journal, that the charge that “President Bush deceived the American people about the threat from Saddam” reminded him of “a similarly baseless accusation that helped the Nazis come to power in Germany.”³⁷ If confirmed, under what circumstances would you consider it appropriate to write opinion pieces on matters of policy or politics?

RESPONSE: Please see my response to Question 78.

130. Earlier this year, Judge Silberman sent an all-staff email to D.C. Circuit employees decrying what he called the “madness” of Senator Warren’s proposal to replace and rename Confederate symbols and military installations. Judge Silberman referred to the proposal as “the desecration of Confederate graves.”³⁸ If confirmed, under what circumstances would you consider it appropriate to send communications to all Supreme Court staff regarding your personal opinions on matters of politics or national policy?

RESPONSE: Please see my response to Question 78.

131. In *Cook County v. Wolf*, the District Court issued a preliminary injunction against the Trump administration’s public charge rule in Illinois. The government appealed to the Seventh Circuit,³⁹ and you sat on the panel that decided that case. That decision was issued on June 10, 2020.⁴⁰ Before you had the chance to rule on that appeal, however, the federal government sought and received an emergency stay from the Supreme Court on February 21, 2020.⁴¹

³⁶ https://www.sourcewatch.org/index.php/Echo_chamber

³⁷ <https://www.wsj.com/articles/laurence-h-silberman-the-dangerous-lie-that-bush-lied-1423437950>

³⁸ https://www.washingtonpost.com/local/legal-issues/a-judges-all-courthouse-email-sparks-debate-over-removal-of-confederate-symbols/2020/06/16/477f58c4-aff3-11ea-8758-bfd1d045525a_story.html

³⁹ The government filed its brief on December 10, 2019. Brief for Appellants, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 10, 2019), *available at* 2019 WL 7040218.

⁴⁰ *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020).

⁴¹ *Wolf v. Cook County*, 589 U. S. ____ (2020), *available at* https://www.supremecourt.gov/opinions/19pdf/19a905_7m48.pdf.

Cook County is part of a troubling trend. As Justice Sotomayor wrote in her dissent in that stay, “decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists—even though review in a court of appeals is imminent—that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields.”

According to the ABA Journal, “Since Trump took office, the Supreme Court had granted 22 stay requests as of mid-August, in whole or in part, from the federal government. In the 16 combined years of the President George W. Bush and President Barack Obama administrations, the court granted only four such emergency requests from the federal government.”⁴² Several of these emergency actions have involved challenges to COVID-19-related restrictions or to election issues. These shadow docket decisions are also often sharply divided: as of August 11, 2020, the court had decided 11 shadow docket matters by a 5-4 vote this term, “almost equaling the dozen 5-4 decisions among the 53 decisions stemming from argued cases this term.”⁴³

What standard would you use when determining whether a case is an appropriate candidate for an emergency stay?

RESPONSE: If I am confirmed, I would consider the “traditional” standard for a stay. *Nken v. Holder*, 556 U.S. 418, 425 (2009). “Under that standard, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 426.

132. What standard would you use when determining whether a case is an appropriate candidate for summary reversal?

RESPONSE: Supreme Court Rule 10 provides that one reason to grant certiorari is when a federal court of appeals “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme] Court’s supervisory power.” And Supreme Court Rule 16.1 provides that the Court may grant certiorari and order “a summary disposition on the merits.” I would consider the relevant legal framework, the factual record, the arguments of the parties, and the views of my colleagues in determining whether summary reversal was warranted in any particular case.

133. Legal scholars have noted that matters decided on the shadow docket “aren’t argued, the decisions aren’t signed, and the majority’s reasoning is rarely offered.”⁴⁴ Would you agree that

⁴² Mark Walsh, *The Supreme Court's 'shadow docket' is drawing increasing scrutiny*, ABA Journal, Aug. 20, 2020, <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny>

⁴³ *Id.*

⁴⁴ *Id.*

it is problematic that the Court is increasingly deciding issues of national and constitutional importance without allowing argument or providing its reasoning?

RESPONSE: As a sitting judge, it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should resolve issues without argument or written opinions.

134. A prominent legal scholar defined the Court’s “shadow docket” as “a range of orders and summary decisions that defy its normal procedural regularity.”⁴⁵ Would you support any changes to the Supreme Court’s rules or practices to provide greater procedural regularity to the shadow docket?

RESPONSE: Please see my response to Question 133.

135. You testified in response to a question from Senator Blumenthal that you didn’t think your views on climate change were “relevant to the job [you] would do as a judge.” In response to later questioning by Senator Harris about your views on climate change, you stated “I will not express a view on a matter of public policy, especially one that is politically controversial because that’s inconsistent with the judicial role.” Your responses to Senators Blumenthal and Harris are inconsistent. Please clarify which of these two statements correctly captures your belief as to the relevance of your views on climate change to your job as a judge.

RESPONSE: My responses were consistent and correctly capture my views. My views on the subject are not relevant to my job as a judge. Furthermore, the Supreme Court has described “climate change” as a “controversial subject[]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

136. Please explain whether you think that basic scientific literacy is a necessary qualification for a judge. For example, will a judge who rejects the overwhelming scientific consensus with respect to anthropogenic climate change be able to adequately assess under *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), whether a challenged greenhouse gas (GHG) emissions regulation is the product of “reasoned decision-making” or is instead arbitrary and capricious?

RESPONSE: As a judge, I decide each case based on the law and the factual evidence in the record before me. The Supreme Court has stated that “[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

⁴⁵ William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. Law & Liberty 1 (2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1961&context=public_law_and_legal_theory.

could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

137. The link between smoking and cancer has been the subject of much litigation and policy debate. Yet when asked by Senator Harris if you accepted the science that smoking causes cancer, you answered yes. Please explain why you answered this question about a matter of public policy that has been the subject of much litigation, but refused to answer a similar question about climate change, which is also a matter of public policy and the subject of at least some litigation. If your answer is that climate change is more “controversial” than the link between smoking and cancer, please explain the basis upon which you came to this conclusion, specifically. Please also provide any evidence demonstrating that the vast majority of atmospheric scientists do not find that fossil fuel combustion is the primary driver of observed warming.

RESPONSE: The Supreme Court has described “climate change” as a “controversial subject[.]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

138. If a judge disregards undisputed scientific evidence on climate change, or any other scientific issue of material fact presented in a case, and instead relies upon their personal opinion of the facts, how does that differ from a judge imposing her policy views in deciding a case?

RESPONSE: As a judge, I decide each case based on the law and factual evidence in the record before me, without regard to my policy views. If a case comes before me involving environmental regulation, I will carefully review the record and apply the relevant law to the facts before me.

139. In *Massachusetts v. EPA*, 549 U.S. 497, 504-505 (2009), the Supreme Court wrote: “A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a greenhouse gas.” Do you have any reason to believe the Supreme Court’s recitation of these facts was in error?

RESPONSE: *Massachusetts v. EPA* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

140. On June 27, 2018, Justice Anthony Kennedy announced he planned to retire. Over the next few days, reports emerged that President Trump was considering nominating you or Brett Kavanaugh to that vacancy, with Kennedy's former clerk as the leading contender. By July 3, Law.com was reporting that a fellow Indianan, James Bopp, had sent a letter to President Trump and Vice President Pence urging the administration not to nominate Kavanaugh, whom Bopp

was reportedly concerned would not support his litigation to undo campaign finance/anti-corruption laws.

According to accounts of the letter, Bopp strongly urged Trump to nominate you instead and praised you as someone who would excite the right-wing or "conservative" base and who shared his legal philosophy.

Bopp was the initial legal strategist for the group Citizens United in its challenge to the Bipartisan Campaign Reform Act (BCRA), which the Supreme Court struck down in the *Citizens United* case and asserted that the First Amendment barred Congress from passing laws to regulate the spending of money by corporations of any type or individuals to influence elections but that do not expressly urge voting for or against a candidate. This and related cases have led to the tsunami of dark money engulfing U.S. elections where groups sometimes outraise and outspend the candidates themselves because the donors identities are kept secret from the public.

At the time of that letter, you had been a judge for only a few months, with your investiture in February 2018, after your nomination to the Seventh Circuit was confirmed by a vote of 55-43 on October 31, 2017.

a) Did you ever see the letter or draft of the letter that Bopp sent endorsing you? If so, please provide a copy of that letter to the Committee.

RESPONSE: No.

b) Did you ever hear about Bopp's letter before or after it was sent? If so, from whom and what specifically did you hear about its content?

RESPONSE: No.

141. Do you know Mr. Bopp?

RESPONSE: To the best of my recollection, I have not met Mr. Bopp.

142. Have you ever spoken with Mr. Bopp about the law or any legal issues during the time you have been living in Indiana or previously? If so, did you discuss your legal or judicial philosophy with him, his litigation in *Citizens United*, the Wisconsin Right to Life cases challenging state election laws, his work to overturn *Roe v. Wade* or any other legal matter? Please specify.

RESPONSE: Please see my response to Question 141.

143. Since Mr. Bopp sent his letter in July 2018, have you spoken with him about that letter or other matters, given his prominent role in defending dark money in elections and seeking to use the courts to change legal precedents to suit his personal views? If so, how often and also has he advised you in connection with this nomination or other matters?

RESPONSE: Please see my response to Question 141.

144. Have you ever met, in person or by phone, Leonard Leo's partner at CRC Advisors, Greg Mueller? If so, what year did you first meet any of them and did you discuss your potential role in the judiciary with them or your judicial philosophy or legal theories, and if so when?

RESPONSE: To the best of my recollection, I have not met, in person or by phone, Greg Mueller.

145. Have you ever met, in person or by phone, Sarah Field, who is now Vice President of Judicial Strategy for Charles Koch's Americans for Prosperity? If so, what year did you first meet any of them and did you discuss your potential role in the judiciary with them or your judicial philosophy or legal theories, and if so when?

RESPONSE: To the best of my recollection, I have not met, in person or by phone, Sarah Field.

146. Your recusals list contains the names of four Shell entities: Shell Oil Company, Shell Oil Products Company LLC, Shell Oil Refinery, and Shell Petroleum Inc. One of these is not a subsidiary of Royal Dutch Shell plc (Shell Oil Refinery). Your financial disclosure shows that you do not hold any Royal Dutch Shell stocks, bonds, or other financial instruments.⁴⁶ Why would you need to recuse yourself from cases involving the above-mentioned Shell affiliates?

RESPONSE: My father worked at Shell Oil Company for many years, and while on the Seventh Circuit, in an abundance of caution, I have recused myself from cases involving those Shell entities with which he was involved.

147. Royal Dutch Shell plc has approximately 1,260 subsidiaries and related undertakings, according to its most recent annual report for investors.⁴⁷ Why have you listed only a few of these subsidiaries on your recusal list?

RESPONSE: Please see my response to Question 146.

148. Are there any other oil and energy companies that, if a case involving them were to reach the Supreme Court, you would need to recuse yourself from?

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing

⁴⁶ Amy Coney Barrett, Form AO 10, Financial Disclosure Report Nomination Filing, dated September 30, 2020 (covering 1/1/2019 to 09/24/2020).

⁴⁷ Royal Dutch Shell plc, Form 20-F, Exhibit 8.1 list of Significant Subsidiaries and Other Related Undertakings, March 12, 2020, <https://www.sec.gov/Archives/edgar/data/1306965/000130696520000014/0001306965-20-000014-index.htm>

precedents, and consulting with colleagues. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

149. According to a professional biography available on your father's law firm's website as recently as February 2016, your father was an "active member of The American Petroleum Institute Subcommittee of Exploration and Production Law and served twice as its Chairman" for 20 years.⁴⁸ Because of your father's leadership position within the American Petroleum Institute, would you need to recuse yourself from any case in which the American Petroleum Institute was an interested party?

RESPONSE: Please see my response to Question 148.

150. The American Petroleum Institute is a national trade association that has "more than 600 member[]" companies in "all segments of America's oil and natural gas industry," according to its website.⁴⁹ Given your father's close ties to American Petroleum Institute, would you need to recuse yourself from all cases involving APIs members? If not, why would your recusal not be warranted?

RESPONSE: Please see my response to Question 148.

⁴⁸ <https://web.archive.org/web/20160222120841/http://carverdarden.com/attorneys/coney-michael-e/>

⁴⁹ <https://www.api.org/about>

Senate Judiciary Committee
“The Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the
United States”
Questions for the Record
October 16, 2020
Senator Amy Klobuchar

We discussed your 2017 article titled *Countering the Majoritarian Difficulty*, in which you argue Justice Roberts “pushed the Affordable Care Act beyond its plausible meaning to save the statute” in *NFIB v. Sebelius* (2012). In response to my question, you said that Chief Justice Roberts had characterized his reading as “the less plausible reading of the statute.”

- Can you provide the section of the opinion to which you are referring?

RESPONSE: I was referring to Part III.B of the Chief Justice’s opinion.

- Chief Justice Roberts wrote in *NFIB v. Sebelius* that “the question is not whether that [the reading of the mandate as being in effect a tax] is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one,” and that the Court has said “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Do you disagree with that reasoning?

RESPONSE: As Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases. The Chief Justice cited several cases in support of his reasoning, which would be entitled to respect as precedents of the Supreme Court.

In *King v. Burwell* (2015), Chief Justice Roberts wrote that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.” You said in an interview on NPR that the dissent in *King v. Burwell* had “the better of the legal argument.”

- Do you agree that the Congress passed the Affordable Care Act to improve health insurance markets?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

- Do you think the Court was required to interpret the Act in a way that is consistent with Congress’s intent in *King v. Burwell*?

RESPONSE: Please see my response immediately above.

Section 1557 of the Affordable Care Act prohibits discrimination on the basis of sex and other characteristics. The Administration has interpreted the law to say that discrimination “on the basis of sex” does not include protections for LGBTQ people. Recently, some lower courts have

rejected this interpretation in light of the Supreme Court’s ruling in *Bostock v. Clayton County* (2020), which held that the words “because of sex” in Title VII prohibits discrimination based on gender identity and sexual orientation.

- Given that, in *Precedent and Jurisprudential Disagreement* (2013), you recognized that statutory precedents receive “super-strong” stare decisis effect, will you faithfully apply *Bostock* and treat it as settled law?

RESPONSE: *Bostock v. Clayton County* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

- Do you agree that the Administration’s interpretation of the Affordable Care Act to exclude protections for LGBTQ people conflicts with *Bostock*?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

Since the Supreme Court’s decision in *Shelby County*, many states have moved to restrict access to voting, including a voter ID law in North Carolina that the Fourth Circuit struck down because it was designed to “target African-Americans with almost surgical precision.”

- Is it your view that voter ID laws can advance legitimate policy objectives?

RESPONSE: The Supreme Court rejected a constitutional challenge to a voter identification law in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). The opinion announcing the judgment of the Court stated that the State had “a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient,” *id.* at 191, “in counting only the votes of eligible voters,” *id.* at 196, and “in protecting public confidence in the integrity and legitimacy of representative government,” *id.* at 197 (internal quotation marks omitted).

- Do you agree that not all voter ID laws have neutral justifications?

RESPONSE: Some courts have held that certain state photo ID laws lack an adequate neutral justification. *See, e.g., N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). The Supreme Court has explained that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

- What do you believe is the proper role of the judiciary in protecting citizens’ constitutional right to vote?

RESPONSE: The federal judiciary, which acts by adjudicating cases or controversies, protects the fundamental right to vote by fairly and impartially applying the United States Constitution and other federal laws related to voting, such as the National Voter Registration Act and the Voting Rights Act.

In a 2014 interview, Justice Ginsburg said that “if there was one decision I would overrule, it would be *Citizens United*.” Justice Ginsburg, who dissented in that case, said “I think the notion that we have all the democracy that money can buy strays so far from what our democracy is supposed to be.” The Supreme Court’s decision in *Citizens United v. Federal Election Commission* (2010) undermined the Bipartisan Campaign Reform Act, which was designed to limit the influence of money in our elections.

- Is *Citizens United* an example of the Court making policy?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

- Justice Thomas wrote a dissenting opinion in *FEC v. Beaumont*, which was joined by Justice Scalia, suggesting that all contribution limits should be subject to strict scrutiny. Do you agree?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases or opinions.

In his concurring opinion in *Doe v. Reed* (2010), Justice Scalia praised the merits of disclosure in our campaign finance system. He wrote that disclosure laws are not only constitutional, but that they “foster civic courage, without which democracy is doomed.”

- Do you share Justice Scalia’s view that disclosure laws foster civic courage?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases or opinions.

- Are there circumstances in which there is a right to anonymous political speech? If so, please describe those circumstances.

RESPONSE: In *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), the Supreme Court recognized that anonymous political speech is protected by the First Amendment under certain circumstances, *id.* at 357.

Chevron U.S.A. Inc. v. Natural Resources Defense Council (1984) is a landmark decision that has been referenced in more than 15,000 decisions, and has been reaffirmed by courts and judges across the ideological spectrum, including Justice Scalia.

- Was *Chevron* correctly decided?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

- Is *Chevron* settled law?

RESPONSE: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a precedent of the Supreme Court entitled to respect under the doctrine of *stare decisis*.

- Is *Chevron* a superprecedent?

RESPONSE: As I explained at the hearing, the term “super-precedent” means different things to different people. I have previously discussed the work of legal scholars who use “super-precedent” to refer to cases that are so well settled that no one seriously proposes overruling them. *Chevron* was not among the list of six cases that have been identified as “super-precedents” in this scholarly context.

You wrote in *Precedent and Jurisprudential Disagreement* (2013) that the doctrine of *stare decisis* serves many goals but that “the protection of reliance interests is paramount.”

- Do you believe that the reliance interests of federal agencies and regulated entities counsel against disturbing *Chevron*?

RESPONSE: *Chevron* is a precedent of the Supreme Court entitled to respect under the doctrine of *stare decisis*. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals relating to that precedent.

- If the *Chevron* doctrine were to be modified, what test should replace it? Should courts give any deference to agency interpretations? And if so, how much deference?

RESPONSE: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is a precedent of the Supreme Court entitled to respect under the doctrine of *stare decisis*. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

Agencies routinely handle complex blended questions touching on technical and legal issues. In your article, *Countering the Majoritarian Difficulty* (2017), you suggest that courts should have “humility about the capacity of judges to evaluate the soundness of scientific and economic claims.”

- Do you believe that it is preferable for Article III judges to defer to agency expertise and judgment if it is within the reasonable bounds of the relevant statute?

RESPONSE: Numerous decisions of the Supreme Court have addressed when judges should defer to an agency. The question whether it is preferable for judges to defer calls for my views on a matter of public policy. As a sitting judge, it would be inappropriate for me to offer an opinion on the matter.

In *Cook County v. Wolf* (2020), you were on a panel that considered the Department of Homeland Security’s “public charge” rule, which would make it harder for immigrants to enter the country or gain legal status. In your dissent, you found that it was reasonable to treat an immigrant who receives only minimal public assistance as a “public charge,” and wrote that plaintiffs simply have a “disagreement” with the Administration’s “policy choice” and that “[l]itigation is not the vehicle for resolving policy disputes.”

- Do you believe that litigation to dismantle the Affordable Care Act is not the proper vehicle for resolving that policy dispute?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. For the last 85 years, the Supreme Court has never applied that doctrine to Congressional statutes directing executive agencies to issue regulations implementing its legislation. Last year, the Supreme Court again rejected a petitioner’s nondelegation arguments in *Gundy v. United States* (2018). The dissenting and concurring opinions, however, expressed a clear preference to abandon the approach that has guided the Court since 1935.

- In your opinion, are the nondelegation issues addressed by the Court in *Gundy* likely to come before the Court in the near future?

RESPONSE: In *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019), the plurality said that the question in a nondelegation inquiry is “whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion.” Four Justices expressed an interest in reconsidering that standard. I cannot speculate about whether the Supreme Court is likely to address nondelegation issues in the near future.

- As a general matter, do you think federal regulatory agencies are currently exercising legislative power to a degree that is questionable under the Constitution?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

- Justice Kagan, writing for the majority, expressed the view that if the delegation at issue in *Gundy* “is unconstitutional, then most of the Government is unconstitutional—dependent as Congress is on the need to give discretion to give discretion to executive officials to implement its programs.” In your opinion, how should the substantial reliance interests in the Court’s nondelegation precedents affect the strength of those precedents?

RESPONSE: As I discussed at the hearing, reliance interests are among the factors that courts consider when applying the doctrine of stare decisis. The application of the doctrine of stare decisis is a question of law. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

In his *Gundy* dissent, Justice Gorsuch explained that, under his interpretation of the nondelegation doctrine, he would limit federal administrative agencies to “filling up details and finding facts.” But Justice Gorsuch did not elaborate on what he meant by “filling up details” or what it might mean for existing federal regulations. In your opinion, would the following regulations be permissible under Justice Gorsuch’s proposed nondelegation rule:

- Environmental Protection Agency’s regulations under the Clean Air Act, the Clear Water Act, and Toxic Substances Control Act?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

- Workplace safety regulations under the Occupational and Safety Health Act?

RESPONSE: Please see my response above.

- Food and Drug Administration and Department of Agriculture regulations that ensure food safety?

RESPONSE: Please see my response above.

- Regulations that prevent housing discrimination under the Fair Housing Act?

RESPONSE: Please see my response above.

During your hearing, you expressed your commitment to originalism as a judicial philosophy. In *Congressional Originalism*, you wrote that “[f]or an originalist” like yourself, “the historical meaning of the text” of the Constitution “is a hard constraint.”

- Under your originalist view of the law, can a state segregate public school children solely on the basis of race? Can the federal government?

RESPONSE: As I said when discussing *Brown v. Board of Education* during my hearing, the constitutional prohibition on segregating schools on the basis of race is so widely established and agreed upon that no one would call for its overruling.

- Under your originalist view of the law, can states and the federal government discriminate on the basis of sex by, for example, segregating public military training institutes by gender?

RESPONSE: In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Virginia Military Institute’s male-only admissions policy violated the Fourteenth Amendment’s Equal Protection Clause. The Court’s decision in *Virginia*, as well as the many other Supreme Court decisions subjecting classifications based on sex to heightened scrutiny, are precedents of the Supreme Court entitled to respect under the doctrine of stare decisis.

- Under your originalist view of the law, can a public state university employ an admissions policy, which considers race among many other factors, to foster a diverse student body in furtherance of its educational mission?

RESPONSE: The Supreme Court has upheld such admissions policies, including in *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

- Under your originalist view of the law, can states deny same-sex couples the right to marry?

