

**Response to Question for the Record from Senator Dick Durbin, Chair, Senate Judiciary Committee to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit**

- 1. The Judiciary Committee has received a number of letters of support from conservatives who have worked and clerked with you. As I mentioned during your hearing, Judge Thomas Griffith— an appointee of President George W. Bush who retired from the bench last year—wrote to the Committee: “Although [Judge Jackson] and I have sometimes differed on the best outcome of a case, I have always respected her careful approach and agreeable manner, two indispensable traits for success in a collegial body.”**

**The Committee also received a letter signed by 23 Supreme Court law clerks who clerked alongside you during the October 1999 Term. The 23 signatories included clerks to Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O’Connor, among others.**

**Please describe the importance you place on working with colleagues who may have different views or who may approach an issue differently than you do.**

RESPONSE: I have had the privilege of working alongside people who have a variety of viewpoints about the law and legal analysis throughout my professional career. As a Supreme Court law clerk, for example, I evaluated complex legal issues and regularly exchanged significant insights with the clerks of other Justices. Similarly, my work in both private practice and on the Sentencing Commission (a bi-partisan policymaking body by statute) routinely required me to consider, assess, and incorporate the views and concerns of brilliant lawyers and judges with different backgrounds and perspectives. Taking into account the views of others helped me to formulate my own perspective on the issues we were considering. And the skills that I developed while engaging in such interactions should serve me well on the circuit court, if I am confirmed. Because the D.C. Circuit often address complicated and potentially contentious legal issues, the ability to listen with an open mind to other points of view, and to be respectful even if a judge ultimately disagrees with another judge’s analysis or conclusions, is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution.

**Responses to Questions for the Record from Senator Chuck Grassley, Ranking Member  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

1. Are you aware of the dark money left wing group Demand Justice?
  - a. Are you aware that you are on their “shortlist” for the Supreme Court?
  - b. Are you aware that when the group initially released their list on October 15, 2019 you were not on the list?<sup>1</sup>
  - c. Do you have any idea why you were added to the list after originally being left off of it?
  - d. Have you had any conversations with anyone associated with Demand Justice since October 15, 2019?

RESPONSE: I am aware that the group Demand Justice has compiled a Supreme Court “shortlist.” I am also aware that I was not on the first iteration of that list, and that I am now listed. I do not know why I was added to the list. Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

2. What is an *Irons* footnote?

RESPONSE: An *Irons* footnote is a mechanism by which a panel of the D.C. Circuit can overrule a circuit precedent that, “due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, . . . is clearly an incorrect statement of current law.” D.C. Circuit Policy Statement on *En Banc* Endorsement of Panel Decisions (“*Irons* Footnote Policy”) at 1 (Jan. 17, 1996) (alteration omitted); see also *Irons v. Diamond*, 670 F.2d 265, 267–68 & n. 11 (D.C. Cir.1981). D.C. Circuit panels are permitted to use *Irons* footnotes when “the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full en banc hearing.” *Irons* Footnote Policy at 1; see also *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013).

3. What is *Skidmore* deference? Can you summarize the D.C. Circuit’s current *Skidmore* jurisprudence?

RESPONSE: *Skidmore* deference refers to the Supreme Court’s conclusion that a court may defer to an agency’s interpretation of a statute that the agency itself administers, when that agency interpretation is not set forth in a document that has the force of law (i.e., not a rule or adjudication). When *Skidmore* deference is applicable,

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<sup>1</sup> Available at <https://demandjustice.org/demand-justice-releases-supreme-court-shortlist-of-diverse-progressive-lawyers/>.

the agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (explaining that a court applying *Skidmore* deference accords the agency's interpretation "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001))). The D.C. Circuit's current *Skidmore* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. See, e.g., *Indian River Cty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 531 (D.C. Cir. 2019) ("When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*."); *Orton Motor, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018) ("Ultimately, a court will uphold an agency determination under *Skidmore* if it is persuasive.").

**4. What is *Chevron* deference? Can you summarize the D.C. Circuit's current *Chevron* jurisprudence?**

RESPONSE: I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. See, e.g., *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at \*13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep't of Health & Hum. Servs.*, 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst. v. Dep't of Agric.*, 968 F. Supp. 2d 38, 52 (D.D.C. 2013). *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, "whether Congress has directly spoken to the precise question at issue[.]" using "traditional tools of statutory construction[.]" *Chevron*, 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute[.]" *id.* at 843, and, if so, the court must defer to the agency's interpretation. The D.C. Circuit's current *Chevron* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. See, e.g., *Murray Energy Corp. v. EPA*, 936 F.3d 597, 608 (D.C. Cir. 2019) (recognizing that, "[o]n questions of statutory interpretation, the court must review [the agency's] actions in

accordance with the standard set forth in” *Chevron*); *see also id.* (reiterating that “*Chevron* deference involves a two-step analysis.”).

**5. What is *Auer* deference? Can you summarize the D.C. Circuit’s current *Auer* jurisprudence?**

RESPONSE: *Auer* deference is a doctrine that instructs courts to “defer[] to agencies’ reasonable readings of genuinely ambiguous regulations.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). Recently, in *Kisor v. Wilkie*, the Supreme Court clarified the circumstances under which *Auer* deference is warranted, holding that “a court should not afford *Auer* deference unless” the court determines that “the regulation is genuinely ambiguous” after “exhaust[ing] all the ‘traditional tools’ of construction.” *Id.* at 2415. And even “[i]f genuine ambiguity remains,” deference is only required when “the agency’s reading” is “reasonable”—*i.e.*, “it must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Id.* at 2415–16. An agency’s interpretation of its regulations “must [also] be the agency’s ‘authoritative’ or ‘official position,’” as well as “in some way implicate its substantive expertise[,]” to qualify for *Auer* deference. *Id.* at 2416–17. The Supreme Court has further explained that *Auer* deference would not be warranted if the reviewing “court concludes that an interpretation does not reflect an agency’s authoritative, expertise-based, fair, or considered judgment[,]” *id.* at 2414 (internal quotation marks, alteration, and citation omitted), and is instead “a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack[,]” *id.* at 2417 (internal quotation marks, alteration, and citation omitted). The D.C. Circuit’s current *Auer* jurisprudence is consistent with the Supreme Court’s articulation of the doctrine. For instance, the D.C. Circuit recently maintained that “[a]n agency may receive deference when it reasonably interprets its own ‘genuinely ambiguous’ regulations.” *Nat’l Lifeline Ass’n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2414); *see also id.* (emphasizing that “if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense” (quoting *Kisor*, 139 S. Ct. at 2415)).