RESPONSE: In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that the Fourteenth Amendment requires a state to license marriages between two people of the same sex on the same terms and conditions as marriages between two people of the opposite sex. The Court's decision in *Obergefell* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

In a 2016 law journal article, *Congressional Originalism*, you wrote that “the constitutionality of the Social Security Administration” is “arguably” inconsistent with originalism. In *Helvering v. Davis* (1937), the Supreme Court upheld the constitutionality of the Social Security Act. You have written that *Helvering v. Davis* is an acknowledged superprecedent, like *Marbury v. Madison* and *Brown v. Board of Education*, and that it is therefore highly unlikely to come before the Court.

- Do you think that *Helvering* is settled law? Why or why not?

RESPONSE: In *Congressional Originalism*, I explained that the super-precedents identified in the academic literature, including *Helvering*, are “decisions that no serious person would propose to undo even if they are wrong.” 19 U. PA. J. CONST. L. 1, 2 (2017).

- Do you think that *Helvering* was correctly decided?

RESPONSE: Please see my response immediately above this question.

In *Trump v. Hawaii*, the Chief Justice wrote that *Korematsu v. United States* (1944) “has been overruled in the court of history.”

- Is the Supreme Court's decision in *Korematsu* still good law?

RESPONSE: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court explained that “*Korematsu* was gravely wrong the day it was decided” and “has been overruled in the court of history,” *id.* at 2423.

You testified that, as a textualist, you interpret statutes based on the original public meaning of the statutory language. You also explained that just because a judge identifies as a “textualist”

does not mean that she will invariably reach the same conclusion in a given case as another judge who also claims that label.

- Can you describe in detail the process that you typically use to identify the original public meaning of a term in a statute?

RESPONSE: Please see my response to the following question.

- To what extent would you look to the context surrounding the passage of a law to determine the original public meaning of the statutory text?

RESPONSE: Textualism calls for a judge to approach the text as it was written, with the meaning it had at the time of its enactment. Context surrounding the passage of the law can be helpful to the extent it sheds light on the original public meaning of the statutory text. I also look to the canons of construction and any relevant judicial precedent in analyzing issues that arise under particular statutes.

- To what extent would sources such as legislative history help to inform your analysis of the original public meaning of the statutory text?

RESPONSE: As a general rule, I do not look to legislative history when I am deciding a case because legislative history is not what goes through the process of bicameralism and presentment. I would look to legislative history when it is relevant to understanding the ordinary public meaning of the statutory text.

In your testimony, you discussed the role of reliance interests in determining whether a court should overturn precedent. Sometimes, reliance interests are very high. For example, in *Federal Trade Commission v. Credit Bureau Center, LLC*, reliance interests in the longstanding precedents upholding the FTC’s authority to seek consumer restitution are particularly high. The effectiveness of the FTC’s antitrust and consumer protection enforcement programs depend heavily on the agency’s ability to seek restitution.

- In your opinion, how should courts weigh high reliance interests against other factors when determining whether to overturn or weaken precedent in close cases?

RESPONSE: The doctrine of stare decisis takes reliance interests into account, including the way that people have ordered their affairs and relied on particular decisions. If I am confirmed, I would apply the doctrine of stare decisis as articulated by the Supreme Court.

During your hearing, you told my colleagues that you “interpret the Constitution as law” and “its text as text.” Ratified in 1795, the Eleventh Amendment restricts the ability to sue states in federal courts. But the Supreme Court, in a series of cases, has expanded the doctrine of state sovereign immunity beyond the text of the Eleventh Amendment. Justice Kennedy, in *Alden v. Maine* (1999), wrote that states’ sovereign immunity “neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, and its history, and the authoritative interpretations of this Court make clear, the States’ immunity from suit is a

fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]”

- Is it a permissible exercise of judicial power for the Supreme Court to infer constitutional rights and immunities from the structure and history of the Constitution?

RESPONSE: *Alden v. Maine*, 527 U.S. 706 (1999), is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

During your hearing, one of my colleagues asked you about the Supreme Court’s “shadow docket,” a range of orders and summary decisions that are handed down, often without an opinion.

- In what circumstances is it appropriate for the Court to resolve novel legal issues in addressing a stay application, without argument and without providing its reasoning in a written decision?

RESPONSE: The Supreme Court has explained that “a court considers four factors” under the traditional standard for a stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009). As a sitting judge, it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should grant a stay.

- Do you think the Court should decide emergency stay applications or requests for preliminary relief, without the benefit of argument and without providing its reasoning in a written decision?

RESPONSE: Please see my response above.

- What justification is there for the Court’s current practice of keeping secret how each justice votes on stay applications?

RESPONSE: Please see my response above.

**Nomination of Judge Amy Coney Barrett to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted October 16, 2020**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

a. Would you consider whether the right is expressly enumerated in the Constitution?

RESPONSE: In considering whether a right “is fundamental to *our* scheme of ordered liberty” and therefore “incorporated in the concept of due process” protected under the Fourteenth Amendment, the Supreme Court has considered inclusion in the Bill of Rights as “surely powerful evidence that the right was regarded as fundamental.” *McDonald v. Chicago*, 561 U.S. 742, 767, 769 (2010) (plurality op.). In considering whether an unenumerated right is protected under the Fourteenth Amendment, the Supreme Court has considered whether a right is so “deeply rooted in this Nation’s history and tradition” to be “ranked as fundamental.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks omitted).

b. Would you consider whether the right is deeply rooted in this nation’s history and tradition, and if so, what types of sources would you consult to make that determination?

RESPONSE: Please see my response to Question 1.a.

c. Would you consider whether a similar right has previously been recognized by the Supreme Court?

RESPONSE: Please see my response to Question 1.a.

d. Would you consider whether the right is central to “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”? See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

RESPONSE: Please see my response to Question 1.a.

e. What other factors would you consider?

RESPONSE: Please see my response to Question 1.a.

2. From an originalist point of view, does the Fourteenth Amendment’s promise of “equal protection” guarantee equality across race and gender, or does it only require racial equality?

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

RESPONSE: The Supreme Court has held that the Equal Protection Clause applies to both race and sex. See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272–73 (1979). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

RESPONSE: Please see my response to Question 2.a.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

RESPONSE: The Supreme Court has held State laws “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples” under the Fourteenth Amendment. *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

3. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court rejected religious and moral beliefs about sodomy as a sufficient justification for a law that criminalized intimate same-sex relationships. Can religious or moral beliefs be the sole basis for the enactment and enforcement of criminal laws, consistent with the Constitution?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals, including on the constitutionally permissible bases for criminal laws. If I am confirmed to the Supreme Court, I will faithfully and impartially apply the law in cases involving criminal laws, as I would in all others.

4. You declined to answer when I asked if you believe *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Supreme Court recognized the right of married couples to use contraceptives, was correctly decided. Chief Justice Roberts stated during his confirmation hearing that he “agree[s] with the *Griswold* Court’s conclusion that marital privacy extends to contraception,” and he said he “fe[lt] comfortable commenting on *Griswold* . . . because that does not appear to me to be an area that is going to come before the Court again.” Justices Alito and Kavanaugh made similar comments during their confirmation hearings.

a. Are you still unwilling to say whether you agree with the result in *Griswold*?

RESPONSE: As I said at my hearing, because *Griswold* lies at the base of substantive due process doctrine, an area that remains the subject of ongoing litigation, I cannot opine on it. But I do not think *Griswold* is in danger of going anywhere.

b. If you are still unwilling to answer, please explain your reasoning for breaking with the practice of recent nominees.

RESPONSE: Please see my response to Question 4.a.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015), the Court reasoned, “[a]s all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

RESPONSE: The answer to this question depends on the nature of the case before a court. Although the law stays the same until it is lawfully changed, that does not mean that the way in which a rule of law applies cannot change over time.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

RESPONSE: Please see my response to Question 5.a.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning,

“it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” *Id.* at 489, 490-93.

a. During your confirmation to the Seventh Circuit, I asked whether you considered *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive. You responded that you had not studied this question. Have you had an opportunity to consider it since?

RESPONSE: As I stated in 2017, although I have not studied the question as a legal scholar, some scholars have fully developed the argument that *Brown* is consistent with originalism. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). I have stated publicly in lectures that I believe *Brown* was correctly decided.

b. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

RESPONSE: The public’s original understanding of the law is not the same thing as the public’s expectations about how that law would apply to any particular circumstance. It is the former, not the latter, that controls.

c. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

RESPONSE: Please see my response to Question 6.b.

d. What sources would you employ to discern the contours of a constitutional provision?

RESPONSE: I would consider the sources to which the Court consistently looks, including text, structure, and history.

7. Recent Supreme Court cases addressing capital punishment under the Eighth Amendment and the privacy of same-sex intimacy under the Fourteenth Amendment have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record, as well as relevant U.S. case law and practices. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Do you agree that foreign court decisions and foreign practices of democratic countries that follow the rule of law are appropriate to consider and cite in opinions interpreting the Constitution?

RESPONSE: As a general matter, because the Constitution is a compact with the American people, its interpretation should not be controlled by the laws passed by other countries.

8. Chief Justice Warren wrote that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This doctrinal standard explicitly calls on the Court not to limit its Eighth Amendment analysis to the meaning of “cruel and unusual punishments” when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Applying *Trop*’s evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.

a. Is that standard consistent with your originalist judicial philosophy?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b. In your view, what is meant by the Eighth Amendment’s prohibition against “cruel and unusual punishments”?

RESPONSE: Please see my response to Question 8.a.

c. Does the phrase “cruel and unusual punishments” have the same meaning from the Eighth Amendment’s ratification in 1791 until now, or has our understanding changed?

RESPONSE: Please see my response to Question 8.a.

d. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes “cruel and unusual punishments”?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

e. If it were permissible at the time of the Founding to execute eight-year-old children, would a commitment to originalism as the exclusive theory of constitutional interpretation mean that it would be similarly permissible to execute eight-year-old children today?

RESPONSE: Please see my response to Question 8.d.

9. During your testimony, you were willing to affirm that *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated a state law prohibiting interracial couples from marrying, was correctly decided. But you were unwilling to say the same for *Obergefell v. Hodges*, 576 U.S. 644 (2015), which invalidated state laws prohibiting same-sex couples from marrying.

a. Please explain your reasoning for drawing this distinction.

RESPONSE: As I said at the hearing, I have stated publicly that I believe that *Brown* was correctly decided and *Loving* follows directly from *Brown*. I have not made similar public statements about *Lawrence* and *Obergefell*.

b. Are you more open to reconsidering *Obergefell* than you would be open to reconsidering *Loving*?

RESPONSE: *Obergefell* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

c. If you were asked to reconsider *Obergefell*, how heavily would you weigh the reliance interests of the more than one million Americans in same-sex marriages, including those in states that previously prohibited or refused to recognize same-sex marriages?

RESPONSE: Please see my response to Question 9.b.

10. During your confirmation hearing, you testified that you would apply the stare decisis factors currently used by the Supreme Court in constitutional cases, which include considerations like reliance interests and the workability of a prior decision. These factors are themselves rooted in precedent, however, and some have voiced disagreement with them. For example, in *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019), Justice Thomas wrote in a concurrence that “the Court’s typical formulation of the stare decisis standard does not comport with our judicial duty under Article III,” and that “if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.”

a. Do you agree with Justice Thomas?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases or opinions.

b. If not, how do you reconcile your current position with your statements that (1) “[g]enerally speaking, if a litigant demonstrates that a prior decision clearly misinterprets the statutory or constitutional provision it purports to interpret, the court should overrule the precedent”; and (2) “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it”? Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1075 (2003); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013).

RESPONSE: I will begin with the second quotation: as I explained at the hearing, pulling that single sentence out of the paragraph in which it appears takes it out of context. In fact, that sentence was part of a *defense* of the Court’s approach to stare decisis, which imposes a presumption against overruling precedent other than in “exceptional” circumstances. *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. at 1728. Were the prohibition on overruling absolute, I argued, it would be impossible for the Court to correct serious errors. *Id.* As for the first citation: that article dealt with stare decisis in the courts of appeals, not the Supreme Court, and argued that some courts of appeals’ rigid procedural rules prohibiting one panel from overruling another panel were inconsistent with general principles of issue preclusion and claim preclusion. The article was not an exploration of the doctrine of stare decisis as articulated in the case law of the Supreme Court.

c. Do you stand by your statement that you will apply the traditional stare decisis factors when evaluating whether to reconsider Supreme Court precedent?

RESPONSE: Yes.

d. Under what circumstances, if any, would it be appropriate for the Court to reconsider its own precedent regarding the relevant factors for overruling precedent?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

11. As you have explained, Justice Scalia sometimes described himself as a “faint-hearted originalist” in his approach to precedent. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921-22 (2017).

a. What did you understand him to mean by that?

RESPONSE: The article explores what Justice Scalia’s self-description may have meant, arguing that Justice Scalia was willing to treat stare decisis as a “pragmatic exception to originalism.” *Id.* *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1939 (2017).

b. Would you describe yourself as a “faint-hearted originalist”? If so, please explain in what way. If not, please explain why not.

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

c. You explained that Justice Scalia, when faced with a decision that conflicted with his originalist philosophy, would sometimes conclude he was bound only to the result of

a particular precedent, while in other instances he concluded he was bound to follow the precedent's underlying reasoning. *See id.* at 1937. How would you determine whether you were bound by the reasoning of a precedent with which you disagreed, as opposed to just its result?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

12. The Supreme Court has recognized that “when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.” *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

a. Do you agree?

RESPONSE: As I said at my hearing, if confirmed, I would apply the doctrine of stare decisis as articulated by the Supreme Court. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b. If so, how do you reconcile your current position with your prior statements that (1) “[i]f . . . a litigant demonstrates that precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret, the role of reliance is significantly diminished, and possibly eliminated”; and (2) “reliance . . . should count much less, if at all, when a litigant convinces a court that precedent conflicts with the statutory or constitutional provision that it purports to interpret”? Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. at 1062, 1064.

RESPONSE: In my scholarly writing I have defended the doctrine of stare decisis. The article you cite dealt with stare decisis in the courts of appeals, not the Supreme Court, and argued that some courts of appeals' rigid procedural rules prohibiting one panel from overruling another panel were inconsistent with general principles of issue preclusion and claim preclusion. I also recognized that the Supreme Court's “opinions—which apply nationwide and are incapable of reversal by another court—are the ones most likely to induce deep-seated reliance.” *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. at 1064.

13. You have written that “[j]ustices sometimes raise additional issues, like the matter of precedent's validity, on their own,” and that “doing so happens when a Justice wants to address the merits of precedent.” Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. at 1930.

a. When, if ever, is it appropriate for a Supreme Court justice to invite challenges to settled precedent?

RESPONSE: Whether to raise an issue is itself part of the judicial process, so as a sitting judge and as a judicial nominee, it would not be appropriate for me to opine on this question.

b. If it is ever appropriate, how would you determine whether and when to do so?

RESPONSE: Please see my response to Question 13.a.

14. You have written that “originalists . . . have abandoned the claim that one should be an originalist because originalism produces more restrained judges.” Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 81 (2017).

a. Please elaborate on what you meant by this statement.

RESPONSE: I was describing the changes in the scholarly debate about originalism over time. I explained that originalism had “shifted from being a theory about how judges should decide cases to a theory about what counts as valid, enforceable law.” *Id.*

b. What is your understanding of the concept of “judicial restraint,” and how would you exercise it as a Supreme Court justice?

RESPONSE: Legal doctrines impose a number of important constraints on judicial activism. One such constraint is the rule that judges cannot issue advisory opinions but must instead wait for specific cases or controversies to come before them.

c. Do you agree with the abandonment of judicial restraint that you described?

RESPONSE: This question misunderstands the article. The article did not state that originalist legal scholars have abandoned judicial restraint; it described how the theoretical arguments for originalism have changed over time.

15. You have written that “[j]ustices are unlikely to set aside their most closely held jurisprudential commitments; in fact, history shows that they have been unwilling to do so.” Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. at 1721.

a. Please elaborate on what you meant by this statement.

RESPONSE: As I state in the two sentences and footnotes following the quotation you cite, the justices themselves have made this point. I go on to say that “[o]ne function of stare decisis is to keep these [jurisprudential] disagreements in check” and that “the preference for continuity disciplines jurisprudential disagreement.” The article uses the term “jurisprudential commitments” to refer to constitutional methods as distinct from partisan political preference.

b. What would you describe as your most closely held jurisprudential commitments?

RESPONSE: As I described at the hearing, I am an originalist. I interpret the Constitution as binding law. And I interpret its text to mean what the public understood it to mean when it was ratified.

c. As a Supreme Court justice, when, if ever, would you set those commitments aside?

RESPONSE: As I explain in the article, judges must consider not only their judicial philosophy but also precedent and the doctrine of stare decisis. How those considerations are resolved in any particular case will vary, depending on the relevant law and precedent.

16. You have written that “Justice Scalia was right to say that originalists can be pragmatic about precedent. But that pragmatism is not, as is commonly assumed, a choice to treat erroneous precedent as law superseding the text it purports to interpret. The pragmatism is one of timing.” Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PENN. J. CONST. L. 1, 43 (2016). You added that the “office holder,” including the Supreme Court, “has the discretion to decide when the timing is right to correct the error.” *Id.*

a. Please elaborate on what you meant.

RESPONSE: This article discussed how *Congress*, not the courts, might approach constitutional questions from an originalist point of view. And the article’s conclusion was that, just as “[t]he Constitution does not require the Supreme Court to correct every constitutional error, . . . it does not require Congress to do so either.” *Id.* at 42.

b. As a Supreme Court justice, would you consider a precedent with which you disagree as “law superseding the text it purports to interpret”? If so, does that require overruling the precedent? If not, please explain why not.

RESPONSE: Please see my response to Question 16.a.

c. Will you view whether to correct precedents you believe to be erroneous as a matter of “timing”? Please explain.

RESPONSE: Please see my response to Question 16.a.

17. You explained at a March 2019 event at the University of Notre Dame that originalists can disagree about the level of generality at which they view the text, and that depending on the level of generality they use, originalists’ view of the Constitution can be more or less determinate.

a. Please explain the different approaches that originalists take to addressing this issue.

RESPONSE: In my speech, I said that there can be disputes even among originalists regarding at what level of generality a given provision or text should be read: “The higher level of generality you read the text at, then the less determinate the meaning is, and so the more room there is for other kind of factors to kind of fill in the gaps.” The Fourth Amendment’s prohibition of “unreasonable searches and seizures” is an example of a provision written at a higher level of generality. Because it articulates a general principle, rather than a laundry list of prohibited searches, it can apply to searches performed by infrared detectors, even though they did not exist in 1791. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001).

b. Please explain what your approach will be in determining the level of generality to read constitutional text and how that approach compares to other originalists, including those on the Supreme Court.

RESPONSE: It would not be appropriate for me to compare myself to my current judicial superiors or, if I am confirmed, my colleagues on the Court.

18. In your writings, you have discussed the gatekeeping function of the certiorari process and emphasized that stability in the law depends in part on justices’ decisions not to take cases that call for the overruling of precedents.

a. How will you decide whether a particular case meets the factors of Supreme Court Rule 10, which provides the bases for granting certiorari?

RESPONSE: Under Supreme Court Rule 10, a petition for a writ of certiorari is granted for “compelling reasons.” If confirmed, I would give due consideration to the factors set forth in Rule 10, the arguments of the parties, and the views of my colleagues.

b. In particular, how will you decide whether a case presents an “important federal question” pursuant to Rule 10(c)?

RESPONSE: Please see my response to Question 18.a.

c. What considerations would you apply in assessing whether the Court should take a case in which a litigant seeks to overturn precedent?

RESPONSE: Please see my response to Question 18.a.

19. At the March 2019 Notre Dame event, you stated of Supreme Court confirmation hearings that “questions about what your judicial philosophy is should absolutely be on the table because that’s what the Senators need to know to fulfill their constitutional duty” and that “what the American people need to know is . . . what yardstick [nominees] are using to make those decisions.”

Insofar as you have declined to answer questions posed in this document, please explain how, as to each such question, your unwillingness to respond to that question is consistent with your view that questions about judicial philosophy “should absolutely be on the table.”

RESPONSE: I have discussed my judicial philosophy during my hearing and in response to these written questions, subject to the limitations imposed by the Code of Conduct for United States Judges.

20. As we discussed during my first round of questioning, you have written that Chief Justice Roberts’s opinion in *NFIB v. Sebelius*, 567 U.S. 519 (2012), “pushed the Affordable Care Act beyond its plausible meaning to save the statute.” Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. at 80.

a. Did you ever discuss this article with anyone involved in the selection process leading up to your nomination? If so, with whom?

RESPONSE: No.

b. Did you discuss the article during your preparation for these hearings? If so, with whom?

RESPONSE: Consistent with the practice of past nominees, I prepared for my hearing with the assistance of attorneys from the Office of the White House Counsel and the Department of Justice. We discussed questions I could expect to be asked, including questions concerning my academic writings.

c. During your testimony, you described the issue of whether the mandate could be construed as a tax as a matter of statutory interpretation. You have also explained that “[s]tatutory precedents receive ‘super-strong’ stare decisis effect.” Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. at 1713. Is the Court’s holding in *NFIB* that the mandate constitutes a tax entitled to “‘super-strong’ stare decisis effect”? Why or why not?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

21. The Supreme Court has held that “when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact,” and that “[e]ven in the absence of a severability clause, the ‘traditional’ rule is that the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2208-09 (2020) (internal quotation marks omitted). Do you agree with this general approach to the question of severability?

RESPONSE: As Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases. But without expressing agreement or

disagreement, I acknowledge that the above quotation reflects the Supreme Court’s general approach to the question of severability.

22. Textualists such as Justice Scalia have often claimed that legislative history is an unreliable or even illegitimate source of authority for statutory interpretation. Severability analysis, however, requires the Court to “determine what Congress would have intended in light of the Court’s constitutional holding.” *NFIB*, 567 U.S. at 586 (internal quotations omitted). What sources of authority should a justice use to determine congressional intent in conducting a severability analysis?

RESPONSE: The Supreme Court has explained that “courts hew closely to the text of severability or nonseverability clauses,” and where a statute does not contain such a clause, courts should “presume[] that an unconstitutional provision in a law is severable from the remainder of the law or statute.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349, 2350 (2020) (plurality opinion).

23. In your dissent in *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019), you wrote that “[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons. Nor have the parties introduced any evidence that founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun.” During your testimony, you indicated that you did not intend in this passage to communicate that the right to vote is less important than the right to bear arms and that you do believe that voting is a fundamental right.

a. As an originalist, how should a justice evaluate whether a right is subject to “virtue-based restrictions”?