**6. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?**

RESPONSE: In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Supreme Court held that a federal court must defer to an agency’s interpretation of a regulation that the agency administers. It appears that the Court has historically treated the *Seminole Rock* deference standard and as interchangeable shorthand for the same idea that it expressed in its subsequent articulation of *Auer* deference: “This Court has often deferred to agencies’ reasonable readings of genuinely ambiguous regulations” and “[w]e call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). The D.C. Circuit has relied on those two cases interchangeably as

well. See, e.g., *Tilden Mining Co., Inc. v. Sec’y of Lab.*, 832 F.3d 317, 322 (D.C. Cir. 2016) (noting that courts afford deference to an agency’s interpretation of its own regulation “based on the Supreme Court’s decisions in [*Auer*] and [*Seminole Rock*]”). Whatever analytical differences there may be between *Seminole Rock* and *Auer*, the current controlling authority concerning deference to an agency’s interpretations of its own regulations is neither *Auer* nor *Seminole Rock*; the Supreme Court has declined to overrule *Auer / Seminole Rock*, but, in *Kisor*, it established a detailed multi-factor process for determining when this kind of deference is proper. See 139 S. Ct. at 2414–18.

- 7. When a new presidential administration begins, they may want to reverse, review, expand upon, or otherwise change agency actions from the previous administration.**
- a. What kind of process do agencies have to go through in order to revoke a rule promulgated by a previous administration?**

RESPONSE: Under section 1 of the Administrative Procedure Act (“APA”), an agency is generally required to use the same processes to repeal a rule as it used to promulgate the rule. See *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 101 (2015). Thus, if the agency issued the rule after engaging in notice and comment rulemaking pursuant to section 553 of the APA, it must ordinarily go through the notice and comment process in order to repeal the rule.<sup>2</sup> However, if the rule in question did not require notice-and-comment rulemaking in the first place (if, for instance, it was an interpretive rule), then the agency need not use the notice-and-comment process to repeal the rule. See *id.* at 102 (holding that courts may not impose any additional procedural requirements on agencies beyond those set forth in the APA); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (same). The Supreme Court has further emphasized that, when an agency changes its policy position on a matter, the agency must provide a “reasoned explanation for its action[.]” “display awareness that it is changing position[.]” and “show that there are good reasons for the new policy.” *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).

- b. What has the Supreme Court said about this issue?**

RESPONSE: Please see my response to Question 7a.

- c. What are they key D.C. Circuit cases on point here?**

RESPONSE: Key D.C. Circuit cases on this topic include *Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020), *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020), *Mingo Logan Coal Co. v. Environmental*

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<sup>2</sup> The APA’s notice-and-comment process entails issuing a notice of proposed rulemaking, giving interested parties an opportunity to comment on the proposed rule, and issuing a final rule with “a concise general statement of [the rule’s] basis and purpose.” See 5 U.S.C. § 553.

*Protection Agency*, 829 F.3d 710 (D.C. Cir. 2016), and *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982). The doctrine announced in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), has also been a “key” case in this area, but the Supreme Court abrogated the *Paralyzed Veterans* rule in *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015).

- 8. You served as a law clerk for Justice Breyer with Tim Wu. Mr. Wu is now a member of President Biden’s National Economic Council.**
- a. How have you handled recusal when it comes to cases that have come before you that implicated Mr. Wu’s work on the National Economic Council?**
  - b. If confirmed, how will you handle recusal when it comes to cases that come before you that implicate Mr. Wu’s work on the National Economic Council?**

RESPONSE: I have not had a case in which the National Economic Council was a party. In general, if confirmed to the U.S. Court of Appeals, my process for determining whether particular matters required my recusal would involve reviewing the Judicial Code of Conduct and 28 U.S.C. § 455 concerning the legal standards that pertain to recusal. I will also consult with my colleagues, and, if necessary, discuss the matter with counsel to the Judicial Conference Committee on Codes of Conduct. This is the process that I have followed as a district court judge.

- 9. You were listed as a counsel on a brief in support of defendant-appellants in *McGuire v. Reilly*, 260 F. 3d. 36 (1st Cir. 2001). Some of the amici curiae your brief was on behalf of include: Rebro Associates, Abortion Access Project of Massachusetts, Mass. NARAL, and the Religious Coalition for Reproductive Choice, among others.**
- a. You appear to have worked on this brief while an associate at a law firm in Boston. Was this a pro bono case?**
  - b. How did you get involved with this case? Did you seek out this assignment?**
  - c. Based on your brief’s analysis of *Hill v. Colorado*, could a legislature enact content-neutral buffer zones that prohibited protests to occur outside of federal courthouses or police stations?**

RESPONSE: The referenced brief was drafted and filed when I was an associate at Goodwin Proctor LLP in Boston in 2001, during my first year of law practice after completing my Supreme Court clerkship. I was assigned to work on this amicus brief related to a matter that was pending in the First Circuit, among other projects. I do not recall how I came to work on this assignment, but I am listed on the brief along with the Goodwin Proctor partner and senior associate with whom I was working at that time. The analysis of *Hill* that is presented in that brief is a legal argument that was made on behalf of my amici-clients, and there have been developments in the law concerning buffer zones in the two decades that have transpired since the brief was filed.

As a sitting federal judge, I am bound by the Supreme Court's current First Amendment caselaw, and I would apply the binding case law of the Supreme Court and the D.C. Circuit if I am assigned to any First Amendment case in which such precedents are applicable. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of buffer zones that government officials might establish in hypothetical circumstances.