RESPONSE: In my dissent in *Kanter*, I concluded that the parties introduced no evidence that founding-era legislatures imposed virtue-based restrictions on the right to bear arms, as they had for other rights.

b. Please describe what you meant when you described the right to vote as “fundamental.”

RESPONSE: A fundamental right is one accorded a high degree of protection. The Supreme Court has stated that “[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

24. In *Smith v. Illinois Department of Transportation*, 936 F.3d 554, 561 (7th Cir. 2019), you wrote an opinion acknowledging that “[t]he n-word is an egregious racial epithet” but held that Smith’s former supervisor calling him a “stupid . . . [n-word]” did not demonstrate a hostile working environment because he failed to prove that this incident “altered the conditions of his employment,” as opposed to constituting “yet another instance of the same ill treatment that he had been receiving all along.” Please explain why this utterance did not shed light on the reason that Smith’s supervisors “made him miserable throughout his employment at the Department.” *See id.* at 561.

RESPONSE: As I explained on behalf of a unanimous panel in *Smith v. Illinois Department of Transportation*, 936 F.3d 554 (7th Cir. 2019), binding Seventh Circuit precedent required the plaintiff to show that he was subjected to unwelcome harassment on the basis of race and that the harassment “was so severe or pervasive that it altered the conditions of employment and created a hostile or abusive working environment.” *Id.* at 560 (citing *Huri v. Office of the Chief Judge of the Circuit Court of Cook County*, 804 F.3d 826, 834 (7th Cir. 2015)). The opinion further explained that the plaintiff had to “make this showing from both an objective and subjective point of view,” meaning that he had to “show not only that a reasonable person would find the workplace hostile or abusive as a result of Colbert’s slur, but also that he himself perceived it that way.” *Id.* at 561 (internal quotation marks and citation omitted). On Smith’s own account, things had reached a breaking point (and, as the opinion details, for non-race-based reasons) well before his supervisor used the egregious epithet. Smith had to show that the epithet caused him additional or different distress. He failed to make that showing. *Id.* at 562.

25. In *EEOC v. Autozone, Inc.*, 875 F.3d 860 (7th Cir. 2017), you voted to deny rehearing en banc of a panel decision that, in the words of three dissenters, upheld a “separate-but-equal arrangement” in how a company segregated its workforce by race. You did not issue your own opinion in voting to deny rehearing.

a. Why did you vote to deny rehearing in this case?

RESPONSE: Federal Rule of Appellate Procedure 35(a) explains that “[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” As I explained at the hearing, my vote to deny rehearing indicates only that I did not believe the petition for rehearing satisfied this elevated standard. It does not indicate that I thought that the panel decision was correct. The Seventh Circuit is deferential to its panels’ decisions.

b. Insofar as you concluded that, pursuant to Fed. R. App. P. 35(a)(1), en banc consideration was not “necessary to secure or maintain uniformity of the court’s decisions,” please explain why not.

RESPONSE: Please see my response to Question 25.a.

c. Insofar as you concluded that, pursuant to Fed. R. App. P. 35(a)(2), the case did not “involve[] a question of exceptional importance,” please explain why not.

RESPONSE: Please see my response to Question 25.a.

26. Do you believe that an originalist reading of the Constitution provides for the treatment of corporations as “persons” under the law for purposes of equal protection, freedom of speech, or due process of law? If so, which textual provisions in the Constitution support those conclusions?

RESPONSE: The Supreme Court has held that the term “person” in some constitutional provisions includes corporations. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (equal protection); *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1893) (due process); *cf. First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (First Amendment). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

27. Are there limits on Congress’s power to strip federal courts of jurisdiction over a particular issue? If so, what are those limits?

RESPONSE: As a sitting judge, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

28. Some people say the Ninth Amendment can play no substantive role in protecting rights, and that it is merely a statement of principle or reminder of limited government. Do you agree?

RESPONSE: As I stated at my hearing, the Ninth Amendment is often treated as a rule of interpretation. It states that the individual’s rights are preserved, but its meaning has not been fleshed out through litigation. As a sitting judge, it would not be appropriate for me to offer a further opinion on the issue.

29. A number of legal scholars argue that the Eleventh Amendment has been interpreted by the Court to shield states from liability for wrongdoing in a way that contravenes the original intent behind the Amendment. Are you familiar with that scholarship, and do you find it persuasive?

RESPONSE: The Supreme Court has said that “[t]he sovereign immunity of the States . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1496 (2019). As a sitting federal judge and as a judicial nominee, it would not be appropriate for me to assess whether this precedent or any other interprets the Eleventh Amendment in a way that contravenes the original intent.

30. The U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from civil actions involving claims “arising under . . . any Act of Congress relating to patents.” 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. If you are confirmed to the Supreme Court, such cases will now have the potential to come before you.

a. Please describe any legal instruction (including at law school and afterwards) you have had in patent law.

RESPONSE: As a judge on the Seventh Circuit, I have decided several cases involving copyright, patent, and trademark infringement claims. *See, e.g., Sullivan v. Flora, Inc.*, 936 F.3d 562 (7th Cir. 2019); *ABS Global, Inc. v. Inguran, LLC*, 914 F.3d 1054 (7th Cir.

2019); *SportFuel, Inc. v. PepsiCo, Inc.*, 932 F.3d 589 (7th Cir. 2019); *Bodum, Inc. v. A Top New Casting, Inc.*, 927 F.3d 486 (2019).

b. Please describe any legal instruction (including at law school and afterwards) you have had in other areas of intellectual property law.

RESPONSE: Please see my answer to Question 30.a.

c. Please describe any experience you have had working on intellectual property issues since graduating law school.

RESPONSE: Please see my answer to Question 30.a.

d. Please list any speeches or public presentations in which you have discussed intellectual property law.

RESPONSE: I have provided a list of my public speeches and presentations in response to Question 12.d of the Senate Judiciary Questionnaire that I provided to the Committee. I do not recall specifically giving any speeches or presentations that focused on intellectual property law, but the topic may have arisen.

31. Are patents property rights? *See* 35 U.S.C. § 261.

RESPONSE: The Supreme Court has explained that “[p]atents convey only a specific form of property right—a public franchise.” *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1375 (2018). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

32. Are copyrights property rights?

RESPONSE: The Supreme Court has said that “[c]opyrights are a form of property.” *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

33. Do you believe it is unduly burdensome for an individual inventor in possession of an issued U.S. patent to prevent infringement by a large corporation? Why or why not? If yes, what steps should be taken to make enforcement easier?

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge and as a judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

34. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. “Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to ‘provide nationwide uniformity in patent law.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97–312, p. 20 (1981)).

a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?

RESPONSE: As a sitting judge and as a judicial nominee, it would be inappropriate for me to take side in the debate about the relationship between the regional circuits and the Federal Circuit. *See, e.g.,* Diane P. Wood, *Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction In Patent Cases?* 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?

RESPONSE: Please see my response to Question 34.a.

c. Resolving circuit splits is often viewed as one of the Supreme Court's core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

RESPONSE: Under Supreme Court Rule 10, a "petition for a writ of certiorari will be granted only for compelling reasons." If confirmed, I would give due consideration to each of the factors set forth in Rule 10, the arguments of the parties, and the views of my colleagues.

35. In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013), a case considering the patent eligibility of inventions relating to isolated human genetic material, Justice Scalia wrote a short, separate opinion in which he stated, "I join the judgment of the Court, and all of its opinion except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief." *Id.* at 596 (Scalia, J., concurring). Yet many critical issues in areas of law including intellectual property, privacy, antitrust, and even crime relate to complex technologies.

a. If there is not enough information in the briefs or in the record from the courts below for a justice to understand the relevant technology, what options are available to the justice?

RESPONSE: If confirmed, I would give due consideration in every case to the arguments of the parties and amici, all applicable statutes and judicial precedents, and the views of my colleagues.

b. Do you think it is appropriate in such instances for the Supreme Court to request additional briefing solely on the technology or science implicated in a given case? If so, from whom?

RESPONSE: Please see my response to Question 35.a.

36. The public's attention to the Supreme Court's work is generally focused on cases that come before the Court through the normal certiorari process, typically after the development of a record in lower courts at the trial and appellate levels, and briefing and oral argument before the Supreme Court. However, the Court also has what some have called a "shadow docket"—requests for emergency relief that are decided without this full process, usually with no explanation and no indication of how justices voted unless they choose to write, often in dissent. *See, e.g.,* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015).

a. If there are justices willing to go on the record in dissent, do you agree that transparency requires that justices in the majority should likewise explain their reasoning?

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to "grade" or give a "thumbs-up or thumbs-down" to particular cases. That rule would apply equally to decisions reached on the "shadow docket."

b. How is a failure to provide an explanation for an affirmative decision, particularly where there is a dissent, consistent with the idea that courts retain their legitimacy by providing reasons for their decisions?

RESPONSE: Please see my response to Question 36.a.

c. Do you believe justices should have to indicate which way they voted on these matters, even if there is no opinion? Why or why not?

RESPONSE: Please see my response to Question 36.a.

37. For the first time in its history, the Supreme Court this year has allowed for the simultaneous live audio broadcasting of its oral arguments, which have been conducted telephonically due to the COVID-19 pandemic. During this period, as many as 500,000 people are estimated to have listened to oral arguments in real-time (live or shortly afterwards), in contrast to the 50 seats available for the public in the Supreme Court. Amy Howe, *Courtroom access: Where do we go from here?*, SCOTUSblog (May 13, 2020), <https://www.scotusblog.com/2020/05/courtroom-access-where-do-we-go-from-here/>. Advocates for greater transparency at the Supreme Court have long called on the justices to provide such real-time access as a routine matter. If confirmed, will you support continuing to provide real-time access to oral arguments after there is no longer a need to conduct them remotely?

RESPONSE: If confirmed, I will keep an open mind regarding live broadcasts of Supreme Court oral arguments.

38. As a judge and as a justice, you have been and would be responsible for the hiring of law clerks every year.

a. Please discuss the diversity of the law clerks you hired as a Seventh Circuit judge.

RESPONSE: I take a holistic approach to hiring law clerks, evaluating the potential clerk's entire application and supporting materials to determine whether that person is the best fit for the job. This approach has led to a diverse group of current and former law clerks, and it is a practice I intend to continue on the Seventh Circuit and, if I am confirmed, on the Supreme Court.

b. Please explain your efforts to ensure diversity in your law clerks as a Seventh Circuit judge.

RESPONSE: Please see my response to Question 38.a.

c. If confirmed to the Supreme Court, what efforts would you make to hire a diverse group of law clerks going forward?

RESPONSE: Please see my response to Question 38.a.

39. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures.

a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?

RESPONSE: As I said at the hearing, although the Code of Conduct for United States Judges does not apply to Supreme Court Justices, I believe that the Justices have chosen to follow them in practice. If I am confirmed to the Supreme Court, I intend to follow the same practice as my colleagues.

b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?

RESPONSE: Please see my response to Question 39.a.

c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 39.a.

40. Section 455(a) of Title 28 of the U.S. Code requires recusal from cases in which a justice’s “impartiality might reasonably be questioned.” Congress codified this requirement separately from circumstances like “personal bias or prejudice,” which also require recusal pursuant to Section 455(b).

a. Do you agree that the law may require recusal even in cases where a justice does not harbor actual bias due to an appearance of impropriety or bias?

RESPONSE: The recusal statute provides that a justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a).

b. Can statements made by a President about what he expects or desires from his judicial nominee suffice to establish an appearance of bias, such that the nominee’s “impartiality might reasonably be questioned,” regardless of the nominee’s actual views?

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

41. Which cases, theories, or legal issues were you asked about during the judicial selection process for the Seventh Circuit and for the Supreme Court (including conversations with the White House or outside advisors)? Please provide a comprehensive response.

RESPONSE: In the judicial selection process for the Seventh Circuit and the Supreme Court, I was asked generally about my qualifications to serve and my approach to judging. As I indicated in response to Question 26.b of the Senate Judiciary Questionnaire for my Seventh Circuit nomination, and in response to Questions 26.b and 26.c of the Senate Judiciary Questionnaire for my Supreme Court nomination, I was not asked about and did not discuss any currently pending or specific cases, legal issues, or questions in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on those cases, issues, or questions. I was not asked and made no representations as to how I might rule as a Judge or Justice, if confirmed.

42. President Trump published an initial list of names from which he would select future Supreme Court nominees in May 2016. You were not on that initial list.

a. Between that time and November 2017, when you were added to the list, what actions, if any, did you take to have your name added?

RESPONSE: None.

b. When and how did you learn that you were added to the list? Please provide details.

RESPONSE: When the November 2017 list was announced, someone told me that I had been added to it.

c. Did you speak to anybody regarding the list? If yes, please list with whom you spoke and what you discussed.

RESPONSE: I do not recall speaking to anyone about the list before it was announced.

d. Did the possibility of being added to the list impact your decisions regarding any speaking engagements or academic activities?

RESPONSE: No.

43. Assuming you prepared for these hearings, how many preparation sessions did you have? Approximately how long did you spend preparing?

RESPONSE: I spent most of my time after the announcement of my nomination preparing for my hearing. This preparation includes completing the Senate Judiciary Questionnaire and financial disclosure forms, meeting with Senators, and meeting with Administration personnel.

44. During any part of your preparation for these hearings, were you given guidance on what questions you should not answer? If yes, what was the guidance?

RESPONSE: Consistent with the practice of past nominees, I discussed with attorneys from the Office of the White House Counsel and the Department of Justice the types of questions I could expect to be asked. I made my own decisions about what to say at the hearing. All answers are my own.

45. At any point during this hearing, did you answer a question a certain way to avoid disclosing relevant information?

RESPONSE: I answered every question during the hearing consistent with my obligations to maintain judicial independence and comply with the Code of Conduct for United States Judges.

46. Is anyone helping you to provide answers to these written questions?

RESPONSE: Consistent with the practice of past nominees, I drafted answers to these questions with the assistance of attorneys from the Department of Justice and the Office of the White House Counsel. My answers to each question are my own.

47. If anyone is helping you to provide answers to these written questions, please provide their names, how they are helping you, and who is compensating them for their work on your answers.

RESPONSE: Please see my response to Question 46.

48. Have you read and verified the answer to each one of these questions?

RESPONSE: Yes.

49. Is the answer to each one of these questions 100 percent accurate?

RESPONSE: To the best of my knowledge, yes.

Nominations
Hearing before the Senate Committee on the Judiciary
Questions for the Record
October 16, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Judge Amy Coney Barrett

1. On October 16, 2020, you submitted a supplemental disclosure of six speeches. This disclosure followed a CNN article revealing at least seven speeches were listed on Notre Dame Law School public calendar.

a. Why had you not disclosed these speeches prior to Friday, October 16, 2020?

RESPONSE: I worked diligently to provide the Committee with comprehensive answers to the Senate Judiciary Questionnaire. I, and others acting on my behalf, reviewed my personal files, including my calendars and correspondence, as well as publicly available resources. As part of that process, I provided the Committee with 127 talks or speeches and produced 1,793 pages of materials. At all times, I sought to complete the Questionnaire fully and completely.

Four of the six events referenced in the October 16 letter took place more than 13 years ago, and all of the events were incidental to my position as a full-time faculty member at Notre Dame Law School. They included small meetings with campus groups and fellow members of the faculty. I had no calendar recording my participation in these events, but when I became aware of Notre Dame calendars suggesting I may have attended these events, I promptly notified the Committee that they may be responsive, consistent with the practice of all recent nominees to the Supreme Court.

b. At that time, why did you disclose only six of the seven speeches identified by CNN?

RESPONSE: I concluded that I did not participate in the other event identified by CNN.

c. Had you previously searched the Notre Dame Law School public calendars in preparation for your responses to the Senate Judiciary Committee Questionnaire?

RESPONSE: As I indicated in response to Question 1.a., in preparing my response to the Senate Judiciary Questionnaire, I and others acting on my behalf reviewed publicly available resources.

i. If not, why not?

RESPONSE: Please see my response to Question 1.c.

d. Have you now searched those calendars in preparing your supplemental response?

RESPONSE: Please see my response to Question 1.c.

i. If not, why not?

RESPONSE: Please see my response to Question 1.c.

e. Have you searched other available event calendars at the University of Notre Dame?

RESPONSE: Please see my response to Question 1.c.

i. If not, why not?

RESPONSE: Please see my response to Question 1.c.

2. Are you aware of any other talks at the University of Notre Dame or elsewhere that have not been disclosed?

RESPONSE: To the best of my knowledge, I have listed all events responsive to Question 12.d.

3. For each of the newly disclosed speeches, you note that you “have no notes, transcript, or recording” of the event in question.

a. Please describe the nature of the search that you have conducted to reach that conclusion.

RESPONSE: I, and others acting on my behalf, reviewed my personal files as well as publicly available resources.

b. Have you asked the University whether it possesses notes, transcripts, or recordings of these speeches?

RESPONSE: For each of the events listed in response to Question 12.d, including those identified as potentially responsive in the letters I sent to the Committee, where I do not possess notes, transcripts, or recordings, I provided an appropriate address consistent with the Questionnaire’s instructions.

c. Have you contacted attendees at each of these events to inquire as to whether they have notes, transcripts, or recordings?

RESPONSE: Please see my response to Question 3.b.

d. Have you contacted attendees at any of these events to inquire as to whether they have notes, transcripts, or recordings? If so, have you collected any available materials reflecting the speeches in question?

RESPONSE: Please see my response to Question 3.b.

e. Are you aware of the location or owner of any notes, transcripts, or recordings of any of these events that you have not been able to obtain? If so, please provide all information that you have concerning the owner and/or location of such materials.

RESPONSE: Please see my response to Question 3.b.

4. You have similarly indicated that you “have no notes, transcripts, or recording” for numerous other speaking engagements in your original response to the Committee Questionnaire.

a. Please describe the nature of the search that you have conducted to reach that conclusion.

RESPONSE: Please see my response to Question 3.a.

b. Have you asked the University and any other entity that has hosted a speech, talk, or event in which you’ve participated whether they possess transcripts or recordings?

RESPONSE: Please see my response to Question 3.b.

c. Have you contacted attendees at each of these events to inquire as to whether they have notes, transcripts, or recordings?

RESPONSE: Please see my response to Question 3.b.

d. Have you contacted attendees at any of these events to inquire as to whether they have notes, transcripts, or recordings?

RESPONSE: Please see my response to Question 3.b.

e. Are you aware of the location or owner of any notes, transcripts, or recordings of any of these events that you have not been able to obtain? If so, please provide all information that you have concerning the owner and/or location of such materials.

RESPONSE: Please see my response to Question 3.b.

5. You testified during the hearing that you did not formally disclose the 2006 public letter and ad sponsored by St. Joseph’s County Right to Life because you did not consider it responsive to the Committee Questionnaire. Are you aware of any other letters, speeches, statements, or other materials reflecting your legal views on matters of law and public policy,

including, but not limited to *Roe v. Wade* and the constitutional rights to privacy and to have an abortion, that you have not disclosed?

RESPONSE: To the best of my knowledge, I have listed all matters responsive to Question 12 of the Questionnaire.

6. At any point prior to your nomination to the Seventh Circuit Court of Appeals, had you ever argued, advised, suggested, recommended, or proposed—

a. That the Affordable Care Act’s individual mandate is unconstitutional? If so, please identify all articles, briefs, speeches, talks, or other circumstances in which such statements occurred.

RESPONSE: To the best of my knowledge, and with the assistance of others acting on my behalf, I have listed any articles, briefs, speeches, talks, or similar items that could be responsive to this Question in my Questionnaire.

b. That the individual mandate is not severable from any other provision in or the remainder of the Affordable Care Act? If so, please identify all articles, briefs, speeches, talks, or other circumstances in which such statements occurred.

RESPONSE: Please see my response to Question 6.a.

7. You testified at your hearing that you have made no commitments to anyone concerning your potential role in *California v. Texas* as an Associate Justice of the Supreme Court. At any point since your nomination to the Seventh Circuit Court of Appeals, have you—

a. Spoken to, received messages from, or otherwise communicated with any person in the Trump Administration, including, but not limited to, the President, the White House Counsel’s Office, other White House staff, and the Department of Justice, regarding the Affordable Care Act or the Administration’s arguments, position, or strategy in *California v. Texas*? If so—

RESPONSE: I have not discussed the Administration’s arguments, position, or strategy in *California v. Texas* with any person in the Trump Administration. With respect to the Affordable Care Act more generally, I was asked questions similar to those posed by the Senators on the Senate Judiciary Committee during preparation for the hearing and during preparation for meetings with individual Senators. I was not asked and have made no promises or commitments to anyone regarding how I might rule in any case involving the Act.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated.

RESPONSE: Please see my response to Question 7.a.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 7.a.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about each person.

RESPONSE: Please see my response to Question 7.a.

b. Spoken to, received messages from, or otherwise communicated with any person from or associated with, whether officially or unofficially, the Trump Campaign regarding the Affordable Care Act or the Trump Administration's arguments, position, or strategy in *California v. Texas*? If so—

RESPONSE: While I am unaware of everyone who may be “associated with, whether officially or unofficially, the Trump Campaign,” to the best of my knowledge, no.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated.

RESPONSE: Please see my response to Question 7.b.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 7.b.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 7.b.

c. Spoken to, received messages from, or otherwise communicated with any Senator or Senate staffer outside your sworn testimony during your nomination hearing regarding the Affordable Care Act or the Trump Administration's arguments, position, or strategy in *California v. Texas*? If so—

RESPONSE: I have not discussed the Administration's arguments, position, or strategy in *California v. Texas* with any Senator or Senate staffer outside my sworn testimony during my nomination hearing. I have discussed the Affordable Care Act with Senators or Senate staffers outside of my sworn testimony only in response to questions about my academic writings relating to the Act. I was not asked to and have made no promises or commitments to anyone regarding how I might rule in any case involving the Act.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated.

RESPONSE: Please see my response to Question 7.c.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 7.c.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 7.c.

d. Spoken to, received messages from, or otherwise communicated with any party or party representative challenging the constitutionality of the Affordable Care Act's individual mandate or any other part of the Affordable Care Act in *California v. Texas*? If so—

RESPONSE: Not to my knowledge.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated.

RESPONSE: Please see my response to Question 7.d.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 7.d.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 7.d.

e. Spoken to, received messages from, or otherwise communicated with any other person regarding the Trump Administration's arguments, position, or strategy in *California v. Texas* or related issues concerning the Affordable Care Act? If so—

RESPONSE: As disclosed on my Senate Judiciary Committee Questionnaire, and as I testified at my hearing, I participated in a moot court that included other sitting judges, lawyers, and academics at William & Mary Law School on September 11, 2020. I do not recall any other communications regarding the Trump Administration's arguments,

position, or strategy in *California v. Texas* or related issues concerning the Affordable Care Act.