- 10. Some of my colleagues on the other side of the aisle have criticized previous nominees for their membership or involvement with the Federalist Society. While I know you were never a member, you have spoken at an event hosted by the American Constitution Society, a self-described progressive legal organization.**
- a. In your opinion, what is the substantive difference between the Federalist Society and the American Constitution Society?**
  - b. Do you think a nominee's involvement with the American Constitution Society is less problematic than with a nominee's involvement with the Federalist Society?**

RESPONSE: I am not a member of the Federalist Society or the American Constitution Society, and thus I am not in a position to speak to the substantive differences between those two organizations or whether a nominee's involvement with either organization is "problematic." Canon 4 of the Code of Conduct for United States Judges authorizes judges to participate in extrajudicial activities, including being involved with organizations, subject to certain limitations, *see also* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law"), and the Code's commentary emphasizes that "a judge should not become isolated from the society in which the judge lives[.]" Commentary to Canon 4. The Judicial Conference Committee on Codes of Conduct has also spoken to this issue: Advisory Opinion No. 82 provides that, prior to undertaking involvement with any organization, judges should carefully consider "the Code's fundamental commands to avoid impropriety or the appearance of impropriety, [to] not lend the prestige of office, and [to] not participate in activities that would detract from the dignity of the judge's office, interfere with the performance of official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification." Advisory Opinion No. 82 ("Joining Organizations").

- 11. The left-wing group Demand Justice has deployed a billboard truck to pressure Justice Breyer into retiring:**



**Do you agree with Demand Justice’s message?**

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court’s precedents, regardless of that Court’s composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

**12. In response to a question from Senator Hawley about a statement of beliefs from a school on whose board you used to sit, you answered that you’re a member of a lot of organizations and you don’t know all the statements of every organization you’re a member of. Then-Senator Franken asked then-Professor Amy Barrett at her hearing of her speaking at the Blackstone Fellowship in light of their positions on LGBT issues, “Is it your habit of accepting money from organizations without first learning what they do?”**

- a. Is it your habit to join an organization without knowing what they believe in?
- b. Can you list the organizations you joined before learning about what the organization believed in?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12<sup>th</sup> grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website at the time of my service. My service on the advisory school board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

**13. What kind of analysis does the D.C. Circuit use to determine if a final rule is a “logical outgrowth” of a proposed rule?**



RESPONSE: A final rule qualifies as a logical outgrowth of a proposed rule, and thus satisfies the Administrative Procedure Act’s notice requirement, “if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (quoting *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009)). “On the other hand, a final rule is *not* a logical outgrowth if ‘interested parties would have had to divine [the agency’s] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.’” *Id.* (quoting *CSX Transp.*, 584 F.3d at 1080 (emphasis supplied)). Thus, the D.C. Circuit has “found that a final rule represents a logical outgrowth where the [agency’s Notice of Proposed Rulemaking] expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change.” *CSX Transp.*, 584 F.3d at 1081. “By contrast, [the D.C. Circuit’s] cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position.” *Id.*

**14. Senator Booker invoked John Adams representing British soldiers accused of murder during the Boston Massacre as a reason why you are the right person for the job. Please list all the cases where you represented a client whose views you disagreed with or whose alleged crimes you found offensive.**

RESPONSE: Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client’s legal arguments and/or undermining her client’s interests by publicly declaring the lawyer’s own personal disagreement with the legal position or alleged behavior of her client. Because these standards apply even after termination of the representation, it would be inappropriate for me to list the cases in which I previously represented a client whose views I disagreed with or whose alleged crimes I found offensive.

**15. In response to my question about sentencing reform, you mentioned that one of your rationales for giving judges more information is because judges don’t like to be “outliers.”**

- a. What, if anything, should we as Congress do about judges who *are* outliers?**
- b. Is that an area for the judicial branch to work on solutions for?**
- c. Is it worse to be an outlier below the mean, above the mean, or are they both equally bad?**

RESPONSE: As a sitting federal district court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court and the D.C. Circuit. I no longer serve

on the United States Sentencing Commission, and canons of judicial ethics prevent me from opining on particular policy positions regarding sentencing reforms or commenting on the particular legislation that Congress should enact. Congress has authorized a policymaking branch of the Judiciary—the United States Sentencing Commission—to make proposals concerning sentencing reforms; additionally, with Congress’ consent, the Commission promulgates sentencing guidelines for federal judges to use when imposing sentences in individual cases. After *Booker*, judges have a duty to calculate and consider the applicable sentencing guidelines in every federal criminal case, and to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of punishment, as 18 U.S.C. § 3553(a) requires.

**16. During Senator Feinstein’s questioning of you, she referenced a statistic from the left-wing group Alliance for Justice that put your reversal rate at less than 2%. I know that was not your statistic, but you didn’t object to the premise of the question and answered. Do you believe 2% is an accurate portrayal of your reversal rate? If not, what do you think your reversal rate is?**

RESPONSE: To the best of my knowledge, it is accurate to say that only 2% of the written opinions that I have issued have been reversed by the Court of the Appeals.

**17. Westlaw has reversal reports for every sitting judge. Instead of using the total number of opinions (which appears to be the denominator used by AFJ in getting to 2%), Westlaw looks at the opinions that were *actually* appealed, which makes sense to me since an opinion that is not appealed cannot be reversed.<sup>3</sup> Using those numbers, you have been reversed 8 times out of 75 appeals, for a rate of 10.7%. Do you believe this is a more accurate reflection of your reversal rate? If not, why not?**

RESPONSE: The reversal-rate analysis that Westlaw employs is misleading. Looking only at the number of reversals relative to the number of decisions that are “actually appealed” merely assesses a losing party’s odds of being successful if an appeal is sought; that computation does not account for the overall number of opinions that the judge has issued and the fact that a losing party may choose to forego an appeal for a number of reasons, including the recognition that the ruling is correct and would be sustained on appeal. The performance of a judge who has written 562 opinions, only 75 of which have even been appealed, is not the same as that of a judge who has written 80 opinions, 75 of which have been appealed, even if those two judges have the same number of reversals. Westlaw would apparently characterize a hypothetical judge who has issued hundreds of uncontested written decisions as having a 50% reversal rate if only four of his decisions are appealed and if two of those four are reversed.

Westlaw’s reversal-rate analysis also lacks an assessment of the relative complexity of the cases at issue or the practices of the court of appeals that reviews a district

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<sup>3</sup> Westlaw notes that the number of cases appealed comes “from only those appeals where the lower court judge is identified in the decision.”

judge's work. Not all reversals are equivalent. *See, e.g., Gov't of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018) (adopting the view of the Sixth and Seventh Circuits, in the context of a circuit split, concerning a dispute regarding application of a provision of the Comprehensive Environmental Response, Compensation, and Liability Act), *rev'd*, 950 F.3d 104 (D.C. Cir. 2020) (reversing after a determination that the D.C. Circuit will side with the Ninth Circuit, rather than the Sixth and Seventh, with respect to the question at issue), *cert. granted*, 141 S. Ct. 976 (oral argument held Apr. 26, 2021). Thus, while Westlaw's analysis suggests that a judge's reversal rate (calculated solely based on the number of appeals and the number of reverses) is a reliable marker of judicial competence, without weighting the cases or standardizing the review practices of the various courts of appeals, it is difficult draw meaningful conclusions.