- i. Please list each person with whom you spoke, received messages from, or otherwise communicated.

RESPONSE: Please see my response to Question 7.e.

- ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 7.e.

- iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 7.e.

8. During your nomination hearing, Chairman Graham asked, “What’s the precedent regarding the Affordable Care Act, if any?” You answered, “There’s no[] precedent on the issue that’s coming up before the Court,” referring to *California v. Texas*.

- a. Please state the issue(s) before the Supreme Court in *California v. Texas*.

RESPONSE: The questions presented that the Supreme Court accepted for review in *California v. Texas* are:

1. Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a) of the Patient Protection and Affordable Care Act (ACA).
2. Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.
3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

You then said, still in response to Chairman Graham’s question, “It turns on a doctrine called severability, which was not an issue in either of the two big Affordable Care Act cases.”

- b. Does the survival of the Affordable Care Act, in whole or in part, “turn[]” on the “doctrine of severability” if the Supreme Court finds that the plaintiffs do not have standing to challenge the statute?

RESPONSE: In my response to Chairman Graham, I intended to indicate that the plaintiffs would have to clear all three hurdles to win. Because this question asks about

matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

c. Does the survival of the Affordable Care Act, in whole or in part, “turn[]” on the “doctrine of severability” if the individual mandate is upheld as it was in *NFIB v. Sebelius*?

RESPONSE: Please see my response to Question 8.b.

You later stated, in response to a question from Senator Harris, that, on the issue of severability, “the question would be figuring out whether Congress, assuming that the mandate is unconstitutional now, whether . . . Congress[] . . . would permit this Act to stand or whether the flawed portion of it could just be excised out. And that is question not of what the judges want; it’s not a question of the Supreme Court. It’s a question of what Congress wanted in the statute.”

d. Please explain how a court determines “what Congress wanted in [a] statute.”

RESPONSE: The Supreme Court has explained that “courts hew closely to the text of severability or nonseverability clauses,” and where a statute does not contain such a clause, courts should “presume[] that an unconstitutional provision in a law is severable from the remainder of the law or statute.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349, 2350 (2020) (plurality opinion).

9. At any point before the President offered to nominate you to the Supreme Court on September 21, 2020—

a. Did the President or anyone else from the White House or Trump Administration speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, cases related to the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: No.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: No.

b. Did anyone from or associated with, whether officially or unofficially, the Trump Campaign, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Republican National Committee, or any Republican campaign for elected office at a federal, state, or local level speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, cases related to the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: While I am unaware of everyone who may be “from or associated with, whether officially or unofficially,” each and every one of these organizations, to the best of my knowledge, no.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 9.b.i.

c. Did any Senator or Senate staffer speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: No.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: No.

d. Did anyone from or associated with, whether officially or unofficially, the Federalist Society, the Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organization speak or otherwise communicate with you about:

i. The 2020 election, including, but not limited to, mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: While I am unaware of everyone who may be “from or associated with, whether officially or unofficially,” each and every one of these organizations, to the best of my knowledge, no.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 9.d.i.

10. At any point since the President offered to nominate you to the Supreme Court and you accepted his offer on September 21, 2020—

a. Has the President or anyone else from the White House or Trump Administration speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, cases related to the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Outside of routine preparation for my hearing during which lawyers in the Office of the White House Counsel and the Department of Justice advised me on the types of questions I may be asked, I do not recall any such communications.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Outside of routine preparation for my hearing during which lawyers in the Office of the White House Counsel and the Department of Justice advised me on the types of questions I may be asked, I do not recall any such communications.

b. Has anyone from or associated with, whether officially or unofficially, the Trump Campaign, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Republican National Committee, or any Republican campaign for elected office at a federal, state, or local level speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, cases related to the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: While I am unaware of every individual who may be “from or associated with, whether officially or unofficially” each and every one of these organizations, to the best of my knowledge, no.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 10.b.i.

c. Has any Senator or Senate staffer speak or otherwise communicate with you about:

i. Possible legal cases arising from the 2020 election, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Prior to my hearing, I had meetings or telephone conversations with more than 40 Senators, who discussed a wide range of issues with me. Consistent with the Code of Conduct for United States Judges, I made no commitments regarding any pending or impending litigation, or possible legal cases, including the issues noted above.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 10.c.i.

d. Has anyone from or associated with, whether officially or unofficially, the Federalist Society, the Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organization speak or otherwise communicate with you about:

i. The 2020 election, including, but not limited to, mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: While I am unaware of every individual who may be “from or associated with, whether officially or unofficially” each and every one of these organizations, to the best of my knowledge, no.

ii. The 2020 election more generally, including, but not limited to, the topics of mail-in or absentee voting and/or ballots, early voting, voter identification, voter fraud, ballot drop boxes, poll watchers, and election results? If so, please identify each person with whom you spoke or otherwise communicated and summarize what you spoke or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 10.d.i.

11. In response to Question 26 in your Senate Judiciary Questionnaire (SJQ), you stated:

“On Saturday, September 19, 2020, Counsel to the President Pat Cipollone and Chief of Staff Mark Meadows called me about the vacancy. On Sunday, September 20, 2020, I spoke to Mr. Cipollone and Chief of Staff Meadows again, who invited me to come to Washington, and President Trump later called to confirm the invitation. I had meetings with President Trump, Vice President Pence, Mr. Cipollone, and Chief of Staff Meadows in Washington on Monday, September 21, 2020. The President offered me the nomination on that day, and I accepted, subject to finalizing the vetting process.”

a. At any point prior to the President offering to nominate you to the Supreme Court of the United States on September 21, 2020, did you speak to, receive messages from, or otherwise communicate with individuals from, representing, or associated with, whether officially or unofficially, at present or in the last year, the Federalist Society, Judicial

Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organizations about being nominated to the Supreme Court? If so—

RESPONSE: While I am unaware of every individual who may be “from, representing, or associated with, whether officially or unofficially, at present or in the last year” each and every one of these organizations, to the best of my knowledge, I did not communicate with any such individual about being nominated to fill this vacancy.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated, including their employer.

RESPONSE: Please see my response to Question 11.a.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 11.a.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 11.a.

b. At any point since the President offered to nominate you to the Supreme Court of the United States and you accepted his offer on September 21, 2020, have you spoken to, received messages from, or otherwise communicated with individuals from, representing, or associated with, whether officially or unofficially, at present or in the last year, the Federalist Society, Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organizations about being nominated to the Supreme Court? If so—

RESPONSE: I have spoken with many people, and received messages from many more, since my nomination. Senators, Administration personnel, former students, law clerks, friends, and family have congratulated me on my nomination and provided me advice on the process. I am unaware of everyone who may be “associated with, whether officially or unofficially . . . the Federalist Society, Judicial Crisis Network the Heritage Foundation, or any other Republican-aligned outside organizations.” But Carrie Severino, who I understand to be employed by the Judicial Crisis Network, wished me well following the announcement of my nomination.

i. Please list each person with whom you spoke, received messages from, or otherwise communicated, including their employer.

RESPONSE: Please see my response to Question 11.b.

ii. Please explain the capacity in which you spoke, received messages from, or otherwise communicated with each person.

RESPONSE: Please see my response to Question 11.b.

iii. Please provide a summary of what you spoke, received messages from, or otherwise communicated about with each person.

RESPONSE: Please see my response to Question 11.b.

c. Please describe, in detail, the “vetting process” you were subject to after you had accepted the President’s offer on September 21, 2020, including each person involved in that vetting process and their employer.

RESPONSE: It is my understanding that the FBI conducted a background investigation.

You also stated in response to SJQ Question 26, “I have also been in regular contact with members of the White House Counsel’s Office and the Department of Justice.”

d. Please identify the members of the White House Counsel’s Office and the Department of Justice with whom you have “been in regular contact.”

RESPONSE: I have had contact with Counsel to the President Pat Cipollone and Assistant Attorney General for the Office of Legal Policy Beth Williams as well as attorneys in their offices.

e. Please describe those contacts, including, but not limited to, when those contacts took place and what those contacts were about.

RESPONSE: Consistent with the practice of past nominees, I have had routine contact with attorneys from the Office of the White House Counsel and the Department of Justice for assistance in completing relevant paperwork, including the Committee Questionnaire; preparing for my hearing; and preparing the written responses to Questions for the Record.

12. Please identify each individual and their employer, including individuals on paid or unpaid leave from or otherwise associated with, officially or unofficially, at present or in the last year, the Federalist Society, Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organizations, who helped, aided, consulted, or were otherwise involved in preparing you for—

a. Your September 19, 2020 call with Mr. Cipollone and Mr. Meadows.

RESPONSE: None that I recall.

b. Your September 20, 2020 call with Mr. Cipollone and Mr. Meadows.

RESPONSE: None that I recall.

c. Your September 21, 2020 meetings with President Trump, Vice President Pence, Mr. Cipollone, and Mr. Meadows.

RESPONSE: None that I recall.

d. The President's public announcement of your nomination to the Supreme Court of the United States in the Rose Garden on September 26, 2020.

RESPONSE: Please see my response to Questions 12d.–h. below.

e. Your in-person, telephonic, or virtual meetings with Senators and Senate staff at any point prior to or since you accepted the President's offer to nominate you to the Supreme Court of the United States on September 21, 2020.

RESPONSE: Please see my response to Questions 12d.–h. below.

f. Your nomination hearing on October 12, 13, and 14, 2020.

RESPONSE: Please see my response to Questions 12d.–h. below.

g. Your responses to Questions for the Record submitted by members of the Senate Committee on the Judiciary on October 16, 2020.

RESPONSE: Please see my response to Questions 12d.–h. below.

h. Any other phone calls, meetings, in-person or virtual, or communications, oral or written, related or pertaining to your nomination to the Supreme Court of the United States at any point prior to or since you accepted the President's offer to nominate you to the Supreme Court of the United States on September 21, 2020.

RESPONSE: Please see my response to Questions 12d.–h. below.

For each individual identified in response to (a) through (h), listed above, please summarize the nature of their help, aid, consultation, or other involvement, including whether they instructed, directed, suggested to, hinted at, indicated to or otherwise communicated to you not to answer specific questions, questions related or pertaining to certain legal, constitutional, or jurisprudential subjects, or any other topics or subject-matters. If so, please describe what they instructed, directed, suggested, hinted, indicated, or otherwise communicated to you to do, say, or write in response.

RESPONSE TO QUESTIONS 12.d through h: Various people have provided me advice throughout this process, including Senators, Administration personnel, former students, law clerks, friends, and family. I am unaware of everyone who may be

“associated with, whether officially or unofficially,” the Federalist Society, Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organizations. To the best of my knowledge, no one employed by or on leave from “the Federalist Society, Judicial Crisis Network, the Heritage Foundation, or any other Republican-aligned outside organizations” helped, aided, consulted, or was otherwise involved in preparing me for the events listed in Questions 12d through h.

13. During the 2016 presidential campaign, President Trump stated that the Federalist Society and Heritage Foundation were providing him a list of potential nominees to the Supreme Court and that he would select a nominee from that list. You were not on the initial list of potential nominees but were added on November 17, 2017.

a. What communications, if any, did you, or anyone on your behalf, have with members of the board of directors, staff, or members of the Federalist Society or Heritage Foundation concerning your omission from the initial list?

RESPONSE: To the best of my knowledge, none.

b. Did you or anyone on your behalf advocate for your name to be added? If so—

RESPONSE: To the best of my knowledge, no.

i. Please describe the participants in the conversations, the dates, the substance of the conversations, and any other relevant details.

RESPONSE: Please see my response to Question 13.b.

ii. Were your views on any legal issues discussed? If so, what were those legal issues and what were your views.

RESPONSE: Please see my response to Question 13.b.

c. Have you ever discussed any of your legal views with any member of the board of directors or staff of the Federalist Society or Heritage Foundation? If so, please describe the participants in and substance of those communications, as well as the dates.

RESPONSE: As indicated in response to Question 12.d. of the Senate Judiciary Questionnaire, I have spoken at, or otherwise participated in, events sponsored by the Federalist Society. With the exception of these events, I do not recall any occasion on which I discussed my legal views with any member of the board of directors or staff of the Federalist Society or Heritage Foundation.

14. During my questioning, I referenced that you had co-authored an article with John Nagel, *Congressional Originalism*, in which you wrote that “answering hypothetical questions about particular precedents is par for the course.” You responded by saying that, “that quote that you read to me from the article talked about it being ‘par for the course’ for those questions to be

asked, but didn't say anything about whether it was appropriate for nominees to answer them." The full quote from *Congressional Originalism* appears on page 17 and reads: "Constitutional adjudication is not like a confirmation hearing, in which answering hypothetical questions about the soundness of particular precedents is par for the course." You specifically stated in your article that *answering*, not *being asked*, such questions was what was par for the course.

a. Why did you refuse to do what you stated was "par for the course" just four years ago?

RESPONSE: As I explained in the same paragraph from which you quote, "[j]udges can only address issues when litigants with standing bring them." Further, "federal courts cannot answer questions in the abstract." Consistent with the practice of other sitting judges and nominees, I have discussed my judicial philosophy during my hearing and in response to these written questions, subject to the limitations imposed by the Code of Conduct for United States Judges. As Justice Kagan explained, it is not appropriate for a judicial nominee to "grade" or give a "thumbs-up or thumbs-down" to particular cases.

b. Why did you misstate your previous position?

RESPONSE: I misremembered the wording of the sentence because I did not have the article in front of me at the hearing. Regardless, that single sentence—which appeared in a 44-page article devoted to a different topic—was written before I was a judge and did not reflect a considered position on the obligations of a sitting judge during a confirmation proceeding. For my views on that question, please see my response to Question 14.a.

15. Do you believe that a strict reading of the Constitution provides for the treatment of corporations as "persons" under the law for purposes of equal protection, freedom of speech or due process of law? And, if so, what in the Constitution's text provides a basis for this belief?

RESPONSE: The Supreme Court has held that the term "person" in some constitutional provisions includes corporations. See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (equal protection); *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1893) (due process); cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (First Amendment). It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to "grade" or give a "thumbs-up or thumbs-down" to particular cases.

16. During your nomination hearing, Ranking Member Feinstein asked you whether the Constitution gives "the President of the United States the authority to unilaterally delay a general election under any circumstances." You testified, "Well, Senator, if that question ever came before me, I would need to hear arguments from litigants and read briefs and consult with my law clerks and talk to my colleagues and go through the opinion-writing process. So, you know, if I give off-the-cuff answers, then I would be basically a legal pundit, and I don't think we want judges to be legal pundits. I think we want judges to approach cases thoughtfully with an open mind."

a. What does Article I, section 4, clause 1 of the Constitution state?

RESPONSE: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

b. Please identify the text in the Constitution that creates any doubt as to whether the President may unilaterally delay a general election.

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

17. During your nomination hearing, Senator Booker asked whether you believe that every president should make a commitment to the peaceful transition of power. You testified, “Well, Senator, that seems to me to be pulling me in a little bit into this question of whether the President has said that he would not peacefully leave office. And so, to the extent that this is a political controversy right now, as a judge, I want to stay out of it and I don’t want to express a view.”

a. Is it your testimony that presidents need not make a commitment to the peaceful transition of power?

RESPONSE: That is not my testimony. As I stated in the same exchange with Senator Booker, one of the beauties of America from the beginning of the republic is that we have had peaceful transfers of power.

18. During your nomination hearing, Senator Durbin asked you whether a president can unilaterally deny the right to vote to any person based on their race. You answered, “I really can’t say anything more than I’m not going to answer hypotheticals.” Section 1 of the Fifteenth Amendment to the United States Constitution states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

a. Is it still your testimony that you cannot say whether a president can deny the right to vote to any person based on their race?

RESPONSE: This question mischaracterizes my testimony. In response to the question whether the President has the authority to unilaterally deny the right to vote to any person based on their race, I responded, “Well, Senator, obviously there are many laws in effect, including the Equal Protection Clause, which prohibits discrimination on the basis of race, including the 15th Amendment, which protects the right to vote against discrimination, based on race. And so there is a principle in constitutional law called external constraints, and even if one evaluates what the authority a branch might have to

act, there are external constraints that press in from other parts of the Constitution. Here it would be the 14th and 15th Amendments.” When asked the same question again, I said “I don’t know how else I can say it, the Constitution contains provisions that prohibit discrimination on the basis of race and voting.” And it was only when I was asked a third time that I said, “Well, Senator, you have asked a couple of different questions about what the President may be able to unilaterally do, and I think that I really can’t say anything more than I am not going to answer hypotheticals.”

19. During your nomination hearing, Senator Klobuchar asked you “under federal law, is it illegal to intimidate voters at the polls?” You answered, “I can’t characterize the facts in a hypothetical situation and I can’t apply the law to a hypothetical set of facts. I can only decide cases as they come to me, litigated by parties on full record after fully engaging precedent, talking to colleagues, [and] writing an opinion . . . so I can’t answer questions like that.” Title 18, United States Code, Section 594, titled “Intimidation of Voters,” states:

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.

a. Is it still your testimony that you cannot answer whether it is illegal under federal law to intimidate voters at the polls?

RESPONSE: The plain text of Section 594, quoted above, makes unlawful intimidation or related conduct “for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for” certain offices. In the sentence immediately before the question to which you refer, Senator Klobuchar said that “as a result of [the President’s] claims [of massive voter fraud], people are trying to get poll watchers, Special Forces people, to go to the polls.” I understood her question about federal law to be referring to the facts she described. Senator Klobuchar then asked: “Do you think a reasonable person would feel intimidated by the presence of armed civilian groups at the polls?” As I said at the hearing, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to offer an opinion on abstract legal issues or hypotheticals.

20. Please state whether murder on federal land is a federal crime.

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

21. During your nomination hearing, in response to a question from Senator Crapo about recusal, you stated, “[R]ecusal is [a] question of law because 28 U.S.C. 455, the recusal statute, actually obligates a judge to recuse in certain cases of either actual bias or apparent bias.” You

also said, in response to a question from Chairman Graham, that section 455 “governs when judges and justices have to recuse” and that “Justice Ginsburg, in explaining the way recusal works, said that it’s always up to the individual justice, but it always involves consultation with . . . the other eight justices.”

a. Please summarize subsections (a) and (b) of section 455, including the standard for recusal and whether the standard for recusal is objective or subjective.

RESPONSE: Subsection (a) of 28 U.S.C. § 455 requires “[a]ny justice, judge, or magistrate judge of the United States [to] disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Subsection (b) lays out additional circumstances where a judge or justice must recuse. These include, but are not limited to “[w]here [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” *id.* § 455(b)(1).

In *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000), Chief Justice Rehnquist issued a statement declining to disqualify himself, writing that the recusal inquiry “is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Id.* at 1302.

In response to a question from Senator Coons about “the appearance of bias” in the context of recusal, you stated that section 455 “does require a justice or judge to recuse when there is an appearance of bias.” You then testified, “[W]hat I will commit to every member of this Committee, to the rest of the Senate, and to the American people, is that I will consider all factors that are relevant to that question—relevant to that question that requires recusal when there is an appearance of bias.”

b. Please state whether the plain text of section 455(a) contemplates or otherwise includes “factors that are relevant” to the question of recusal when there is an appearance of bias. If the plain text of subsection (a) does not contemplate or otherwise include such “factors,” please identify the specific factors to which you were referring and the statutory or jurisprudential bases for each of them.

RESPONSE: I testified that section 455(a) requires a justice or judge to recuse when there is an appearance of bias, and I promised to consider “all factors that are relevant” to determining whether there is an appearance of bias. Decisions to recuse are legal questions answered through a specific process in the context of an actual case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

In 1998, you wrote that section 455(a) “is concerned less with the litigants’ rights to a neutral judge than with the appearance of justice and the legitimacy of the judicial system.”¹

¹ Amy Coney Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 332 (1998).

c. Please describe what you meant by “the legitimacy of the judicial system” and state whether you still believe that section 455(a) “is concerned less with the litigants’ rights to a neutral judge than with the appearance of justice and the legitimacy of the judicial system.”

RESPONSE: Section 455(a) requires a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The Supreme Court has said that, under § 455(a), “what matters is not the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

You also wrote, “For that reason, [section 455(a)] asks how people might perceive the judge—it may require recusal if there is no bias in fact.” You continued, “It is not a question about the judge’s state of mind at all. The issue is whether a reasonable person might doubt his impartiality.”

During your nomination hearing, in response to questions about whether you would commit to recusing yourself, if you are confirmed to the Supreme Court of the United States, in *California v. Texas* or from any cases involving President Trump arising out of the 2020 election, you repeatedly stated that you “have no agenda” and that you “would not be coming in with any agenda.”

d. Please describe whether, in the analytic structure you described, having “no agenda” and not “coming in with any agenda” relates to your “state of mind” or to “whether a reasonable person might doubt [your] impartiality.”

RESPONSE: As an initial matter, I do not recall making these statements in response to questions about recusal in particular. But in any event, as I explained at the hearing, recusal is a question of law that must be addressed in the context of a specific case. My decision whether to recuse in a case would be guided by the applicable law and the facts of the case.

e. Please state whether you agree that “a reasonable person might [doubt] your impartiality” even if you, in fact, “have no agenda.”

RESPONSE: Please see my response to Question 21.d.

f. Please state whether you agree that a “reasonable person” could take into account a third-party’s comments about a judge or a case in reaching an opinion or perception about that judge or case.

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

22. During your nomination hearing, Senator Klobuchar displayed a tweet from @realdonaldtrump posted on June 26, 2015 that stated, “If I win the presidency, my judicial appointments will do the right thing unlike Bush’s appointee John Roberts on ObamaCare.” Senator Klobuchar asked you, “Do you think we should take the President at his word when he said his nominee will do the right thing and overturn the Affordable Care Act.” You answered, “I can’t really speak to what the President has said on Twitter. He hasn’t said any of that to me.”

Senator Harris asked you if, prior to your nomination, you were “aware of President Trump’s statements committing to nominate judges who will strike down the Affordable Care Act.” You answered, “I want to be very, very careful. I’m under oath. As I’m sitting here, I don’t recall seeing those statements. . . I don’t recall seeing or hearing those statements but I don’t really know what context they were in.”

Senator Harris then asked you if, during your preparation for your nomination hearing, you were informed of the aforementioned statements and “that this might be a question that was presented to you during the course of this hearing.” You answered, “When I had my calls with the Senators, it came up. Many of the Democratic Senators wanted to know about the Affordable Care Act and to satisfy themselves that I had not made any pre-commitments to [the] President about it.”

a. Is it still your testimony that outside your “calls with the Senators,” you “don’t recall seeing or hearing those statements”?