**18. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings.**

- a. **Does any judge have control over what third parties or reporters say about her rulings?**
- b. **Was it wrong for Senator Tillis to question you over what third parties or reporters said about your rulings?**
- c. **Was it wrong of Democrats to question judicial nominees appointed by President Trump over what third parties or reporters said about their rulings?**

RESPONSE: No judge has control over what third parties or reporters say about her rulings. It would be inappropriate for me to comment on the propriety of any question that any Senator asks of a nominee in connection with the Senate's exercise of its constitutional advise and consent power.

**19. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings. You also said in the *McGahn* opinion, "Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings." Did the Department of Justice claim monarchical powers for the President in that case?**

RESPONSE: In *McGahn*, the Department of Justice claimed that the President has the power to prevent certain former staff members from appearing for questioning in response to a valid legislative subpoena, even against will of the former staff member to whom the subpoena is directed—i.e., even when the former staff member would otherwise be required by law to respond to the subpoena, would willingly do so, and would be able to invoke executive privilege in the context of such questioning, where appropriate.

**20. You go on to explain, "This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control."**

- a. **Did the Department of Justice claim blood loyalty on the part of Don McGahn?**

- b. **Assuming “not a subject, bound by loyalty or blood” is the correct analytical category by which to understand the relationship between the President and his staff, does it also apply to the following relationships? If not, why not?**
  - i. **Attorney General and political staff**
  - ii. **Attorney General and career staff**
  - iii. **Senators and Senate staff**
  - iv. **Judges and law clerks**
  - v. **Police chiefs and patrol officers**

RESPONSE: As a sitting federal judge, it would not be appropriate for me to provide an opinion concerning hypothetical disputes over directives from the listed government officials to their staff members. With respect to the Department of Justice’s arguments concerning the power of the President to direct that certain former White House staff members ignore a valid legislative subpoena, please see my response to Question 19.

21. **In *McGahn* you continued: “Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States.”**
- a. **Doesn’t this beg the question?**
  - b. **Wasn’t the position of the Department of Justice that Don McGahn couldn’t comply with the subpoena *because of* his oath to protect and defend the Constitution of the United States?**

RESPONSE: Please see my response to Question 19.

22. **If a future Congress were to subpoena one of your law clerks to better understand your thinking in the *McGahn* case and you instructed him or her not to comply with the subpoena, would it answer that “the primary takeaway from the past 250 years of recorded American history is that Judges are not kings; this means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control”?**

RESPONSE: Please see my response to Question 20.

23. **President Obama famously said of enacting policy without legislation, “I have a pen and a phone.” Was President Obama a king?**

RESPONSE: I am not familiar with the quoted statement. The Supreme Court has addressed the extent of the President’s authority to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, “[t]he President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act

of Congress or from the Constitution itself[,]” *Medellin*, 552 U.S. at 524 (citation omitted), and the Supreme Court’s pronouncements regarding this issue are binding on me as a sitting federal judge. The Code of Conduct for federal judges prevents me from further opining about the oft-litigated and controversial subject of the power of the President to enact policy without legislation.

**24. During your hearing there were multiple comments made about the importance of an independent judiciary. You defined judicial activism to Senator Cruz as a judge unable or unwilling to separate personal views from the law and ruling consistent with those views instead of the law. I agree.**

- a. Is the final disposition of a case the only metric to mark judicial activism? More specifically—if a judge reaches the result mandated by the law and by precedent but editorializes why she disagrees with the result or engages in superfluous dicta, is that also judicial activism?**
- b. “I have my doubts about the wisdom of courts opining on hot-button political issues or the motives of citizens who hold one position or another in those debates.” Do you agree with this statement? If not, why not?**

RESPONSE: I am not familiar with the quoted statement. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with what the law requires, despite the judge’s own personal views of the matter, and this is so even with respect to cases and controversies that pertain to controversial political issues. While the judge may acknowledge the force of contrary positions regarding the legal issues in dispute, the result that a judge reaches must be consistent with the requirements of the law, as set forth in the binding precedents of the Circuit and the Supreme Court. Judicial activism occurs when a judge who is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views. It is my testimony that judicial activism is properly defined as characterizing a judge who is unwilling or unable to rule as the law requires.

**25. Senator Cruz asked you if you believed in the idea of a “living constitution” and you declined to answer one way or the other, citing your lack of experience interpreting constitutional text. During your 2013 nomination to the District Court, the late Senator Tom Coburn asked you the following written question for the record: “Some people refer to the Constitution as a ‘living’ document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?” You responded: “No.”**

- a. Why did your answer change from 2013 to now?**
- b. If you were absolute in your answer about disagreeing with the idea of a “living” constitution in 2013 but were not during your hearing last week, should we take your answer to mean that you at least agree with the “living” constitution more than you did in 2013?**
- c. If so, what has happened during your tenure as a District Judge to make you believe more in a “living” constitution than you did in 2013?**

- d. As I mentioned, you cited your lack of experience interpreting constitutional text in declining to answer Senator Cruz’s question. Yet you answered freely in 2013. Did you have more experience interpreting constitutional text in 2013 than you do now?**

RESPONSE: As a sitting federal judge, I am bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court’s chosen methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have a duty to avoid commenting on, or providing personal views of, disputed legal matters such as the most appropriate method of interpreting the Constitution. I was not a sitting federal judge when I answered Senator Coburn’s question in 2013.

- 26. Under the Supreme Court’s First Amendment jurisprudence, can someone shout “fire” in a crowded theater?**

RESPONSE: In *Schenck v. United States*, Justice Oliver Wendell Holmes, Jr., writing for the Court, stated in dicta that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” 249 U.S. 47, 52 (1919). The facts of *Schenck* itself did not involve yelling fire in a crowded theater; instead, the Court was reviewing convictions for conspiracy to violate the Espionage Act of 1917, where the defendants had merely mailed leaflets that asserted that the draft was unlawful to men eligible for military service. *See id.* at 48–49. The Court affirmed the convictions on the ground that such speech presented a “clear and present danger” by obstructing the war effort. *Id.* at 52.

*Schenck*’s “clear and present danger” test no longer governs the scope of permissible speech proscriptions, and the Supreme Court has generally recognized that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force[.]” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, under *Brandenburg*, the State may proscribe speech or advocacy, including potentially yelling fire in a crowded theater, if the speech “is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.” *Id.* (emphases added).

- 27. Justice Scalia’s opinion in *D.C. v. Heller* does allow for some regulation of firearms, such as possession of firearms by felons. Which firearm regulations has the D.C. Circuit upheld as constitutional?**

RESPONSE: Since the Supreme Court’s decision in *Heller*, the D.C. Circuit has upheld challenged firearm regulations on five separate occasions. In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), the D.C. Circuit upheld the District’s basic registration requirement as applied to handguns and the District’s prohibitions on assault weapons and large-capacity magazines. In *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), the D.C. Circuit upheld the federal law

prohibiting felons from possessing firearms as applied to common-law misdemeanants. In *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015), the D.C. Circuit upheld the District's basic registration requirement as applied to long guns, the District's requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the District's requirement that an individual pay certain fees associated with the registration of a firearm, and the District's requirement that registrants complete a firearms safety and training course. In *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019), the D.C. Circuit upheld the federal statute prohibiting felons from possessing firearms, as applied to a person convicted of a felony count of making a false statement to a lending institution. And, most recently, in *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019), the D.C. Circuit upheld a federal law prohibiting the possession of firearms on the grounds of the United States Capitol, as applied to a defendant who possessed guns in a parking lot near the Capitol.

**28. Is it proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about in a dissent?**

RESPONSE: A circuit judge might properly encourage the Supreme Court to reconsider holdings that are confusing or otherwise problematic in application, by pointing out a problem with the interpretation or application of a precedent, in either a concurrence or a dissent. But it would not be proper for a circuit court judge to depart from Supreme Court precedent when ruling in a case.

**29. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?**

RESPONSE: As a sitting district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. My review of my past practice indicates that I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). I have also consulted the legislative history of a statute, as the Supreme Court permits, but I have never resolved an ambiguity based solely on the legislative history of the statute.

**30. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?**

RESPONSE: As a district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. In my experience, canons of statutory interpretation sometimes lead to

conflicting results, and are not always and inevitably helpful. I attempt to resolve alleged ambiguities in a statutory provision by carefully examining the text of the provision and the statute as whole, including any statutory statements of finding and purpose. If necessary, I consult the legislative history of the statute, as the Supreme Court permits, in order to ascertain the will of Congress.

**31. How do you decide when text is ambiguous?**

RESPONSE: Some of the nearly 50 written opinions that I have issued that involve statutory interpretation address disputed questions of first impression about the meaning of the text. *See, e.g., Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 367–70 (D.D.C. 2018). In each of those cases, when deciding whether the statute's text is ambiguous, I used traditional tools of statutory construction, including textual analysis, structural analysis, and canons of construction, to determine whether the statute at issue “can be read more than one way” and is therefore ambiguous, *AFL–CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (citation omitted); *see also, e.g., Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375, 391–99 (D.D.C. 2016), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).

**32. Do you find, in general, Congressional statutes or agency regulations to consist of more ambiguous text?**

RESPONSE: As a district court judge who has reviewed both congressional statutes and agency regulations, it is my role to interpret statutes and regulations, as necessary, to resolve the cases before me. I have not formed an opinion as to whether statutes or regulations tend to be more ambiguous as a generally matter, and I doubt that it is possible to determine in the abstract which form of law has “more ambiguous text.” I evaluate each case that comes before me on its own merits.

**33. In Federalist No. 62, James Madison wrote: “It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?” Do you agree with this statement?**

RESPONSE: In our constitutional system, the Legislative Branch promulgates statutes, consistent with its limited authority under Article I of the Constitution and the protections of individual rights embodied in the Constitution's Amendments. I understand this quotation from Federalist No. 62, which is entitled, “The Senate,” to be addressing the extent to which the Senate should exercise its powers in a prudent manner that leads to clear statements of policy concerning the matters that the Senate seeks to address. In any case that raises the question of the clarity of legislative enactments, it would be my duty to apply Supreme Court precedent and the binding law of the D.C. Circuit to resolve the dispute before me.



**34. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?**

RESPONSE: During my confirmation hearing, I testified in response to a question from Senator Hawley that the Free Exercise Clause is a fundamental and foundational constitutional right. The Supreme Court has made clear that the First Amendment’s Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

**35. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization’s right to hire and fire ministers? What, in your view, are the limits on church autonomy consistent with what the Supreme Court has said?**

RESPONSE: Federal courts, including the Supreme Court, are actively evaluating the scope of the fundamental First Amendment right of religious liberty in a variety of circumstances. I am bound by the Supreme Court’s precedents and pronouncements regarding church autonomy, including its reaffirmance in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that the Free Exercise Clause protects the right of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 2055 (citation omitted). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding the limits of church autonomy beyond what the Supreme Court has said.

**36. Do you agree that the Religious Freedom Restoration Act requires assessing compelling government interests “to the person” substantially burdened by a government action?**

- a. **If not, why not?**
- b. **If so, can *general* interests restrict religious liberty, or must the interests be defined more precisely?**

RESPONSE: In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court held that the Religious Freedom Restoration Act “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430–31 (citation omitted). Thus, federal courts must “look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *Id.* at 431. My personal views of this standard, if any, are irrelevant; notwithstanding

any personal views of this issue, I am required to apply the Supreme Court's interpretation of what RFRA requires. If confirmed, I will do so.

**37. Do you agree with the following statements?**

- a. **We live in a pluralistic society with people of widely diverse faith traditions. Religious freedom for all is part of our country's bedrock, from the enactment of our Constitution to the establishment of our more recent statutes that protect against religious discrimination.**

RESPONSE: Please see my response to Question 34.