RESPONSE: This question mischaracterizes my testimony. The relevant testimony from the hearing is as follows:

Senator Harris: Senator Klobuchar, Judge Barrett, asked you earlier today, but did not receive an answer. Prior to your nomination, were you aware of President Trump’s statements committing to nominate judges who will strike down the Affordable Care Act? And I would appreciate a yes or no answer, please.

Judge Barrett: Well, Senator Harris, I want to be very, very careful. I am under oath. As I am sitting here I don’t recall seeing those statements, but if—let’s see, I don’t recall seeing or hearing those statements, but I don’t really know what context they were in, so I can’t really definitively give you a yes or no answer. What I would like to say is that I don’t recall hearing about or seeing such statements.

Senator Harris: Well, I imagine you were surrounded by a team of folks who helped prepare you for this nomination and hearing. Did they—

Judge Barrett: I have had—yeah—

Senator Harris: Well, let me finish, if you don’t mind.

Judge Barrett: Oh, I am so sorry.

Senator Harris: Did they inform you of the President's statements and that this might be a question that was presented to you during the course of this hearing?

Judge Barrett: When I had my calls with Senators it came up. Many of the Democratic senators wanted to know about the Affordable Care Act and to satisfy themselves that I had not made any pre-commitments to the President about it.

Senator Harris: And so you then became aware of the President's statement? Is that correct?

Judge Barrett: Let's see, Senator Harris. In the context of these conversations I honestly can't remember whether Senators framed the questions in the context of President Trump's comments. Perhaps so. I think, from my perspective, the most important thing is to say that I have never made a commitment, I have never been asked to make a commitment, and I hope that the committee would trust in my integrity not to even entertain such an idea, and that I wouldn't violate my oath if I were confirmed and heard that case.

Senator Harris: So just so I am clear, and then we can move on, are you saying that you are now—before I said it—aware or not aware that President Trump made these comments about who he would nominate to the United States Supreme Court?

Judge Barrett: Senator Harris, what I was saying, I thought you initially framed the question as whether I was aware before this nomination process began, and my answer to that—

Senator Harris: If you are aware—were you aware before this hearing began?

Judge Barrett: You are changing—you are asking me now whether I was aware before the hearing began?

Senator Harris: As a follow-up question I am, yes.

Judge Barrett: And what I said was that when I had my calls with Democratic Senators this question came up, and I don't recall but it may well have been that they referenced those comments in the course of those calls. Even if so, that wasn't something that I heard or saw directly by reading it myself.

b. Have you now seen and heard “those statements” and “know what context they were in”?

RESPONSE: As you note, Senator Klobuchar displayed a June 26, 2015 tweet at the hearing.

i. If so, please explain “what context they were in.”

RESPONSE: Please see my response to Question 22.b.

ii. If not, please explain why not.

RESPONSE: Please see my response to Question 22.b.

c. Under the standard set forth by the plain text of section 455(a) should a reasonable person consider—

i. “[T]hose statements” in assessing your impartiality in presiding over *California v. Texas* if you are confirmed to the Supreme Court of the United States? Please explain why or why not.

RESPONSE: The question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. As Justice Ginsburg described the process that Supreme Court justices go through in deciding whether to recuse, it involves reading the statute, reviewing precedents, and consulting with colleagues. As a sitting judge and judicial nominee, it would not be appropriate for me to opine on this abstract legal issue without going through the process described.

ii. Your awareness or knowledge of “those statements” in assessing your impartiality in presiding over *California v. Texas* if you are confirmed to the Supreme Court of the United States? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

iii. Whether or not the President has “said any of that to [you]” in assessing your impartiality in presiding over *California v. Texas* if you are confirmed to the Supreme Court of the United States? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

23. During your nomination hearing, Senator Coons stated, “Just days after Justice Ginsburg passed, the President was asked why there was such a rush to fill her seat before the election and he responded, ‘We need nine justices, you need that. With the millions of ballots that they,’” referring to Democrats, “‘are sending, it’s a scam. It’s a hoax. They’re going to need nine justices.’” Senator Coons further quoted the President, stating, “[H]e doubled down, ‘I think this,’” referring to the election, “‘will end up in the Supreme Court. It’s very important. We must have nine justices.’”

a. Prior to your nomination to the Supreme Court, had you heard, read, learned, or otherwise become aware that President Trump made the aforementioned remarks quoted by Senator Coons at your nomination hearing? If not, have you since heard, read, learned, or otherwise become aware that President Trump said the aforementioned remarks?

RESPONSE: I do not recall hearing the quoted remarks before my nomination to the Supreme Court. During the hearing, I listened as Senator Coons read the above statements.

At the first and, to this point, only 2020 presidential debate, President Trump was asked if he was counting on the Supreme Court, including a “Justice Barrett,” to settle any dispute arising out of the election. He answered, “Yeah, I think I’m counting on them to look at the ballots, definitely . . . I hope we don’t need them in terms of the election itself, but for the ballots, I think so.”

b. Since your nomination to the Supreme Court, had you heard, read, learned, or otherwise become aware that President Trump stated that he is “counting on [the Supreme Court] to look at the ballots, definitely”? If not, have you since heard, read, learned, or otherwise become aware that President Trump said that he “counting on [the Supreme Court] to look at the ballots, definitely”?

RESPONSE: Senators Leahy and Klobuchar referred to these comments during my hearing.

Senator Coons asked you, “Given what President Trump has said [and] given the rushed context of this confirmation, will you commit to recusing yourself from any case arising from a dispute in the presidential election results three weeks from now?” You answered, “I want to be very clear for the record and to all members of this Committee that, no matter what anyone else may think or expect, I have not committed to anyone or so much signaled.” You also stated, “I certainly hope that all members of the Committee have more confidence in my integrity than to think that I would allow myself to be used as a pawn to decide this election for the American people.”

c. Under the standard set forth by the plain text of section 455(a), and that you have described, is your actual integrity the relevant standard, or is the standard whether a reasonable person might question your impartiality?

RESPONSE: The recusal statute provides that a justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a).

d. Under the standard set forth by the plain text of section 455(a) should a reasonable person consider—

i. President Trump’s statement quoted by Senator Coons at your nomination hearing in assessing your impartiality in presiding over any cases involving the President arising out of the 2020 election? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

ii. Your awareness or knowledge of President Trump’s statement quoted by Senator Coons at your nomination hearing in assessing your impartiality in

presiding over any cases involving the President arising out of the 2020 election? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

iii. President Trump’s remarks that he is “counting on [the Supreme Court] to look at the ballots, definitely” in assessing your impartiality in presiding over any cases involving the President arising out of the 2020 election? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

iv. Your awareness or knowledge of President Trump’s remarks that he is “counting on [the Supreme Court] to look at the ballots, definitely” in assessing your impartiality in presiding over any cases involving the President arising out of the 2020 election? Please explain why or why not.

RESPONSE: Please see my response to Question 22.c.i.

e. Under section 455(a), is the standard for recusal whether the Senate Committee on the Judiciary “think[s] that [you] would allow [yourself] to be used as a pawn to decide this election for the American people” or whether your “impartiality might reasonably be questioned”?

RESPONSE: Please see my response to Question 23.c.

24. You have said that *Boumediene* was wrongly decided—that the Bush administration should have been allowed to hold prisoners in Guantanamo Bay forever, with no ability to challenge their confinement in court.² You reasoned, “[T]he historical record fails to establish that courts had ever entertained habeas petitions filed by noncitizens held in other countries.” There was no historical record *either way*.

a. Why should historical silence be a reason to limit, rather than extend, important constitutional rights?

RESPONSE: As I said in my hearing, all judges and Justices take account of history and the original meaning of constitutional text to differing degrees. History is an important tool in interpreting constitutional text. But it does not follow that historical silence on a matter necessarily limits important constitutional rights.

b. Shouldn’t decisions instead be guided by what makes sense of the functional purpose of the right in question, and in the case of *Boumediene*, the need to have habeas

² Amy Coney Barrett, *The Scope of the Suspension Clause*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763#the-suspension-clause-by-amy-barrett>.

rights not turn on the technicality of whether an island is owned by the United States or “leased” for hundreds of years by the United States?

RESPONSE: Please see my response to Question 24.a.

25. During your nomination hearing, I asked if you were willing to say that *Roe v. Wade* was correctly decided. You answered, “Well, Senator, as I’ve said, you know, to others of your colleagues in response to questioning, that it’s inconsistent with the duties of the sitting judge and, therefore, has been the practice of every nominee that sat in this seat before me [not] to take positions on cases that the Court has decided in the past.”

a. Please state whether you stand by this answer.

RESPONSE: Please see my response to Question 14.a. I will add that, as I indicated at the hearing, nominees have felt freer to speak about precedents that they have previously spoken about publicly.

Senator Hawley has said, “I will vote only for those Supreme Court nominees who have explicitly acknowledge that *Roe v. Wade* is wrongly decided. By explicitly acknowledged, I mean on the record and before they were nominated.” Senator Hawley has since said that he will vote in favor of your nomination.

b. Have you “explicitly acknowledged” to Senator Hawley or anyone else that *Roe v. Wade* was wrongly decided?

RESPONSE: As I said at the hearing, I have made no commitments to anyone regarding how I would rule in any specific case.

26. During your nomination hearing, Senator Coons asked you whether you agree with Justice Scalia that *Griswold v. Connecticut* was wrongly decided. You answered, “Well, Senator, as I’ve said a number of times, I can’t express a view . . . I think that *Griswold* is very, very, very, very, very, very unlikely to go anywhere in order for *Griswold* to be overruled.” I asked whether you believe *Griswold* was correctly decided. You similarly stated, “I can’t give a yes or no, and my declining to give an answer doesn’t suggest disagreement or agreement.”

a. Does the “very, very, very, very, very, very” low unlikelihood that *Griswold* will “go anywhere” mean that *Griswold* can never be overturned?

RESPONSE: It means that it is very, very unlikely to be overturned, for the reasons I have explained.

In response to Senator Coons, you continued, “You, or a state legislature, would have to pass a law prohibiting the use of birth control, which seems, you know, shockingly unlikely. And then a lower court would have to buck Supreme Court precedent and say, ‘We’re not following *Griswold*’—again, seems very unlikely. So I think that it’s an academic question that wouldn’t arise. But it’s something that I can’t opine on, particularly because it does lie at the base of [the]

substantive due process doctrine, which is something that continued to be litigated in courts today.”

b. Since, in your view, *Griswold* “lie[s] at the base of [the] substantive due process doctrine . . . that continue[s] to be litigated in courts today,” isn’t it possible that, in your hypothetical, a “lower court” could “buck Supreme Court precedent and say, ‘We’re not following *Griswold*’”?

RESPONSE: Please see my response to Question 26.a.

Your answer implied both that the issues core to *Griswold* are being actively litigated, and therefore that you could not discuss them, and that the issues core to *Griswold* are so unlikely to be litigated that the case is in fact settled, and therefore that there is no need to discuss them. These positions are inconsistent.

c. Please clarify your position as to why you could not opine as to whether *Griswold* was correctly decided.

RESPONSE: As I said at my hearing, because *Griswold* lies at the base of substantive due process doctrine, an area that remains the subject of ongoing litigation, I cannot opine on it. But I do not think *Griswold* is in danger of going anywhere.

27. Justices Roberts, Kennedy, and Thomas all agreed with *Griswold*’s holding during their confirmation hearings. Please explain why they were able to answer this question but you decline to do so.

RESPONSE: Please see my response to Question 26. I will not speculate about the answers given by other judges in their confirmation hearings. Each Judge must decide for him or herself how to respond to particular questions consistent with the Code of Conduct for United States Judges.

28. During your nomination hearing, I asked you whether you believe *Lawrence v. Texas* was correctly decided. You answered, “[A]gain, you know, I’ve said through the hearing, that I can’t grade precedent—in the words of Justice Kagan—give it a thumbs up or thumbs down.” I also asked you whether you believe *Obergefell v. Hodges* was correctly decided. You stated, “[E]very time you ask me a question about whether a case was correctly decided or not, I cannot answer that question because I cannot suggest agreement or disagreement with precedents of the Supreme Court.” You then continued, “You’re pushing me to try to violate the judicial canons of ethics and to offer advisory opinions, and I won’t do that.”

a. Please identify the “judicial canons of ethics” to which you were referring and explain how answering these specific questions would violate them.

RESPONSE: As I have noted in response to previous questions, recent nominees have consistently concluded that it would be inconsistent with judicial independence to grade

or give a thumbs-up or thumbs-down to particular Supreme Court cases before this Committee.

You also testified, in response to my questioning about *Lawrence* and *Obergefell*, that “[a]ll of those precedents bar me now, as a Seventh Circuit judge, and were I to be confirmed, I would be responsible for applying the law [of] *stare decisis* to all of them.”

b. Is there any constitutional provision that requires the Supreme Court itself to “apply[] the law [of] *stare decisis*” ?

RESPONSE: I have written at great length about the virtues of *stare decisis* and the stability interests it serves. If I am confirmed, I would apply the doctrine of *stare decisis* as articulated by the Supreme Court.

While you did not answer whether you believe *Lawrence* and *Obergefell* were correctly decided, you did testify that *Brown v. Board of Education* and *Loving v. Virginia* were.

c. Please explain why it was not a violation of the “judicial canons of ethics” you referenced in your testimony and identified in response to Question 2(a) to state that *Brown* and *Loving* were correctly decided, but *Lawrence* and *Obergefell* were not.

RESPONSE: As I said at the hearing, I have stated publicly that I believe that *Brown* was correctly decided and *Loving* follows directly from *Brown*. I have not made similar public statements about *Lawrence* and *Obergefell*.

29. You stated during the hearing that *Brown* was correctly decided. But the schools of the District of Columbia—which were under the direct control of the federal government—remained segregated by law during the entire period of the proposal, ratification, and early enforcement of the Fourteenth Amendment.

a. As a public meaning originalist, do the expectations and judgments of citizens at the time of the enactment of a law regarding the application of that law to specific cases control the meaning of that law?

RESPONSE: I have not studied the question, as a legal scholar, whether *Brown v. Board of Education* was consistent with the original public meaning of the Equal Protection Clause. Some scholars have argued that it was. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). I have stated publicly that I believe *Brown* was correctly decided.

b. As a public meaning originalist, would the fact that those interpreting Title VII or the Equal Protection Clause did not envisage their extension to transgender or homosexual persons control the meaning of either provision?

RESPONSE: No; it is the original public meaning of the text of a law, not the subjective intent of any particular drafter, that controls.

30. During your nomination hearing, Senator Klobuchar asked whether you consider *Roe v. Wade* to be “super precedent.” You answered, “*Roe* doesn’t fall in that category” because it’s “not a case that everyone has accepted.”

a. Please state whether you have “accepted” *Roe*.

RESPONSE: In the exchange with Senator Klobuchar to which you are referring, I explained that the term “super precedent” is used in academic work to refer to cases that are so well settled that no political actors and no people seriously push for overruling. *Roe* does not fall within that category, but that does not mean that *Roe* should be overruled. *Roe* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

In two articles, you described seven “cases that appear most frequently on lists of super precedents,” which you defined as “decisions that no serious person would propose to undo even if they are wrong.”³ At your hearing, you told me that one of the seven cases that you list as commonly regarded as super precedent, *Brown v. Board of Education*, was, in your view, correctly decided. In your view, were the other six cases on your list of “cases that appear most frequently on lists of super precedents” correctly decided?

b. Was *Marbury v. Madison* correctly decided?

RESPONSE: In *Congressional Originalism*, I explained that the super-precedents identified in academic work are “decisions that no serious person would propose to undo even if they are wrong.” Please also see my response to Question 14.

c. Was *Martin v. Hunter’s Lessee* correctly decided?

RESPONSE: Please see my response to Question 30.b.

d. Was *Helvering v. Davis* correctly decided?

RESPONSE: Please see my response to Question 30.b.

e. Were the Legal Tender Cases correctly decided?

RESPONSE: Please see my response to Question 30.b.

f. Was *Mapp v. Ohio* correctly decided?

RESPONSE: Please see my response to Question 30.b.

g. Were the Civil Rights Cases correctly decided?

³ Amy C. Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. Penn. J. of Const. L. 1, 14 (2017); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1734 (2013).

RESPONSE: Please see my response to Question 30.b.

31. During your nomination hearing, Senator Harris asked whether you believe that climate change is happening. You answered, “You have asked me a series of questions that are completely uncontroversial, like whether COVID-19 is infections, whether smoking causes cancer, and then [tried] to analogize that to eliciting an opinion from me that is on a very contentious matter of public debate. And I will not do that. I will not express a view on a matter of public policy, especially one that is politically controversial because that’s inconsistent with the judicial role.”

a. Please describe the requirements of the judicial role, and explain why it prevented you from answering Senator Harris’ specific question.

RESPONSE: As a sitting judge and as a judicial nominee, it would be inappropriate for me to offer an opinion on matters of public policy. The Supreme Court has itself identified “climate change” as a “controversial subject[]” that is of “profound value and concern to the public.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2476 (2018) (internal citations omitted).

I asked you if you believe that human beings cause global warming. You responded, “I don’t think I am competent to opine on what causes global warming or not. . . . I don’t think that my views on global warming or climate change are relevant to the job I would do as judge, nor do I feel like I have views that are informed enough, and I haven’t studied scientific data. I’m not really in a position to offer any kind of informed opinion on what I think causes global warming.”

b. If you “don’t think that [your] views on global warming or climate change are relevant to the job [you] would do as a judge,” please explain why you cannot answer whether you believe human beings cause climate change.

RESPONSE: The Supreme Court has described “climate change” as a “controversial subject[]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

c. If you still cannot answer the question regarding whether human beings cause global warming, please identify the specific canon or rule that prevents you from doing so and explain why it prevents you from answering this question.

RESPONSE: As I have noted in my previous responses, recent nominees have concluded that it would be inconsistent with the Code of Conduct for United States Judges and the independence of the judiciary for a sitting judge to offer her views on matters of subjects of political controversy.

32. Do cars that burn gasoline emit pollutants into the air when driven?

RESPONSE: Congress has entrusted the Administrator of the Environmental Protection Agency to by regulation prescribe “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). Because this question raises matters that could be the subject of litigation, it would not be appropriate for me as a sitting judge to opine further.

a. Do power plants that burn coal emit pollutants into the air when operated?

RESPONSE: Congress has addressed the emission of air pollutants from stationary sources. 42 U.S.C. § 7412(b). Because this question raises matters that could be the subject of litigation, it would not be appropriate for me as a sitting judge to opine further.

b. Does the pollution caused by cars that burn gasoline and power plants that burn coal contribute to climate change?

RESPONSE: Please see my response to Question 31.b.

33. Does the use of masks inhibit the spread of COVID-19?

RESPONSE: This question is better directed to experts and policy makers.

a. Does social distancing inhibit the spread of COVID-19?

RESPONSE: Please see my response to Question 33.

b. Does ventilation of indoor spaces inhibit the spread of COVID-19?

RESPONSE: Please see my response to Question 33.

34. During your nomination hearing, Senator Harris asked you about the inherent imbalance between corporations and workers in the context of forced arbitration. As you know, forced arbitration clauses often appear in the fine print of consumer contracts and employee handbooks—yet they can have tremendous consequence. These clauses deny individual workers and consumers their day in court, instead compelling them to bring any claims in private arbitration, where the corporation can write the rules. Senator Harris asked whether you would recognize a point that Justice Ginsburg made in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420 (2019), that there is “extreme imbalance” of power between large corporations and individual workers in this context. You responded that you are “not going to engage in critiquing or embracing portions of opinions, especially opinions that have been recently decided and are contentious, from the Court.”

a. Without critiquing or embracing the Supreme Court’s recent decisions, can you state as a general matter whether you agree that there is an imbalance of power between large corporations and individual workers in the context of forced arbitration?

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge, it would be inappropriate for me to offer an opinion on the matter.

b. In your legal view, what is the purpose of the Federal Arbitration Act (FAA)?

RESPONSE: The Supreme Court has said that the FAA was enacted “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

35. During your nomination hearing, Senator Booker asked you if a president has the power to pardon himself for past or future crimes. You answered, “Well, Senator Booker, that would be a legal question. That would be a constitutional question. And so, in keeping with my obligation not to give hints, previews, or forecasts of how I would resolve a case, that’s not one that I can answer.”

a. Please state whether you stand by that answer.

RESPONSE: Article II, Section 2 of the Constitution provides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Because the scope of the pardon power could be the subject of litigation, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to opine further on the matter.

During your nomination hearing, in response to questions from myself, Senator Leahy, and Senator Crapo, you repeatedly stated, “[N]o one is above the law” but you also refused to answer whether a self-pardon is constitutional.

b. How do you reconcile those answers?

RESPONSE: Please see my response to Question 35.a.

c. Do you still stand by them?

RESPONSE: Please see my response to Question 35.a.

The Nomination of Amy Coney Barrett to be an Associate Justice of the
Supreme Court of the United States
Questions for the Record

Senator Mazie K. Hirono

1. In response to a question by Senator Feinstein about whether the President has the authority to unilaterally delay the election, you said, “if that question ever came before me, I would need to hear arguments from the litigants and read briefs and consult with my law clerks and talk to my colleagues and go through the opinion writing process.” When Senator Durbin asked you whether you stood by your answer, you said, “I am not going to answer hypotheticals.” You however, answered the question of whether the President has the authority to unilaterally deny the right to vote to any person based on their race.”

a. Senator Feinstein’s question was not a hypothetical. Is it your position that whether the President has authority to unilaterally delay the election is an open question? Please answer yes or no.

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Such questions can only be answered through the judicial process.

b. Please identify the provisions of law that are relevant your answer to question (a).

RESPONSE: Please see my response to Question 1.a.

2. At the hearing, you acknowledged that racism persists in our country, but you refused to answer whether there is systemic racism, calling it a ‘policy question.’ You also refused to answer other questions based on your view that they are ‘policy questions.’

a. What makes a statement a policy question rather than a question of fact?

RESPONSE: I believe that racism persists in our country but, as I explained at the hearing, whether there is “systemic racism” is a public policy question of substantial controversy, as evidenced by the disagreement among Senators on this very question during the hearing. As a sitting judge and judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

b. What is your definition of a ‘policy question’?

RESPONSE: Please see my response to Question 2.a.

3. In an exchange with Senator Graham, you testified that a court could not pass judgment on the constitutionality of a law that criminalizes in vitro fertilization (IVF) unless and until (1) a state passes a law criminalizing in vitro fertilization; and (2) “a prosecutor would have to try to hold someone criminally liable for getting IVF.”

a. Would a doctor whose practice includes performing IVF have standing to challenge the constitutionality of a law that criminalizes IVF? What considerations would be relevant to answering this question?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

b. Under what circumstances could a woman who seeks to become pregnant through IVF challenge the constitutionality of a statute criminalizing IVF prior to criminal enforcement against her?

RESPONSE: Please see my response to Question 3.a.

c. Under what circumstances and with what evidence, could a court prevent a state from enforcing a law criminalizing IVF before such a law went into effect?

RESPONSE: Please see my response to Question 3.a.

4. When Senator Feinstein asked you at the hearing about *California v. Texas*—a case considering the constitutionality of the Affordable Care Act currently before the Supreme Court—you distinguished Justice Scalia’s severability analysis in *NFIB v. Sebelius*, in part, by analogizing to the game Jenga. You said, “Justice Scalia thought two provisions of the Constitution were unconstitutional. So if you picture severability being like a Jenga game, it’s kind of if you pull one out, can you pull it out while it all stands, or if you pull two out, will it still stand? So Justice Scalia, his view was that if you pulled those two provisions out, could it still stand? And here, we’re talking about one.”

The two provisions at issue in *NFIB v. Sebelius* were (1) the individual mandate; and (2) the Medicaid expansion. The Supreme Court ruled that the Medicaid expansion had to be optional in *NFIB v. Sebelius*. The Court is currently considering the constitutionality of the individual mandate—as amended by the Tax Cuts and Jobs Act of 2017—in *California v. Texas*. Should the Supreme Court rule the individual mandate unconstitutional in *California v. Texas*, wouldn’t the case present the same severability issue as the one analyzed by Justice Scalia in *NFIB v. Sebelius*?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

5. At the hearing, Senator Leahy asked you about Judge Easterbrook’s dissent you joined regarding whether the full Seventh Circuit should review a three-judge panel’s decision to strike down three provisions of an Indiana law restricting reproductive rights. Indiana had requested a review of one of three provisions. Senator Leahy noted that the dissent you joined went out of its way to address another provision not before the court, a reason ban, which the dissent called a ‘eugenics statute.’ When he asked you why the dissent you joined was not limited to the issue the court was asked to review, you explained that other states had filed an amicus brief urging the

court to take up the claim that was not before the court. However, you also stated at the hearing that courts “cannot just dispense advice or give our views on the law.” Is it your position that it is appropriate for courts to address a claim it was not asked to review so long as an amicus curiae – a ‘friend of the court’ that is not a party to the litigation, urges the court to do so?

RESPONSE: As I explained at the hearing, the dissent was based on the portion of the Indiana law regulating the disposal of fetal remains; the Supreme Court granted certiorari and summarily reversed our court on that issue, vindicating that dissent. Although 18 states had urged the Court to consider a separate portion of the Indiana law, the dissent did not weigh in on the merits of the issue, noting that Indiana had not asked the full court to address it. In other words, this question misunderstands what happened: the dissent I joined specifically *declined* to address a claim that it was not asked to review by any party to the litigation.

6. In *Kanter v. Barr*, you wrote a 37-page dissent arguing that only those with a felony conviction who are shown to be dangerous may be denied the right to own a gun. You wrote that “while both Wisconsin and the United States have an unquestionably strong interest in protecting the public from gun violence, they have failed to show, by either logic or data that disarming Kanter substantially advances that interest.” The majority opinion, however, cited a number of studies and other evidence that the government relied on to justify prohibiting individuals with nonviolent felony convictions like Kanter from possessing firearms. In your dissent, you concluded that prohibiting Kanter from possessing a gun “treats the Second Amendment as a second-class right.”

a. What information was lacking in the studies and evidence cited by your colleagues in the majority that led you to conclude that prohibiting individuals with nonviolent felony convictions like Kanter from possessing firearms to advance public safety interests was unjustified?

RESPONSE: I discussed the shortcomings in these materials in my dissent in *Kanter v. Barr*, 919 F.3d 437, 466–68 (7th Cir. 2019).

b. How would you balance the government’s “unquestionably strong interest in protecting the public from gun violence” with your position on the Second Amendment as detailed in your dissent in *Kanter*?

RESPONSE: My dissent in *Kanter* explains that “both Wisconsin and the United States have an unquestionably strong interest in protecting the public from gun violence” but, on the facts of that case, the governments “failed to show, by either logic or data, that disarming Kanter substantially advances that interest.” 919 F.3d at 469 (citation omitted).

7. Several Senators at the hearing asked you about your 2013 article in the *Texas Law Review* that was titled *Precedent and Jurisprudential Disagreement*. In that article, you wrote, “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”

a. Do you still stand by that statement?

RESPONSE: As I explained at the hearing, pulling that single sentence out of the paragraph in which it appears takes it out of context. In fact, that sentence was part of a *defense* of the Court’s approach to stare decisis, which imposes a presumption against overruling precedent other than in “exceptional” circumstances. 91 TEX. L. REV. at 1728. Were the prohibition on overruling absolute, I argued, it would be impossible for the Court to correct serious errors. *Id.*

b. When Senator Feinstein asked you about your statement, you said “the whole article was defending the Supreme Court’s current doctrine.” Is it your position that the current Supreme Court Justices are simply following their own interpretation of the Constitution regardless of longstanding Supreme Court precedent?

RESPONSE: No. Please see my response to Question 7.a.

c. You told Senator Coons that your statement – that “a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it” – was taken out of context. Please provide quotes from your article showing how it was taken out of context.

RESPONSE: The paragraph in which that sentence appears is set forth below. I have omitted the footnotes, which reflect that my position—that overruling is sometimes permissible—is a conventional view held not only by the Supreme Court itself but also by scholars across the spectrum. For further context, the full article can be found at 91 Tex. L. Rev. 1711.

The above speaks to the Court’s apparent legitimacy. The question remains whether overruling precedent affects the Court’s actual legitimacy. Does the Court act lawlessly--or at least questionably--when it overrules precedent? I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it. That itself serves an important rule-of-law value. Of course, constant upheaval in the law would disserve rule-of-law values insofar as it would undermine the consistency--and therefore the predictability—of the law. But constant upheaval is not what a weak presumption of stare decisis has either promised or delivered. The Court follows precedent far more often than it reverses precedent. And even though overruling is exceptional, it is worth observing that the Court’s longstanding acceptance of it lends legitimacy to the practice. Our legal culture does not, and never has, treated the reversal of precedent as out-of-bounds. Instead, it treats departing from precedent as a permissible move, albeit one that should be made only for good reason. Because there is a

great deal of precedent for overruling precedent, a justice who votes to do so engages in a practice that the system itself has judged to be legitimate rather than lawless.

Id. at 1728–29.

d. In the 2013 article, you defined superprecedents as “cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.” At the hearing, you identified yourself as an originalist and textualist. Where in the text of Article 3 of the Constitution is your idea of superprecedent?

RESPONSE: As I explained at the hearing, the term “super-precedent” is not a doctrinal term. Rather, it is a term used in the scholarly literature.

e. In your 2013 article, you compiled a list of superprecedents that you stated are on “most hit lists.” You included the Civil Rights Cases from 1883, which struck down the Civil Rights Act of 1875, but you did not include the landmark cases upholding the Voting Rights Act and the Civil Rights Act of 1964. Is it your position that the landmark cases upholding the Voting Rights Act and the Civil Rights Act of 1964 are generally not considered ‘cases that no justice would overrule, even if she disagrees’?

RESPONSE: As the article made clear, the term “super-precedents” generally refers to how the public treats the precedents of the Court, which prevents challenges to those precedents from reaching the Court even if a justice were inclined to revisit them. *See* 91 *Tex. L. Rev.* 1711, 1734 (2013).

f. You did not include *Roe v. Wade* in your compiled list of superprecedents. Is it your position that *Roe v. Wade* is generally not considered a ‘case that no justice would overrule, even if she disagrees’?

RESPONSE: Please see my response to Question 7.e.

g. You did not include in your compiled list of superprecedents *West Coast Hotel Co. v. Parrish*, the landmark case repudiating *Lochner* and upholding New Deal era protections for workers. Is it your position that the landmark case repudiating *Lochner* is generally not considered a ‘case that no justice would overrule, even if she disagrees’?

RESPONSE: Please see my response to Question 7.e.

8. On several occasions during the hearing, you referenced the “multiple factors” that are considered when determining whether to overturn precedent—including quality of reasoning, workability, inconsistency with related decisions, changed understanding of relevant facts, and reliance.

a. In your 2013 *Texas Law Review* article, you wrote, “Asking whether a prior case is in ‘error’ according to a shared standard does not generally require a justice to

relinquish her fundamental interpretive commitments. But when a justice rejects the premises of a precedent rather than its conclusion, affirming it requires her to let those commitments go.” When considering whether to overturn precedent, what weight should a Justice give to her “fundamental interpretative commitments” as compared to the factors you discussed during the hearing?

RESPONSE: The quoted sentence was referring to practical difficulties in “mediating intense jurisprudential disagreement” among judges. 91 Tex. L. Rev. 1711, 1721 (2013). “One function of stare decisis,” the article argued, “is to keep these kinds of disagreements in check.” *Id.* at 1722. As I explained at the hearing, the article was a defense of the Court’s doctrine of stare decisis, discussing “the virtues of stare decisis and the stability interest it serves.”

b. In that same article, you wrote, “It makes sense that one committed to a textualist theory would more often find precedent in conflict with her interpretation of the Constitution than would one who takes a more flexible, all-things-considered approach.” During the hearing, you described yourself as committed to a textualist theory. How would you weigh your commitment to a textualist theory compared to the factors discussed during the hearing when considering whether to overturn precedent?

RESPONSE: Please see my response to Question 8.a.

c. You also wrote, “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.” When considering whether to overturn precedent, what weight should a Justice give to her “best understanding of the Constitution” as compared to the factors you discussed during the hearing?

RESPONSE: Please see my response to Question 8.a.

9. Senator Feinstein asked you whether you “agree with originalists who say that the Medicare program is unconstitutional.” You responded, “I can’t answer that question in the abstract, you know, because as we’ve talked about, the no hints, no forecasts, no previews rule.” You called this “Ginsburg Rule.” But, as Senator Durbin noted at the hearing, Justice Ginsburg “did answer substantive legal questions about matters that might come before the Court.”

a. Do you consider the constitutionality of the Medicare program an open question that may come before you should you be confirmed as a Justice to the Supreme Court?

RESPONSE: Please see my response to Question 9.c.

b. Do you agree that the Medicare program constitutional?

RESPONSE: Please see my response to Question 9.c.

c. Do you agree that the Social Security program constitutional?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Those questions can be answered only through the judicial process. I will note, however, that scholars have identified *Helvering v. Davis*, 301 U.S. 619 (1937), which held that the Social Security program was constitutionally permissible, as a super precedent in academic work.

10. When Senator Booker asked you whether you are aware of evidence of implicit bias, particularly in the criminal justice system, you only acknowledged that you were “aware that there have been studies showing that implicit bias is present in many contexts including in the criminal justice system.” I frequently ask judicial nominees the questions below regarding implicit bias training.

a. Do you agree that training on implicit bias is important for judges to have?

RESPONSE: Every federal judge swears an oath to “administer justice without respect to persons” 28 U.S.C. § 453. This solemn promise is extremely important to me. As a judge on the Seventh Circuit, I have always worked hard to ensure that bias has no place in my decisions, and I will continue that effort if confirmed to the Supreme Court.

b. Have you ever taken such training?

RESPONSE: Please see my response to Question 10.a.

c. If confirmed, do you commit to taking training on implicit bias?

RESPONSE: Please see my response to Question 10.a.

11. In a speech you gave at Hillsdale College last year, you spoke about the obligations of duty in the face of personal preference and intense public scrutiny. You pointed to the dissenting judge in *Korematsu v. United States* as an example of a judge who was willing and able to stand up to the President that had appointed him and withstand intense public opinion to issue a dissenting opinion. This implied respect or approval for the dissent. Do you believe that *Korematsu* was wrongly decided?

RESPONSE: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court explained that “*Korematsu* was gravely wrong the day it was decided” and “has been overruled in the court of history.”

12. In an exchange with Senator Harris, you referred to certain propositions, including that COVID-19 is infectious and that smoking causes cancer, as “uncontroversial.” You contrasted these propositions with the proposition that “climate change is happening.”

a. Do you consider whether climate change is happening a matter of factual dispute?

RESPONSE: As I discussed at the hearing, my views on the subject are not relevant to my job as a judge. If a case comes before me involving climate change, I will carefully review the record and apply the relevant law to the facts before me. Furthermore, the Supreme Court has described “climate change” as a “controversial subject[.]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

b. Is human activity a major contributor to climate change?

RESPONSE: Please see my response to Question 12.a.

c. Based on your statements, what makes the proposition that smoking causes cancer to be ‘completely uncontroversial’ but the proposition that “climate change is happening” to be ‘politically controversial’?

RESPONSE: Please see my response to Question 12.a.

13. Two University of Virginia law professors, Joshua Fischman and Kevin Cope, conducted an empirical analysis of your judicial record as a Seventh Circuit judge. They analyzed more than 1,700 cases that the Seventh Circuit has heard since you joined that court in 2017, including 378 cases where you cast a vote. Based on their empirical analysis, they “conclude[d] with substantial confidence that Judge Barrett’s record over the period is more conservative than the majority of her colleagues on the Republican-appointee-dominated court.” They further found that your voting record placed you within a group of the Seventh Circuit’s “six most conservative judges, and possibly more conservative than every other judge studied.” How do you explain these findings in this data-driven study?

RESPONSE: I am not familiar with this particular study and therefore cannot speak to its accuracy. As a judge, I approach each case with an open mind. My decisions are guided by the law and the factual evidence in the record before me. I apply the law without considering the status of a party.

14. Both during your speech at the White House accepting your nomination, you described Justice Scalia’s judicial philosophy as your own. However, at the hearing, you indicated that your statement did not necessarily mean that “every sentence that came out of Justice Scalia’s mouth or every sentence that he wrote is one that I would agree with” or “that [you] would always reach the same outcome as he did.” Please provide examples of judicial opinions written by Justice Scalia with which you disagree.

RESPONSE: It would not be appropriate for me to opine on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases or opinions.

15. At the hearing, I noted that the Supreme Court’s *Epic Systems Corporation v. Lewis* allowed companies to force their employees to sign arbitration clauses prohibiting them from joining together to bring claims against their employer. Forced arbitration clauses are ubiquitous in modern agreements, including credit card contracts, cell phone contracts, online click-through “agreements,” employee handbooks, and nursing home admissions forms to name a few. These clauses restrict Americans’ access to justice by stripping them of their constitutional right to go to court. The Federal Arbitration Act (“FAA”), as originally drafted and passed by Congress in 1925, was intended to apply—and for nearly 60 years had been presumed to apply—only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Congress did not intend to force individual American consumers, employees, and patients into secret, private arbitration as a means of depriving them of their constitutional right to trial by jury. Despite the original intent of the FAA, the Supreme Court in recent years has reinterpreted the FAA more broadly, leading more and more individuals to be shut out of courts and forced into arbitration.

a. Given the Act’s history and the fact that these clauses now apply to every aspect of American life, are there any limits to when individual workers, consumers, and nursing home residents should be subject to forced arbitration?

RESPONSE: This question calls for my views on both the soundness of a Supreme Court precedent and how that precedent should apply in future litigation. As a sitting judge and as a judicial nominee, it would be inappropriate for me to opine on either issue.

b. What are those limits?

RESPONSE: Please see my response to Question 15.a.

16. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice Rehnquist stated the following:

“Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.

“It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”

In the above statements, Chief Justice Rehnquist acknowledges that the notions and experiences that judges have developed over the course of their lives influence their interpretation of the Constitution.

a. Do you agree with Chief Justice Rehnquist’s observations?

RESPONSE: I quoted those observations in a law review article more than 20 years ago. See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 340 (1998).

b. If judicial nominees have set forth legal inclinations and interpretations in their work, do you believe that this has a bearing on how they would apply the law as a Justice?

RESPONSE: Although judges, like all persons, possess personal convictions, they must never twist the law to align it with their personal convictions, no matter how deeply held they may be.

c. Given Justice Rehnquist's observation, which do you think provides more information about a Justice's judicial approach – blanket reassurances that they will simply follow the law or their prior statements, writings, judicial opinions, and record, particularly in areas where they may have strong convictions?

RESPONSE: It would not be appropriate for me to tell the Senate what information to consider in order to fulfill its advice-and-consent function under the Constitution.

17. At the hearing, I and many other Senators noted the real-world consequences of the Supreme Court striking down the Affordable Care Act. One of the real-world impacts I highlighted was on women, particularly women of color. Following the hearing, are you now aware of the following:

a. That under the Affordable Care Act, 8.7 million women gained coverage for critical maternity care services, including prenatal and postnatal doctor visits, gestational diabetes screenings, labs and medications needed during pregnancy, and newborn baby care?

RESPONSE: I recall that you referenced this during the hearing.

b. That Black and Native women in the United States are 2.5 to 3.1 times more likely to die than white women during pregnancy, at birth, or postpartum?

RESPONSE: I recall that you referenced this during the hearing.

c. That before the enactment of the Affordable Care Act, only 12 percent of individual market plans covered maternity care?

RESPONSE: I do not recall this particular statistic being referenced during the hearing.

d. That before the enactment of the Affordable Care Act, women could be charged higher health insurance premiums than men?

RESPONSE: I recall that Senator Coons referenced this during the hearing.

18. In 2015, you told NPR that “the dissent has the better of the legal argument” in *King v. Burwell*, which upheld key provisions of the Affordable Care Act. In that case, Chief Justice Roberts wrote the majority opinion and stated, “oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’” Do you agree with Chief Justice Roberts?

RESPONSE: As Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases. As a general matter, I agree that words must be construed in context.

19. At the hearing, Senator Blumenthal asked you about the Supreme Court’s shadow docket, which consists of cases that are decided, often stays or extension of orders, without an opinion. This year, the Supreme Court has decided several election cases that affected or will affect how elections are administered, by granting or denying applications to stay, rather than actually addressing the merits of the issues.

a. When do you think it is appropriate for the Supreme Court to make such decisions that could significantly impact an election without addressing the merits of the issues in the case?

RESPONSE: The Supreme Court has explained that “a court considers four factors” under the traditional standard for a stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009). As a sitting judge, it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should grant a stay.

b. How do you think election decisions like these affect the American public’s perception of the legitimacy of the Court?

RESPONSE: Please see my response to Question 19.a.

c. What role do you think courts should play in ensuring that every citizen can vote and can do so safely?

RESPONSE: The federal judiciary protects the fundamental right to vote by fairly and impartially applying the United States Constitution and other federal laws related to voting, such as the National Voter Registration Act and the Voting Rights Act, in cases or controversies.

20. I asked you at the hearing about the Supreme Court’s decision in *Shelby County v. Holder*, which gutted Section 5 of the Voting Rights Act, and whether “voter suppression or discrimination in voting currently exists.” You did not answer my question. Instead, you said “we have the Voting Rights Act that offers protection” and pointed out that Shelby County did not address Section 2 of the Voting Rights Act. Unlike the preclearance framework that was gutted in *Shelby County*, Section 2, places the burden on those whose votes are suppressed to challenge the discriminatory voting law.

After *Shelby County*, many states passed laws suppressing voting rights, particularly those of minorities. They claimed they were going after voter fraud. But, voter fraud is actually incredibly rare. A 2014 study found a total of 31 credible cases in 14 years.

a. Are you aware studies have shown that in-person voter fraud is vanishingly rare? Do you believe such studies are relevant in assessing whether a voter ID law is discriminatory?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals, nor to comment on matters of public policy.

b. Do you believe there is evidence of widespread in-person voter fraud in our country?

RESPONSE: Please see my response to Question 20.a.

c. Do you believe there is evidence of widespread mail-in voter fraud in our country?

RESPONSE: Please see my response to Question 20.a.

d. Do you believe the Voting Rights Act should be read robustly or narrowly?

RESPONSE: Please see my response to Question 20.a.

21. In *Shelby County*, the conservatives Justices struck down the list of jurisdictions required to preclear voting changes due to their history of discrimination. But Justice Thomas wrote a separate concurrence to point out that he would also strike down as unconstitutional the entire preclearance framework – a key component of the Voting Rights Act. He wrote: “The extensive pattern of discrimination that led the Court to previously uphold §5 as enforcing the Fifteenth Amendment no longer exists.” The majority decision in *Shelby County* left it up to Congress to pass a new list of jurisdictions required to preclear voting changes. But Justice Thomas wanted to strike down the preclearance framework completely so that Congress could never use this remedy again, at least under Section 5 of the VRA. Do you agree with Justice Thomas that Congress should not have the opportunity to fix the current problem of discrimination in voting with the preclearance framework in the Voting Rights Act?

RESPONSE: *Shelby County* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases or opinions.

22. Tribes have a unique government-to-government relationship with the United States under the Constitution and federal law. Tribal nations are affected by decisions from federal courts, especially the U.S. Supreme Court, to a greater degree than almost any other group. The Supreme Court’s interpretation of Treaties, federal statutes and federal common law have direct impact on the daily lives of Tribal nations and Tribal communities. I’m interested in learning more about how you would handle these issues:

a. Do you have any legal experience addressing Federal Indian law questions or working with Tribal governments?

RESPONSE: As a judge on the Seventh Circuit, I have not had the opportunity to examine in detail questions of Indian law or work with tribal governments. I have written about the origins of the Indian canon of construction and its historic application to interpretation of treaties, as well as about the more modern application of the canon to the interpretation of statutes affecting Indian tribes and persons. *See Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010).

b. What is your view on the role of Tribal governments within the United States system of government?

RESPONSE: Article 1, Section 8 of the U.S. Constitution provides that Congress shall have the power to “regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.” As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues.

c. What is your understanding of the legal foundation of the federal trust and treaty responsibility between Tribes and the U.S. federal government?

RESPONSE: The Supreme Court has recognized that there is a “distinctive obligation of trust incumbent upon the Government in its dealings with” Indian Tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

d. Are there any external or self-imposed restraints on the Supreme Court’s ability to define the scope of Tribal sovereignty?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues.

e. What is your opinion on the Doctrine of Discovery?

RESPONSE: The Supreme Court has said that the “doctrine of discovery” provided that “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.” *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 n.1 (2005). As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues.

23. In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the Supreme Court indicated that the application of certain federal protections of the Indian Child Welfare Act to a non-custodial Indian father would raise equal protection concerns. The Court did not explain the basis for this statement. Do you believe that there are circumstances where legislation on behalf of Indian people would raise equal protection concerns? If yes, please explain under what circumstances this would be the case.