- b. **Title VII requires that employers not discriminate against applicants or employees because of their religious beliefs, observances, or practices and that employers accommodate religious beliefs, observances, and practices, absent undue hardship.**

RESPONSE: Title VII of the Civil Rights Act of 1964 prohibits employers from undertaking certain employment practices "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Under that statute, prohibited practices include the failure or refusal to hire an individual, or the discharge of an individual, on the basis of these protected characteristics, as well as "discriminat[ion] against any [such] individual with respect to his compensation, [or the] terms, conditions, or privileges of employment." *See id.* § 2000e-2(a). The definitions provision of Title VII defines "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

- c. **Federal civil-rights regulators should seek to learn more about the extent to which employees request time off for prayer or Sabbath observance, seek exemption from grooming or dress codes, or seek to avoid participation in hot-button practices like abortion or LGBTQ celebration.**

RESPONSE: As a sitting district judge, my role in the judicial system is to consider any legal claims brought by employees concerning the manner in which their employers have treated their requests for religious accommodation. My role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment on threshold policy questions concerning what federal civil-rights regulators can or should do to educate themselves regarding such requests.

- d. **It is important to improve religious discrimination awareness for employees and employers while encouraging meaningful dialogue between employees, employers, and the government.**

RESPONSE: As a sitting district judge, my role is to consider any legal claims brought by employees concerning alleged religious discrimination, and my role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment about threshold policy matters, including the importance *vel non* of general awareness and meaningful dialogue about religious discrimination.

**e. The federal government should prevent and remedy unlawful religious discrimination.**

Please see my answers to Question 37(c) and (d).

**38. You can answer the following questions yes or no:**

- a. Was *Brown v. Board of Education* correctly decided?
- b. Was *Loving v. Virginia* correctly decided?
- c. Was *Griswold v. Connecticut* correctly decided?
- d. Was *Roe v. Wade* correctly decided?
- e. Was *Planned Parenthood v. Casey* correctly decided?
- f. Was *Gonzales v. Carhart* correctly decided?
- g. Was *District of Columbia v. Heller* correctly decided?
- h. Was *McDonald v. City of Chicago* correctly decided?
- i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
- j. Was *Sturgeon v. Frost* correctly decided?
- k. Was *Juliana v. United States (9th Cir.)* correctly decided?
- l. Was *Rust v. Sullivan* correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of any of the Supreme Court’s binding precedents. Of the listed cases, the *Brown v. Board* and *Loving v. Virginia* opinions are two exceptions to this general rule. *Brown* overruled the manifest injustice of *Plessy v. Ferguson*, and its underlying premise—that “separate but equal is inherently unequal”—is beyond dispute. *Loving*, which reaffirms the Court’s rejection of the “notion that the mere ‘equal application’ of a statute containing racial classifications” comports with the Fourteenth Amendment, is a direct outgrowth of *Brown*. Therefore, I can confirm that that these two matters were rightly decided without calling into question my duties under the Code of Conduct.

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

RESPONSE: The original Blaine Amendment—a proposal that Congress considered but did not pass in the 1870’s—“would have amended the Constitution to bar any aid to sectarian institutions.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Some states have enacted state-law provisions or have adopted practices that bar government entities from appropriating funds to religious sects or institutions (which I understand

are referred to as Blaine Amendments), on the grounds that doing so is necessary to prevent Establishment Clause violations. The Supreme Court recently addressed one such state-law provision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020) (assessing the Montana Supreme Court's application of a no-aid provision in Montana's Constitution to invalidate a state scholarship program). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court reviewed a similar state agency's practice of summarily denying a religious institution's application for competitively awarded grant funding on the grounds that the money could not be given to a religious institution. In both cases, the Supreme Court struck down the state restrictions as a violation of the First Amendment's neutrality requirement. See also *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). As a sitting federal judge, I am bound by the Supreme Court's precedents regarding whether a state prohibition concerning the provision of funds to religious sects or institutions violates the Constitution.

**40. Please describe the selection process that led to your nomination from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

RESPONSE: On January 26, 2021, White House Counsel Dana Remus contacted me concerning my potential nomination to the D.C. Circuit to fill the anticipated vacancy that would arise from then-Judge Merrick Garland's confirmation as Attorney General of the United States. Since that date, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice regarding my potential nomination and the nominations process. On February 24, 2021, I met with President Biden and Dana Remus at the White House concerning the nomination, and on March 30, 2021, the President announced his intent to nominate me.

**41. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

RESPONSE: Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. Mr. Kang served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

**42. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

RESPONSE: No.

**43. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

RESPONSE: I had one conversation with Kristen Clarke in mid-April 2021, in which we discussed her experience in appearing before the Committee. That is the only communication that is responsive to this question.

**44. You mention in your SJQ that you met with President Biden before being nominated. Did he ask you any questions about judicial precedent or public policy in that meeting? If so please describe those questions and your responses.**

RESPONSE: President Biden did not ask me any questions about judicial precedent or public policy.

**45. Please explain with particularity the process by which you answered these questions.**

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice's Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

**46. Do these answers reflect your true and personal views?**

RESPONSE: I have responded truthfully to each question, and have provided answers that are true and consistent with my oath of office and my duties and obligations as a sitting federal judge.

**Responses to Questions for the Record from Senator Tom Cotton  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

- 1. Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

RESPONSE: No.

- 2. Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

RESPONSE: No.

- 3. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for drug trafficking should be more lenient?**

RESPONSE: During my confirmation hearing, Ranking Member Grassley stated that he himself was “someone who has worked hard on the First Step Act and other issues of criminal justice reform,” and that he “appreciate[d]” my prior work “on sentencing reform[.]” He then asked me one question about a particular policy position that I had publicly asserted as a member of the Sentencing Commission—a position that Judge William Pryor, a former Acting Chair of the Sentencing Commission, also shared. In this regard, Ranking Member Grassley noted that, as members of the Sentencing Commission, Judge Pryor and I had publicly “agree[d] sentencing needs to be reformed” but we had also publicly debated the nature of any such reforms. Ranking Member Grassley’s one question to me during the confirmation hearing was to ask me to explain the difference between Judge Pryor’s and my publicly stated policy positions on sentencing reform, and, specifically, “why [I] trust judges with more discretion when it comes to sentencing than Pryor does?”

In response to Ranking Member Grassley’s question, I first thanked Ranking Member Grassley, Chairman Durbin, Senator Lee and other members of the Judiciary Committee, “as a former member of the Sentencing Commission,” for their work on statutory changes to the federal sentencing system. I then proceeded to explain the different approaches that Judge Pryor and I had taken “in our public statements and in the [Commission] meetings about the need for reform[.]” and I explained our respective, publicly stated views about “how do we change the system after the Supreme Court’s decision making the Guidelines advisory and not binding anymore on judges?” Ranking Member Grassley did not respond to my description of the past

positions that Judge Pryor and I had taken in the context of proposed sentencing reforms during my service as a policymaker on the Sentencing Commission, nor did I engage in any policy discussion with Ranking Member Grassley or express a current position on any federal sentencing laws.