RESPONSE: Because this question asks about matters that could be the subject of future litigation, it would be improper for me as a sitting judge to opine on it.

24. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court held that legislation pertaining to Indian people is based upon their unique political status and not their racial classification. Due to this unique status, the rational basis test is applied to determine the validity of legislation affecting Indian people. Congress has passed numerous federal statutes that are consistent with the Supreme Court’s holding in *Morton v. Mancari* to further the government-to-government relationship with Indian Tribes and Indian people and relies on the Indian Commerce Clause as the basis. What is your view on Congress’s authority in this area? Do you believe there are any limitations on that authority, and if so, what are they?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues.

25. You have stated that you share Justice Scalia’s judicial philosophy. Justice Scalia’s judicial philosophy adhered to the implicit divestiture doctrine. The Supreme Court devised the implicit divestiture doctrine in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to describe the notion that Tribal sovereignty can be implicitly eroded over time.

a. Do you share that view and why?

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia. Because this question asks about matters that could come before me in litigation, it would be improper for me as a sitting judge to opine further on it.

b. Do you think that state sovereignty can be implicitly divested as well?

RESPONSE: Please see my response to Question 25.a.

c. If not, what is the justification for the differing treatment given that the U.S. Constitution acknowledges States and Tribes are both sovereign governments and all Tribal nations existed prior to the U.S. Constitution?

RESPONSE: Please see my response to Question 25.a.

26. In your 2010 law review article, *Substantive Canons and Faithful Agency*, you wrote about the Indian canon of construction and stated that ambiguities in treaties and statutes addressing Indian affairs will be construed to benefit Tribes. With respect to statutes, you noted that the canon “might be rationalized with reference to the Constitution rather than to a contract analogy.” You also said that the “point for present purposes is not the validity of the canon.”

a. What is your view on the validity of the Indian canon of construction for statutory interpretation?

RESPONSE: In my article *Substantive Canons and Faithful Agency*, I described the origins of the Indian canon of construction and its historic application to the interpretation of treaties, as well as the more modern application of the canon to the interpretation of statutes affecting Indian tribes and persons. I did not address “the validity of the canon.” 90 B.U. L. Rev. 109, 152 (2010). As a sitting judge, it would not be appropriate for me to offer an opinion on abstract legal issues.

b. When a statute specific to Indian tribes is ambiguous, what steps should the court take to clarify that ambiguity?

RESPONSE: When faced with statutory ambiguity, a judge should seek to resolve the ambiguity in accordance with established law, including the use of canons of statutory interpretation.

27. Jurisdiction in Indian Country is complex, and determining which sovereign exercises jurisdiction over various issues requires knowledge of Tribal, federal, and state statutes. There are numerous jurisdictional disputes that arise around business transactions, civil regulatory authority, child adoption, and non-violent criminal offenders that involve non-Indians within Tribal communities. There is also a crisis of non-Indians perpetrating violent crimes, particularly domestic violence and sexual assault, against American Indian and Alaska Native women within Indian Country.

a. What is the appropriate legal framework for determining whether a Tribe has jurisdiction over a non-Indian in Indian country, both in the civil and criminal context?

RESPONSE: As a sitting judge, it would not be appropriate for me to offer an opinion on abstract legal issues.

b. In your judicial opinion, are there Constitutional limitations on a Tribe’s civil or criminal jurisdiction over non-Indians?

RESPONSE: Please see my response to Question 27.a.

c. Describe your understanding of Tribal courts and/or Tribal court judges, and whether you have had any exposure to or experiences with either.

RESPONSE: As a judge on the Seventh Circuit, I have not had the opportunity to interact with tribal courts or tribal court judges.

**Nomination of Amy Coney Barrett
Supreme Court of the United States
Questions for the Record
Submitted October 16, 2020**

QUESTIONS FROM SENATOR BOOKER

1. During this week’s hearing, I asked you whether poll taxes are unconstitutional, and you referenced only Section 2 of the Voting Rights Act of 1965 in your response. Can you affirm that poll taxes are unconstitutional, and under what authority?

RESPONSE: As I said at the hearing, a poll tax having a discriminatory effect would be unlawful under Section 2 of the Voting Rights Act of 1965. In addition, “the Twenty-Fourth Amendment abolish[ed] the poll tax as a requirement for voting in federal elections,” *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), and the Supreme Court has held “that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard,” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

2. The Fourteenth Amendment, ratified in the wake of the Civil War, guarantees the equal protection of the laws.¹ It was central to the Supreme Court’s decision in *Brown v. Board of Education*.² It is at the heart of many of our modern civil rights protections. But in a recent article on originalism, you described the Fourteenth Amendment as “possibly illegitimate.”³ Why?

RESPONSE: In the article you are referencing, I did not express the opinion that the Fourteenth Amendment is “possibly illegitimate.” That was an argument advanced in a different article by a critic of originalism. My article merely acknowledged the existence of that critic’s article.

3. The same day that the Supreme Court decided *Brown* in 1954, it handed down another decision in *Bolling v. Sharpe*, which held that racial segregation in Washington, D.C.’s public schools was unconstitutional. Although the text of the Fourteenth Amendment’s guarantee of equal protection only mentions the states, the Supreme Court relied on the Fifth Amendment’s Due Process Clause and ruled in *Bolling v. Sharpe* that it would simply be “unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”⁴

a. Do you believe that *Bolling v. Sharpe* was rightly decided?

¹ U.S. CONST. amend. XIV, § 1.

² 347 U.S. 483 (1954).

³ Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 2 (2017).

⁴ 347 U.S. 497, 500 (1954).

RESPONSE: As I said when discussing *Brown v. Board of Education* during my hearing, the constitutional prohibition on segregating schools on the basis of race is so widely established and agreed upon that no one would call for its overruling.

b. If so, on what specific basis do you believe *Bolling v. Sharpe* was rightly decided? Do you believe it was the view of the Founding generation in 1791, when the Fifth Amendment was ratified, that public schools in Washington, D.C., should be integrated?

RESPONSE: Please see my response to Question 3.a.

c. Do you believe *Bolling v. Sharpe* is a “superprecedent” along with *Brown*?

RESPONSE: Please see my response to Question 3.a.

4. When you spoke at the White House Rose Garden for your nomination announcement, you said of Justice Scalia, “His judicial philosophy is mine, too.”⁵ In several cases, Justice Scalia made clear his opposition to race-conscious admissions at universities.

a. In 2015, the Supreme Court heard arguments on the University of Texas’s admissions policy.⁶ Justice Scalia suggested that Black students might benefit from going to “a less advanced school” or “a slower track school where they do well.”⁷ Do you agree with what he said?

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

b. In a 2003 case about admissions at the University of Michigan’s law school, Justice Scalia wrote an opinion calling the school’s admissions policy “a sham to cover a scheme of racially proportionate admissions” that was forbidden by the Constitution.⁸ Do you agree?

RESPONSE: Please see my response to Question 4.a.

⁵ Full Transcript: Read Judge Amy Coney Barrett’s Remarks, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html>.

⁶ *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

⁷ Janell Ross, *Antonin Scalia’s Strange Idea That Blacks Might Do Better in ‘Less-Advanced Schools,’* WASH. POST (Dec. 10, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/10/justice-scalias-strange-but-all-too-familiar-theory-on-the-victims-of-affirmative-action>.

⁸ *Grutter v. Bollinger*, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part).

c. In the same case about admissions at the University of Michigan’s law school, the Supreme Court’s majority opinion relied on a brief by high-ranking military leaders that said, “Based on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”⁹ The Supreme Court quoted these exact words in its justification for the educational benefits of diversity. Is the military wrong about the importance of ensuring diversity in its ranks?

RESPONSE: This question calls for an evaluation of the majority’s reasoning. But as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

d. Do you think having a diverse student body is a compelling government interest in the education context?

RESPONSE: In *Fisher v. University of Texas at Austin*, the Supreme Court stated that the government has a “compelling interest” in obtaining “the educational benefits that flow from student body diversity.” 136 S. Ct. 2198, 2210 (2016) (quotation marks and citation omitted).

5. Justice Scalia fiercely opposed constitutional claims for advancing gay rights—from criminal prohibitions on same-sex conduct to the legalization of same-sex marriage. As noted, you have said of Justice Scalia, “His judicial philosophy is mine, too.”

a. The Supreme Court ruled in a case called *Lawrence v. Texas* that laws that criminalize sexual intimacy between two men violate the Constitution.¹⁰ This was a landmark decision for civil rights. Justice Scalia disagreed with the Court’s decision. And the words he used in his dissent are as painful as they are stunning. Here’s what he wrote: “Today’s opinion is the product of a Court, which is the product of a law- profession culture, that has largely *signed on to the so-called homosexual agenda*, by which I mean the agenda promoted by some homosexual activists directed at *eliminating the moral opprobrium that has traditionally attached to homosexual conduct*.” He went on to accuse the Court of “tak[ing] sides in the culture war.”¹¹ Justice Scalia wrote these words 17 years ago about laws that made it a *crime* for two men to engage in intimate sexual conduct. Do you agree with what Justice Scalia wrote here?

RESPONSE: As I stated at my hearing, the fact that I share Justice Scalia’s approach to text does not mean that I agree with him on all points or would reach the same result in any particular case. I have my own mind, and if I am confirmed, you would be getting Justice Barrett, not Justice Scalia.

⁹ *Id.* at 331 (majority opinion).

¹⁰ 539 U.S. 558 (2003).

¹¹ *Id.* at 602 (Scalia, J., dissenting) (emphases added).

b. What legal theory supports the offensive things Justice Scalia said in *Lawrence* about gay Americans?

RESPONSE: Please see my response to Question 5.a.

c. In *Obergefell v. Hodges*, the Supreme Court found the Constitution protects the right of same-sex couples to marry nationwide.¹² Again, Justice Scalia dissented. He called the Court’s decision “a threat to American democracy” that “robs the People” of “the freedom to govern themselves.” He said the decision was “lacking even a thin veneer of law.”¹³ Do you agree with what Justice Scalia wrote here?

RESPONSE: Please see my response to Question 5.a.

d. Under what legal theory was the *Obergefell* decision “a threat to American democracy,” as Justice Scalia called it?

RESPONSE: Please see my response to Question 5.a.

6. At this week’s hearings, you told Senator Coons the following about *Griswold v. Connecticut*¹⁴: “I think that *Griswold* is very, very, very, very, very, very unlikely to go anywhere. In order for *Griswold* to be overruled, you or a state legislature would have to pass a law prohibiting the use of birth control, which seems, you know, shockingly unlikely, and then a lower court would have to buck Supreme Court precedent and say we’re not following *Griswold*. Again, seems very unlikely. So I think that it’s an academic question that wouldn’t arise, but it’s something that I can’t opine on, particularly because it does lie at the base of substantive due process doctrine, which is something that continues to be litigated in courts today.” Are you willing to affirm, as nominees before you have done, that *Griswold v. Connecticut* is settled law?

RESPONSE: As I said at my hearing, because *Griswold* lies at the base of substantive due process doctrine, an area that remains the subject of ongoing litigation, I cannot opine on it. But I do not think *Griswold* is in danger of going anywhere.

7. President Trump has said, “There has to be some form of punishment” for women who have abortions.¹⁵ If *Roe v. Wade*¹⁶ were overturned, would that be possible—could a state enact a law criminally punishing women for having abortions?

¹² 576 U.S. 644 (2015).

¹³ *Id.* at 713-16 (Scalia, J., dissenting).

¹⁴ 381 U.S. 479 (1965).

¹⁵ Philip Bump, *Trump Goes Where Few Pols Have Gone Before, Urges ‘Punishment’ for Women Getting Illegal Abortions*, WASH. POST (Mar. 30, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/30/donald-trump-there-has-to-be-some-form-of-punishment-for-women-who-get-abortions>.

¹⁶ 410 U.S. 113 (1973).

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals.

8. A recent study has found that women living in states that are less restrictive of abortion rights have better birth outcomes compared with women living in states with more restrictive abortion laws. The study also found that less restrictive policy environments were particularly protective for Black women.¹⁷ At a time when Black and Native American women are two to three times more likely than white women to die during pregnancy, at birth, or postpartum, increased abortion restrictions could worsen an already alarming maternal health crisis. How would you consider evidence like this in a case challenging state abortion restrictions?

RESPONSE: I would carefully consider the entire record in any case that comes before me.

9. Last month, the Trump Administration issued a series of directives banning racial sensitivity and diversity training at federal agencies, and even at private entities that do business with the federal government.¹⁸ President Trump’s directives called these trainings “un-American.” Do you think that racial bias and sensitivity training—like training about addressing implicit or unconscious biases someone might attach to certain groups of people—is “un-American”?

RESPONSE: It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure or on any subject of political controversy.

10. When I asked you about your use of the term “sexual preference” during the hearing, you said, “I really, then using that word, did not mean to imply that I think that . . . it’s not an immutable characteristic or that it’s solely a matter of preference. I honestly did not mean any offense or to make any statement by that.” To be clear, do you believe that someone’s sexual orientation is a choice?

RESPONSE: As you note in your question, my choice of words was not meant to imply that I think that a person’s sexual orientation is not an immutable characteristic.

11. Do you think it is wrong to ban someone from serving their country in the military because of their sex?

RESPONSE: I am not aware of a current ban on service in the U.S. Armed Forces on the basis

¹⁷ May Sudhinaraset, Dovile Vilda, Jessica D. Gipson, Marta Bornstein & Maeve E. Wallace, *Women’s Reproductive Rights Policies and Adverse Birth Outcomes: A State-Level Analysis to Assess the Role of Race and Nativity Status*, AM. J. PREVENTATIVE MED. (Oct. 13, 2020), [https://www.ajpmonline.org/article/S0749-3797\(20\)30372-X/fulltext](https://www.ajpmonline.org/article/S0749-3797(20)30372-X/fulltext).

¹⁸ *Executive Order on Combating Race and Sex Stereotyping*, WHITE HOUSE (Sept. 22, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping> (pmb.) (scheduled to be published in the Federal Register as Exec. Order No. 13,950, *available at* <https://www.federalregister.gov/d/2020-21534>); Memorandum from Russell Vought, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep’ts & Agencies 1 (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf>.

of sex. Because issues related to who may serve in the military could be the subject of litigation, it would be improper for me as a sitting judge to opine further on the subject.

a. Do you think it is wrong to ban someone from serving their country in the military because of their sexual orientation?

RESPONSE: Please see my response to Question 11.

b. Do you think it is wrong to ban someone from serving their country in the military because of their gender identity?

RESPONSE: Please see my response to Question 11.

12. Can a government-supported program that openly and explicitly discriminates against gay people ever be constitutional? Can you provide an example?

RESPONSE: As I stated at my hearing, I fully respect the rights of the LGBTQ community. Because questions of discrimination on the basis of sexual orientation in government-supported programs are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on the subject.

13. Is it inappropriate for a federal judge to refuse to refer to a transgender plaintiff, defendant, or witness in a case before him or her in accordance with that person's gender identity?

RESPONSE: Please see my response to Question 14.

14. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

RESPONSE: It has been my practice to use the names and pronouns that litigants use in their filings.

15. Do you believe that a judge's sexual orientation or gender identity can be a basis for recusal or disqualification?

RESPONSE: Whether a judge should recuse from a case is a legal question governed by 28 U.S.C. § 455. Judges are expected to make a decision whether to recuse by applying the law to the facts and circumstances of a particular case rather than in the abstract. It would be inappropriate for me to offer a legal opinion with respect to such a question outside the context of an actual case.

16. In 2015, the Obama Administration issued guidance that transgender students in public schools should be able to access the bathrooms and locker rooms that match their gender identity. This was about the civil rights law known as Title IX, which prohibits sex discrimination in schools. You gave a speech in 2016 indicating that you thought the Obama

Administration’s guidance was wrong. You said it was “a huge shift.” You said that “it’s pretty clear that no one, including the Congress that enacted that statute would have dreamed of that result” when Title IX was enacted in the 1970s. And you said that the Obama Administration’s guidance “does seem to strain the text of the statute.”¹⁹

a. In your view, does Title IX protect students against discrimination based on gender identity?

RESPONSE: Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine on it.

b. How does the Supreme Court’s recent decision in *Bostock v. Clayton County*²⁰ affect the analysis you offered in this speech?

RESPONSE: See my response to Question 16.a.

17. Two years ago, the Supreme Court dealt a major blow to unions in the *Janus* case, holding that public-sector unions cannot require workers to pay fair-share dues. Writing in dissent, Justice Kagan said that the conservative majority was overthrowing this deeply entrenched, 40-year-old precedent “for no exceptional or special reason, but because it never liked the decision”—that is, just “because it wanted to.”²¹ Does Justice Kagan’s statement match your understanding of why the Court’s conservative majority was so willing to throw out this embedded precedent on labor unions?

RESPONSE: *Janus* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

18. Writing for the majority in *District of Columbia v. Heller*, Justice Scalia recognized that there was a “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”²²

a. Do you think that a bump stock, which can convert a semi-automatic weapon into an automatic weapon, is a “dangerous and unusual weapon”?

¹⁹ Amy Coney Barrett, Presenter, *Justice Scalia and the Future of the Court*, YOUTUBE (Nov. 3, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81II> (Hesburgh Lecture, cosponsored by the Jacksonville Notre Dame Club and Jacksonville University Public Policy Institute).

²⁰ 140 S. Ct. 1731 (2020).

²¹ *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

²² 554 U.S. 570, 627 (2008).

RESPONSE: Because this question asks about matters that could be the subject of litigation, it would be improper for me as a sitting judge to opine on it.

b. Do you think that a firearm with a high-capacity magazine is a “dangerous and unusual weapon”?

RESPONSE: Please see my response to Question 18.a.

c. Do you think that an expanding bullet shot from an assault rifle that pulverizes bones, tears blood vessels, and liquefies organs is a “dangerous and unusual weapon”?

RESPONSE: Please see my response to Question 18.a.

19. Regarding your involvement in *Bush v. Gore*,²³ you testified this week, “I did work on behalf of the Republican side. To be totally honest, I can’t remember exactly what piece of the case it was.” Please explain the full extent of your role in *Bush v. Gore* and any other litigation relating to the 2000 presidential election.

RESPONSE: As I stated in the Senate Judiciary Questionnaire that I submitted to the Committee, I provided research and briefing assistance in *Bush v. Gore* for about a week at the outset of the litigation. My former law firm, Baker Botts, L.L.P., represented George W. Bush, and I worked on the case in Florida. I did not continue working on the case after my return to Washington, D.C.

20. When the First Amendment was ratified in 1791, what kinds of speech do you believe it was enacted to protect? In particular, was it enacted to protect political speech? Was it enacted to protect commercial speech?

RESPONSE: The Supreme Court has counseled that “the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation marks omitted). The Court has “applied more deferential review [under the First Amendment] to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Nat’l Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quotation marks omitted). Because the First Amendment remains the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on the matter.

a. In your view, is the holding in *Buckley v. Valeo*²⁴ upholding campaign finance disclosure requirements “superprecedent”?

RESPONSE: *Buckley v. Valeo* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. The term “superprecedent” is a phrase that is used in

²³ 531 U.S. 98 (2000).

²⁴ 424 U.S. 1 (1976).

academic work, but it has no doctrinal meaning under Supreme Court precedent.

b. In your view, is *Citizens United v. FEC*²⁵ a “superprecedent”?

RESPONSE: *Citizens United v. FEC* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. The term “superprecedent” is a phrase that is used in academic work, but it has no doctrinal meaning under Supreme Court precedent.

c. In your view, does the First Amendment allow the Food and Drug Administration to impose labeling requirements?

RESPONSE: Supreme Court “precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Nat’l Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Supreme Court precedents have also allowed States to “regulate professional conduct, even though that conduct incidentally involves speech.” *Id.* Because this question asks about matters that are the subject of ongoing litigation, it would not be appropriate for me to opine further on it.

d. In your view, does the First Amendment allow the Securities and Exchange Commission to impose disclosure requirements?

RESPONSE: Please see my response to Question 20.c.

21. Is voting by mail a legitimate way for Americans to cast their ballots in an election?

RESPONSE: The Supreme Court has explained that, subject to constitutional constraints, “[t]he States possess a broad power to prescribe the Times, Places, and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (quotation marks and citation omitted). States have accordingly adopted vote by mail procedures, and the Supreme Court has resolved several election law cases involving vote by mail. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020). Because this question asks about matters that are or could be the subject of litigation, it would be improper for me as a sitting judge and as a judicial nominee to opine further on it. To the extent that this question calls for my views on a matter of public policy, it would be inappropriate for me, as a sitting judge and as a judicial nominee, to offer an opinion on the matter.

22. In your view, is the principle of “one person, one vote”—established in Supreme Court decisions such as *Baker v. Carr*,²⁶ *Reynolds v. Sims*,²⁷ and *Wesberry v. Sanders*²⁸—settled law?

²⁵ 558 U.S. 310 (2010).

²⁶ 369 U.S. 186 (1962).

²⁷ 377 U.S. 533 (1964).

²⁸ 376 U.S. 1 (1964).

RESPONSE: These cases are precedents of the Supreme Court entitled to respect under the doctrine of stare decisis.

23. At the hearing, you declined to answer a question from Ranking Member Feinstein about whether a President has the legal authority to unilaterally delay a general election under any circumstances. There is ample authority in the Constitution and federal statutes indicating that the answer is no.²⁹ Are you aware of *any* authority under federal law supporting the proposition that a President has the power to unilaterally delay a general election?

RESPONSE: As a sitting judge and as a judicial nominee, it would not be appropriate for me to offer an opinion on abstract legal issues or hypotheticals. Those questions can be answered only through the judicial process.

24. During this week’s hearing, Senator Hirono and I questioned you about your dissent in *Cook County v. Wolf*.³⁰ This case involved a challenge to a Department of Homeland Security (DHS) rule that interpreted the definition of “public charge” in the Immigration and Nationality Act (INA), which was not previously defined.³¹ The INA permits DHS to deny a noncitizen admission or adjustment of status if that individual is likely to “become a public charge.”³² DHS’s definition defined “a ‘public charge’ as any noncitizen (with some exceptions) who receives certain cash and noncash government benefits for more than ‘12 months’ in the aggregate in a 36-month period.”³³ As the majority acknowledged, the rule represented “a striking departure from the previous administrative guidance” and it could have a “potentially devastating impact to those to whom it applied.”³⁴ In short, the rule would make it more difficult for legal residents to obtain permanent residency if they have used, or were likely to use, public assistance programs like SNAP, Medicaid, and Section 8 Housing. Importantly, the majority opinion noted that the “Rule is likely to cause immigrants to forgo routine treatment, immunizations, and diagnostic testing, resulting in more costly, uncompensated emergency care and an increased risk of communicable diseases spreading to the general public.”³⁵ The majority of the court affirmed the district court’s decision to grant a preliminary injunction, but you dissented.³⁶

²⁹ See, e.g., Ian Millhiser, *No, Trump Can’t Delay the Election*, VOX (July 30, 2020), <https://www.vox.com/2020/3/21/21188152/trump-cancel-november-election-constitution-coronavirus-vote-by-mail>.

³⁰ 962 F.3d 208 (7th Cir. 2020).

³¹ *Id.* at 215.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 216.

³⁵ *Id.* at 218.

³⁶ *Id.* at 234.

In your dissent, you wrote, “[I]t’s important to recognize that immigrants are dropping or forgoing aid out of misunderstanding or fear because, with very rare exceptions, those entitled to receive public benefits will never be subject to the public charge rule.”³⁷ You concluded by stating, “At bottom, the plaintiffs’ objections reflect disagreement with this policy choice and even the statutory exclusion itself. Litigation is not the vehicle for resolving policy disputes. Because I think that DHS’s definition is a reasonable interpretation of the statutory term ‘public charge,’ I respectfully dissent.”³⁸

a. You acknowledged in your dissent that “immigrants are dropping or forgoing aid out of misunderstanding or fear.” Did you understand that the purpose of DHS’s rule was to instill fear in the immigrant community?

RESPONSE: In my dissent in *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), I based my understanding of the rule on the facts and arguments presented by the parties in the case, including the text of the rule itself. I acknowledged the plaintiffs’ evidence that the rule was causing “noncitizens to drop or forgo public assistance,” *id.* at 235. But I also explained that “immigrants are dropping or forgoing aid out of misunderstanding or fear because, with very rare exceptions, those entitled to receive public benefits will never be subject to the public charge rule.” *Id.* The government has petitioned for certiorari in *Cook County*. See Pet. for Writ of Cert., *Wolf v. Cook Cty.*, No. 20-450 (Oct. 7, 2020). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

b. If not, do you now concede that that was the intent?

RESPONSE: Please see my response to Question 24.a.

c. Do you acknowledge that the “Rule is likely to cause immigrants to forgo routine treatment, immunizations, and diagnostic testing, resulting in more costly, uncompensated emergency care and an increased risk of communicable diseases spreading to the general public” like the majority opinion noted?

RESPONSE: Please see my response to Question 24.a.

d. Did it at all concern you that the Trump Administration’s “Rule is likely to cause immigrants to forgo routine treatment, immunizations, and diagnostic testing, resulting in more costly, uncompensated emergency care and an increased risk of communicable diseases spreading to the general public” in the middle of a global pandemic like the majority acknowledged?

RESPONSE: Please see my response to Question 24.a.

³⁷ *Id.* at 235.

³⁸ *Id.* at 254.

e. What evidence did you rely on when you wrote that “those entitled to receive public benefits will never be subject to the public charge rule”?

RESPONSE: In my dissenting opinion, I explained in detail that “with very rare exceptions, those entitled to receive public benefits will never be subject to the public charge rule.” *Cook Cty. v. Wolf*, 962 F.3d 208, 235 (7th Cir. 2020). I based my understanding of the rule on the facts and arguments presented by the parties in the case, including the text of the rule itself. I also relied on the authorities cited in my dissenting opinion.

f. Do you recognize that the damage the rule has inflicted on the immigrant community?

RESPONSE: Please see my response to Question 24.a.

25. During this week’s hearing, Senator Kennedy asked you about climate change, and you said the following: “You know, I’m not a scientist. I have read things about climate change. I would not say I have firm views on it.” When Senator Blumenthal followed up on that exchange and asked you whether you believe that human activity causes global warming, you said, “I don’t think I am competent to opine on what causes global warming or not.” And, in response to Senator Harris’s question asking whether you believe climate change is happening, you said, “I will not express a view on a matter of public policy, especially one that is politically controversial.”

a. It is a scientifically established fact that climate change is happening. Do you dispute that?

RESPONSE: As I discussed at the hearing, my views on the subject are not relevant to my job as a judge. If a case comes before me involving environmental regulation, I will carefully review the record and apply the relevant law to the facts before me. Furthermore, the Supreme Court has described “climate change” as a “controversial subject[.]” and “sensitive political topic[.]” *Janus v. AFSCME, Council*, 138 S. Ct. 2448, 2476 (2018). It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of political controversy.

b. Why do you think it is a matter of political controversy whether human activity causes climate change?

RESPONSE: Please see my response to Question 25.a.

c. Do you have any reason to doubt scientists who say that humans are the cause of climate change?

RESPONSE: Please see my response to Question 25.a.

d. Would you agree that a judge who disregards undisputed scientific evidence on

climate change, and instead relies on his or her personal opinion of the facts, is guilty of imposing his or her policy views in deciding a case?

RESPONSE: As a judge, I decide each case based on the law and the factual evidence in the record before me, without regard to my policy views. I do not believe it would ever be appropriate to impose my policy views on the law.

e. Do you believe it would be appropriate for a judge to disregard undisputed scientific evidence on climate change in a case involving that issue?

RESPONSE: Please see my response to Question 25.d.

f. Do you accept the finding of the 2018 National Climate Assessment that “Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities”?³⁹

RESPONSE: Please see my responses to Questions 25.a and 25.d.

26. In 2010, you published a law review article titled *Substantive Canons and Faithful Agency* in which you wrote, “The *Miranda* doctrine . . . is an example” of “the court’s choice to overenforce a constitutional norm by developing prophylactic doctrines that go beyond constitutional meaning.”⁴⁰ *Miranda v. Arizona*, of course, requires law enforcement officers to inform a person who becomes a suspect in a criminal investigation of certain rights, including the right to remain silent and to have counsel, before the suspect can be questioned.⁴¹ In 2016, I wrote the following about *Miranda* in a foreword for the *Harvard Law & Policy Review*: “*Miranda*’s legacy permeates our courts and, even more importantly, our national conscience. It stands for the idea that not just police conduct, but the entire justice system, must be consistent with our core values, a justice system that lives up to our highest ideas and fundamental guarantees of liberty and justice for all.”⁴²

a. Do you agree that *Miranda* “stands for the idea that not just police conduct, but the entire justice system, must be consistent with our core values”?

RESPONSE: *Miranda v. Arizona*, 384 U.S. 436 (1966), is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.

b. According to the NAACP, “a Black person is five times more likely to be stopped

³⁹ 2 U.S. GLOBAL CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT 34 (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

⁴⁰ Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

⁴¹ 348 U.S. 436, 467-73 (1966).

⁴² Cory A. Booker & Roscoe Jones, Jr., *Foreword*, 10 HARV. L. & POL’Y REV. 3 (2016).

without just cause than a white person.”⁴³ What does this fact, if anything, tell you about the importance *Miranda*?

RESPONSE: Please see my response to Question 26.a.

c. What did you mean when you said *Miranda* goes “beyond constitutional meaning”?

RESPONSE: This quote appears in a discussion of the scholarship of Professor Richard Fallon of Harvard Law School. As I explained in the article, Professor Fallon took the position that federal courts could overenforce constitutional norms “by developing prophylactic doctrines that go beyond constitutional meaning.” The Supreme Court has “repeatedly referred to the *Miranda* warnings as ‘prophylactic,’ and ‘not themselves rights protected by the Constitution.’” *Dickerson v. United States*, 530 U.S. 428, 437–38 (2000) (citations omitted).

27. In capital punishment cases, the race of the criminal defendant and of the victim plays a significant role in whether a defendant ultimately receives the death penalty. In *McCleskey v. Kemp*, a narrowly divided Supreme Court found in 1987 that stark racial disparities in the imposition of the death penalty were not enough to invalidate it.⁴⁴

a. According to the ACLU, people of color account for 43 percent of total executions since 1976 and 55 percent of individuals currently awaiting execution.⁴⁵ Based on these data, do you believe that racial disparities still exist in the application of the death penalty?

RESPONSE: Any racial disparities in the criminal justice system merit close attention. But as racial disparities may be the subject of litigation, it would be improper for me as a sitting judge to opine further on this issue.

b. A new study has updated the data used in *McCleskey* in 1987. The study found stunning racial disparities. Someone convicted of killing a white victim was *17 times* more likely to be executed than someone convicted of killing a Black victim.⁴⁶ Based on these data, do you believe that racial disparities still exist in the application of the death penalty?

⁴³ *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Oct. 16, 2020).

⁴⁴ 481 U.S. 279 (1987).

⁴⁵ *Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/race-and-death-penalty> (last visited Oct. 16, 2020).

⁴⁶ Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L L. REV. (forthcoming 2020), <https://harvardcrcl.org/wp-content/uploads/sites/10/2020/07/07.30.2020-Phillips-Marceau-For-Website.pdf>.

RESPONSE: Please see my response to Question 27.a.

c. In *Gregg v. Georgia*, the Supreme Court said that the use of capital punishment is unconstitutional if it is “inflicted in an arbitrary and capricious manner.”⁴⁷ Do you believe that the disproportionate application of the death penalty on African Americans is arbitrary and capricious?

RESPONSE: Please see my response to Question 27.a.

28. The Eighth Amendment to the Constitution forbids “cruel and unusual punishment.”⁴⁸

a. What is the standard for judging whether a punishment is cruel and unusual?

RESPONSE: Numerous decisions of the Supreme Court discuss the meaning of the Eighth Amendment’s prohibition of cruel and unusual punishment. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court explained that the Eighth Amendment “guarantees individuals the right not to be subjected to excessive sanctions,” and that “punishment for crime should be graduated and proportioned to both the offender and the offense.” *Id.* at 469 (citation and quotation marks omitted). The Supreme Court has also looked to “the evolving standards of decency that mark the progress of a maturing society” when addressing the prohibition on cruel and unusual punishments. *Id.* (citation and quotation marks omitted). More recently, the Court has explained that “what unites the punishments the Eighth Amendment was understood to forbid, and distinguishes them from those it was understood to allow, is that the former were long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superadd[ition] of terror, pain, or disgrace.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (internal quotations omitted).

Because the meaning of “cruel and unusual punishment” under the Eighth Amendment is the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

b. Do you believe placing someone in a pillory is prohibited as “cruel and unusual” pursuant to the Eighth Amendment?

RESPONSE: Please see my response to Question 28.a.

c. Do you believe branding an individual is “cruel and unusual” punishment proscribed under the Eighth Amendment?

RESPONSE: Please see my response to Question 28.a.

d. Do you believe placing an individual in solitary confinement is “cruel and

⁴⁷ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

⁴⁸ U.S. CONST. amend. VIII.

unusual” punishment prohibited under the Eighth Amendment?

RESPONSE: Please see my response to Question 28.a.

e. At the time of our nation’s Founding, placing someone in a pillory was not considered “cruel or unusual.” From an originalist perspective, how do you square your mode of statutory and constitutional interpretation with a “claim that punishment is excessive is judged not by the standards prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail”?⁴⁹

RESPONSE: Please see my response to Question 28.a.

29. According to the Constitutional Accountability Center, the U.S. Chamber of Commerce “has won 70% of the cases in which it has filed briefs at the Court since 2006—a win rate far and away above its record during comparable periods in previous decades,” during the Burger and Rehnquist Courts.⁵⁰ Do you believe this evident pattern of ruling in favor of corporate interests damages the American people’s perception of the Supreme Court as a fair arbiter of justice? If not, please explain.

RESPONSE: I am not familiar with this specific study and therefore cannot speak to its accuracy. As a judge, I approach each case with an open mind. My decisions are guided by the law and the factual evidence in the record. I apply the law without considering the status of a party.

30. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

RESPONSE: Yes. Originalism calls for a judge to interpret the Constitution as a law, applying the meaning that the text had at the time the people ratified it.

31. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

RESPONSE: Yes. Textualism calls for a judge to approach the text as it was written, with the meaning it had at the time of its enactment. Context surrounding the passage of the law can be helpful to the extent it sheds light on the original public meaning of the statutory text. I also look to any relevant judicial precedent in analyzing issues that arise under particular statutes.

32. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by

⁴⁹ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

⁵⁰ Brian R. Frazelle, *Quick Take: The Chamber of Commerce at the Supreme Court: 2019-2020*, CONST. ACCOUNTABILITY CTR. (July 6, 2020), <https://www.theusconstitution.org/blog/quick-take-the-chamber-of-commerce-at-the-supreme-court-2019-2020>.

consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

RESPONSE: As a general rule, I do not look to legislative history when I am deciding a case because legislative history is not what goes through the process of bicameralism and presentment. I would look to legislative history when it is relevant to understanding the ordinary public meaning of the statutory text.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn’t it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

RESPONSE: Please see my response to Question 32.a.

33. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

RESPONSE: Having not served as a district judge, I will say more generally that judges should apply the law faithfully and consistent with constitutional and statutory limitations on the judicial power.

a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.⁵¹ Was that decision guided by the principle of judicial restraint?

RESPONSE: *District of Columbia v. Heller* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁵² Was that decision guided by the principle of judicial restraint?

RESPONSE: *Citizens United v. FEC* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

⁵¹ 554 U.S. 570 (2008).

⁵² 558 U.S. 310 (2010).

c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁵³ Was that decision guided by the principle of judicial restraint?

RESPONSE: *Shelby County v. Holder* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis. It would not be appropriate for me to opine further on this question; as Justice Kagan explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

34. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁵⁴ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁵⁵

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

RESPONSE: Because this question asks about matters that are or could be the subject of litigation, it would be improper for me as a sitting judge to opine on it.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

RESPONSE: Please see my response to Question 34.a.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

RESPONSE: Please see my response to Question 34.a.

35. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁵⁶ Notably, the same study

⁵³ 570 U.S. 529 (2013).

⁵⁴ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁵⁵ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

⁵⁶ *Id.*

found that whites are actually *more likely* than blacks to sell drugs.⁵⁷ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.⁵⁸ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁵⁹

a. Do you believe there is implicit racial bias in our criminal justice system?

RESPONSE: As I explained at my hearing, it would be hard to imagine that a criminal justice system as large as ours does not have any implicit bias in it.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

RESPONSE: In your question, you have cited troubling statistics regarding a disparity.

c. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.⁶⁰ Why do you think that is the case?

RESPONSE: I do not know and, as a sitting judge and as a judicial nominee, it would be inappropriate for me to speculate on a matter that may be the subject of future litigation.

d. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.⁶¹ Why do you think that is the case?

RESPONSE: Please see my response to Question 35.c.

e. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

⁵⁷ *Id.*

⁵⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁵⁹ *Id.*

⁶⁰ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

⁶¹ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

RESPONSE: When judges take the oath of judicial office, we swear to “administer justice without respect to persons” and to “impartially discharge and perform all the duties incumbent” on us “under the Constitution and laws of the United States.” 28 U.S.C. § 453. This oath binds judges when we review “difficult, complex criminal cases,” as it does in all cases. Every federal judge must ensure that racial bias plays no role in her decision making.

36. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.⁶² In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁶³

a. Do you believe there is a direct link between increases in a state’s incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

RESPONSE: This question calls for my views on a matter of public policy. As a sitting judge and judicial nominee, it would be inappropriate for me to offer an opinion on the matter.

b. Do you believe there is a direct link between decreases in a state’s incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

RESPONSE: Please see my response to Question 36.a.

37. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

RESPONSE: As a law professor, I have had the pleasure of teaching and mentoring students with a diverse array of backgrounds, life experiences, and characteristics. I have learned a great deal from these students and the different perspectives they bring to the law.

38. Do you believe that *Brown v. Board of Education*⁶⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

RESPONSE: As I have stated publicly, *Brown v. Board of Education* was correctly decided, remedying the unjust decision in *Plessy v. Ferguson*.

⁶² Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

⁶³ *Id.*

⁶⁴ 347 U.S. 483 (1954).

39. Do you believe that *Plessy v. Ferguson*⁶⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

RESPONSE: *Plessy v. Ferguson* was a grievous wrong, which the Supreme Court correctly overruled in *Brown v. Board of Education*.

40. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

RESPONSE: My responses to these questions, and to those asked during my hearing, are my own.

41. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”⁶⁶ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

RESPONSE: It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine on the statements of any political figure or on any subject of political controversy.

42. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”⁶⁷ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

RESPONSE: The Supreme Court has held that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *See Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020). Because this question asks about matters that are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine further on it.

⁶⁵ 163 U.S. 537 (1896).

⁶⁶ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

⁶⁷ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Senator John Cornyn
Questions for the Record**

**Judge Amy Coney Barrett
Nominee, Associate Justice of the Supreme Court of the United States**

Question 1: Judge Barrett, I'd like to give you a chance to respond to some of the issues raised regarding abortion and contraceptives. Some members of the Committee took comments that you made in your personal capacity as a citizen—before you were an Article III judge—as evidence that you will impose your religious convictions and personal views on the Court. I find these attacks to be without merit, particularly in light of your strong character, record at the Seventh Circuit, and your deep appreciation to apply the law faithfully and impartially. Am I missing something here?

RESPONSE: No. As I stated at my hearing, I will apply the law fully and faithfully. I will not impose my religious convictions or personal beliefs on anyone.

Question 2: Judge Barrett, as you sit here today, do you recall religious tests being applied to Democrat nominees for judicial office? Relatedly, do you agree that there is no place for a religious test in our country for those seeking public office?

RESPONSE: As I stated at my hearing, the Constitution—specifically Article VI, Clause 3—prohibits religious tests for public office.

Question 3: Judge Barrett, some members of the Committee attacked you on account of your Catholic faith. As you know, this is not only unconstitutional to impose a religious test on a nominee, but it also violates our country's history of religious tolerance. Do you see any problems with applying a religious test to nominees for public office beyond what I just mentioned?

RESPONSE: Please see my response to Question 2.

Question 4: Judge Barrett, as we discussed during my questioning, I take, as should all Americans, the First Amendment and religious liberties seriously. Do you intend to take the First Amendment and religious liberties seriously if you were to be put on the Supreme Court?

RESPONSE: Yes. Should I be confirmed as an Associate Justice of the Supreme Court, I will fully and faithfully enforce the rights guaranteed by the First Amendment, as I will all other constitutional rights.

Question 5: Judge Barrett, you were attacked on account of your dissent in *Kanter v. Barr*. Some members of the Committee claimed and sponsored witness testimony to assert that you somehow thought that convicted felons were not “virtuous” enough to vote, but they nevertheless could own a firearm. Do you think that was a fair characterization of your dissent in *Kanter v. Barr*? If not, why not?

RESPONSE: I do not think that is a fair characterization of my dissent in *Kanter v. Barr*. That case dealt with the Second Amendment, not the right to vote. And my opinion did not assert that convicted felons are not virtuous enough to vote.

Question 6: Judge Barrett, during the confirmation hearings, a number of members of the Committee colleagues took a view of the courts as a body that is focused on results. Having been a judge before, and looking at our Constitution, I see the role of a judge very differently. As I see it, judges are constrained to the record, the issues, and the litigants before them. As Alexander Hamilton wrote in Federalist 78, judges “have neither FORCE nor WILL, but merely judgment.” Do you agree with my assessment as to the role of courts, including the Supreme Court of the United States?

RESPONSE: Yes.

Senator Marsha Blackburn
Questions for the Record
Senate Judiciary Committee
“Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States”

1. In 2012, President Obama unilaterally created the Deferred Action for Childhood Arrivals (DACA) program through an executive memo. President Trump rescinded DACA in 2017, but the Court subsequently ruled that his decision to end amnesty for millions of illegal aliens needed additional justification to stand. The Court did this, despite issuing a split decision in 2014 that ended a similar amnesty program, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Please provide a general explanation of the limits, if any, on the powers that the Constitution explicitly assigns to the President when these powers are used to subvert the conventionally recognized authority of Congress under the separation of powers.

RESPONSE: As a judicial nominee, it would not be appropriate for me to comment on the merits of any particular past decision of the Supreme Court or on a matter of political controversy. But in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring), Justice Jackson laid out the “familiar tripartite scheme” that the Supreme Court has called “the accepted framework for evaluating executive action”:

First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.*, at 637. In such a circumstance, Presidential authority can derive support from “congressional inertia, indifference or quiescence.” *Ibid.* Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.” *Id.*, at 637–38.

Medellin v. Texas, 552 U.S. 491, 524–25 (2008) (quoting *Youngstown*, 343 U.S. at 585).

2. In 1969, the Supreme Court said in *Tinker v. Des Moines* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” What obligation do public universities have to protect free speech on campus under the First Amendment?

RESPONSE: The Supreme Court has stated that its precedents recognize that the First Amendment protects speech on campuses of public universities. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972). The application of the First Amendment to particular speech on campus is a matter of ongoing legal dispute.

3. The lawmakers of our country are accountable to the electorate through regular elections. When Congress delegates the authority to legislate to the executive branch, unelected bureaucrats wield massive power and are immune to consequences for bad decisions. That leaves the judiciary in charge of reviewing excessive agency action. What is the proper role of the courts when reviewing challenges to agency rules and regulations?

RESPONSE: Statutory and constitutional rules govern judicial review of agency action. For example, the Administrative Procedure Act directs a court to “set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The Supreme Court has explained that a rule is arbitrary and capricious when “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

4. Throughout the history of our country, there has been conflict between the federal government and the states. Often, our federalism is healthy as it protects liberty and prevents tyranny. In some other times, conflict driven by partisan politics endangers lives and causes the rule of law to break down.
 - a. What powers does the federal government have at its disposal to compel the states to follow federal law—especially when states or cities fail to keep their citizens safe?
 - b. What tools does Congress have under its Spending Clause authority to condition funds in order to incentivize states toward certain policies?

RESPONSE: Under Supreme Court precedent, the scope of Congress’s ability to induce states to take particular actions depends on numerous factual and legal issues. For example, the Supreme Court has identified a number of factors that bear on Congress’s use of its spending power to induce states to particular action through conditional grants. *South Dakota v. Dole*, 483 U.S. 203, 207–12 (1987). Many of these issues could be contested in a given case, and I would give due consideration to all of the parties’ arguments and faithfully apply the law to the facts.

5. States have the authority and responsibility to protect the health of their citizens, but they must also uphold First Amendment protections—including the free exercise of religion. Recently, some churches across the country have asserted their rights have been infringed because of states selectively enforcing public health restrictions on places of worship. Do states infringe on the free exercise of religion when they selectively restrict a religious gathering as a matter of enforcement discretion?

RESPONSE: The Supreme Court has explained that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality” and that “[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The application of these principles to public health restrictions is a matter of ongoing legal dispute.