As a pending judicial nominee and a sitting federal judge, I am not a policymaker, and the Code of Conduct for United States Judges prevents me from expressing a view about the propriety of the penalties that Congress has prescribed for any crimes. It would be inappropriate for me to provide policy views concerning whether federal criminal sentences should be more lenient, even based on my expertise as a “former member of the Sentencing Commission[.]” because doing so would jeopardize the confidence of the parties and the public in my ability to set aside any such views and faithfully apply the penalties that currently exist in federal criminal statutes.

- 4. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for fentanyl trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for fentanyl trafficking.

- 5. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for heroin trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the

Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for heroin trafficking.

- 6. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for methamphetamine trafficking should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for methamphetamine trafficking.

- 7. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for armed criminals should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley’s question during my confirmation hearing. When I responded to Ranking Member Grassley’s request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for armed criminals.

- 8. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but “as a former member of the Sentencing Commission.” In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing**



**Commission, do you believe that federal criminal sentences for violent crime should be more lenient?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for violent crimes.

**9. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing Commission, do you believe that illegally reentering the United States after being deported should be a crime?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about whether Congress should have criminalized illegally reentering the United States after being deported.

**10. During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." You also told Senator Lee that you are "aware of" studies regarding racial bias, again mentioning your time as a member of the Sentencing Commission. You said further that the different thresholds to trigger mandatory minimum sentences in crack cocaine cases as compared with powder cocaine cases are one factor that you believe contributes to alleged racial disparities in criminal sentencing. What other factors do you believe contribute to alleged racial disparities in federal criminal sentencing?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's

request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes “as a former member of the Sentencing Commission” or otherwise.

In response to Senator Lee—who asked me whether I would agree or disagree “with someone who said that most racial disparities in criminal convictions and sentencings result from an unconscious racial bias of judges, juries, and other judicial decisionmakers”—I began by explaining that “as a judge now, it is very important for me not to make personal commitments about things like the question that you asked.” I then acknowledged being “aware of social science research” regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission’s body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission’s October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study.

When I responded to Senator Lee, I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors, in response to this policy question.

**11. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s views on foundational, fundamental rights: You said during your hearing that you are bound by the Supreme Court’s opinions on the Second Amendment, including *District of Columbia v. Heller*, and *McDonald v. Chicago*. Do you believe that the Supreme Court “rightly viewed” Second Amendment rights in those cases?**

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]” expressly protects a fundamental and foundational right to religious liberty. I also explained that “the Supreme Court is working through the doctrine” and that “there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently.” Similarly, the Second Amendment

states that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed[.]” and in *District of Columbia v. Heller*, the Supreme Court held that this constitutional provision establishes “an individual right to keep and bear arms[.]” *see* 554 U.S. 570, 595 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 74–50 (2010). As a current federal judge, I am bound to follow both *Heller* and *McDonald*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental rights protected by the First and Second Amendments, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, given that the Supreme Court and other courts are actively considering such issues as applied to various government regulations.

**12. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Speech Clause in *Citizens United*?**

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” expressly protects a fundamental and foundational right to religious liberty. The First Amendment also prohibits Congress from “abridging the freedom of speech” by legislation, and the Supreme Court has long held that it thereby expressly protects a fundamental and foundational right to free speech. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court determined that the First Amendment’s fundamental right to free speech prohibits the federal government from imposing limits on corporate entities’ independent expenditures for political communications. As a sitting federal judge, I am bound to follow *Citizens United*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal view about the Supreme Court’s application of First Amendment protections to campaign-finance restrictions, or any other law, and it would not be appropriate for me to do so under the Code of Conduct for Judges, given the fact that I am bound by Supreme Court precedents and campaign-finance issues are the subject of ongoing legislative review. Disputes concerning these matters are routinely litigated in federal courts.

**13. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from**

**restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Speech Clause in *Citizens United*?**

RESPONSE: Please see my response to Question 12.

- 14. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court in November 2020 enjoined New York from enforcing its 10- and 25- person occupancy limits on religious gatherings, which it described as “the Governor’s severe restrictions on the applicants’ religious services.” Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Exercise Clause in *Roman Catholic Diocese of Brooklyn v. Cuomo*?**

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” expressly protects a fundamental and foundational right to religious liberty. I also explained that “the Supreme Court is working through the doctrine” and that “there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently.” As a sitting federal judge, I am bound to follow the Supreme Court’s decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, as well as the principles that the Court recently articulated, *per curiam*, in *Tandon v. Newsom*, and I would continue to be bound by Supreme Court precedents in this area if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental right to religious liberty, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, as the Supreme Court and other courts are actively evaluating the Free Exercise Clause, as applied to various government regulations.

- 15. During your confirmation hearing, you commented on the Supreme Court’s jurisprudence regarding the First Amendment. Specifically, you said that “the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental.” I’d like to ask you about another of the Supreme Court’s holdings regarding the First Amendment: In *Tandon v. Newsom*, the Supreme Court in April 2021 enjoined California from enforcing its limits on religious gatherings, including gatherings in private homes, noting that California “treats some comparable secular activities more favorably than at-home religious exercise.” This decision did not break new ground, and the Court even noted that this ruling was “the fifth time that the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise,” and that the Court’s decisions have made the law on the Free Exercise Clause “clear.” You**

**mentioned in your confirmation hearing that you are aware of the “series of rulings” from the Supreme Court on this issue in the past few years. Do you believe that the Supreme Court “rightly viewed” the First Amendment’s Free Exercise Clause in *Tandon v. Newsom*?**

RESPONSE: Please see my response to Question 14.

**16. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe that the First Amendment right to free speech, which the Supreme Court has held in *Citizens United v. FEC* also applies to the speech of corporations and nonprofit entities, is a “foundational tenet of our entire government, our constitutional scheme?”**

RESPONSE: Please see my response to Question 12.

**17. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe in the Second Amendment right of an individual to keep and bear arms?**

RESPONSE: Please see my response to Question 11.

**18. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, “I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can’t infringe on people’s religious rights.” Do you believe that the Second Amendment right of an individual to keep and bear arms is a “foundational tenet of our entire government, our constitutional scheme?”**

RESPONSE: Please see my response to Question 11.

**19. Are civil rights guaranteed to all Americans, or only specific sub-sets of Americans?**

RESPONSE: All Americans have the rights that are guaranteed by our Constitution. Federal civil rights statutes, such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, and the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, contain provisions that specifically define the scope of the protections that are afforded by the particular congressional enactment, and in so doing, statutes such as these ultimately ensure liberty and justice for all. Such statutes also typically

contain extensive findings by Congress pertaining to the prior discriminatory treatment of the groups of persons that the statutes cover. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (stating that the law was meant to provide, among other things, “appropriate remedies for intentional discrimination and unlawful harassment in the workplace”); Americans with Disabilities Act § 2(b)(1) (declaring that the law’s purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”); Religious Freedom Restoration Act § 2(b)(2) (explaining that the law was intended to “provide a claim or defense to persons whose religious exercise is substantially burdened by government”). These civil rights statutes, and others, protect the constitutional rights of the categories of persons that are specifically identified in the statutes.

**20. Do illegal aliens have a civil right to come to the United States?**

RESPONSE: The circumstances under which noncitizens may be admitted into the United States are established in several federal statutes, including the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, as amended by legislation including the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009. Section 208 of the INA authorizes the Secretary of Homeland Security or the Attorney General to grant asylum to noncitizens who qualify as refugees within the meaning of the statute and satisfy certain eligibility criteria. *See* 8 U.S.C. § 1158. The Supreme Court has also held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent[.]” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); however, the Court has recently clarified that noncitizens “seeking initial entry[.]” such as those “who arrive at ports of entry” or those who are “detained shortly after unlawful entry[.]” are afforded “only those rights regarding admission that Congress has provided by statute[.]” *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020).

**21. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice’s Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

**22. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers,**

**please also identify the department or agency with which those officials are employed.**

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. No individual outside of the United States federal government wrote or drafted any of the answers to any of the written questions that were sent to me by members of the Committee. My current and former chambers staff assisted me with research, as necessary, and employees of the Department of Justice's Office of Legal Policy provided feedback on the answers that I drafted.

**Responses to Questions for the Record from Senator Ted Cruz  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

- 1. Different judges apply different theories of interpretation to the Constitution. Some understand the Constitution to be living document, whereas Justice Scalia described himself as an originalist and said the Constitution was “dead, dead, dead.” During your hearing, you testified that you have not presided over any cases that have “required [you] to develop a view on Constitutional interpretation of text.”**

- a. Is it your testimony that, as a sitting judge and a nominee for D.C. Circuit Court of Appeals that you do not have a theory of constitutional interpretation?**

RESPONSE: Yes, that is my testimony. As a sitting district judge, I view my role as applying D.C. Circuit and Supreme Court precedents to cases that come before me, and not developing my own theory of constitutional interpretation. If confirmed to the D.C. Circuit, I would likewise be bound by both Supreme Court and D.C. Circuit precedent.

- b. If your answer to subpart (a) is anything other than “yes” please describe the theory of Constitutional interpretation of text to which you ascribe.**

RESPONSE: Please see my response to subpart (a).

- 2. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s philosophy from Warren, Burger, Rehnquist, or Robert’s Courts is most analogous with yours.**

RESPONSE: I do not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. Specifically, in every case that I have handled as a district judge, I have considered only the parties’ arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents of the Supreme Court and the D.C. Circuit. And I have consistently applied the same level of analytical rigor to my evaluation of the parties’ arguments, no matter who or what is involved in the legal action. Moreover, in my work as a district judge, I have not had occasion to evaluate broader legal principles or develop a substantive judicial philosophy. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice’s judicial philosophy and the approach that I have employed as a district court judge or would employ as a D.C. Circuit Judge, if I am confirmed.



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

RESPONSE: As a sitting district judge, I am currently bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court's methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have a duty to avoid commenting on, or providing any personal views about, matters that are in the Supreme Court's province to decide, such as how best to discern the meaning of the Constitution's provisions and whether its meaning has changed over time.

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

RESPONSE: The Constitution requires that the President "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. As a sitting federal judge, who might be called upon to address a President's refusal to enforce a law in the context of a litigated case, it would be inappropriate for me to opine as to whether the President's refusal to enforce a law violates Article II, section 3 or any other constitutional provision.

**5. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?**

RESPONSE: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with the exercise any of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

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

RESPONSE: As a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's size or composition. It would be

inappropriate for me to comment on the merits or demerits of proposals to increase or decrease the number of Justices on the Supreme Court.

**7. Do you personally own any firearms? If so, please list them.**

RESPONSE: No, I do not own any firearms.

**8. Have you ever personally owned any firearms?**

RESPONSE: No, I have never owned a firearm.

**9. Have you ever used a firearm? If so, when and under what circumstances?**

RESPONSE: I have not had occasion to use a firearm. I am familiar with the operation of firearms, however, through my service on a court that often handles trial cases that involve unlawful possession of dangerous weapons, and also through my relationship with my only sibling, who has served both as an infantryman and officer in the Maryland Army National Guard (during which he was twice deployed overseas) and as an undercover narcotics recovery officer in the Baltimore City police department. My earliest exposure to firearms occurred in connection with my childhood relationship with two of my uncles, who were employed as law enforcement officers in Miami-Dade County when I was a child, one of whom was subsequently appointed as the Chief of the City of Miami Police Department.

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

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers “an individual right to keep and bear arms.” 554 U.S. 570, 595 (2008). In *McDonald v. City of Chicago*, the Court further held that the right that the Second Amendment guarantees is a fundamental right that applies to the states as well the federal government. *See* 561 U.S. 742, 750 (2010). These precedents of the Supreme Court are binding on me, and I would be required to apply them in any case that implicates a restriction or limitation on a person’s individual right to own a firearm.

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

RESPONSE: The Supreme Court has held that the Second Amendment confers “an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. The Court has also clarified that the individual constitutional right to keep and bear arms is “not unlimited, just as the First Amendment’s right of free speech [is] not[.]” *Id.* To my knowledge, neither the Supreme Court nor the D.C. Circuit has concluded that the right to own a firearm receives less protection than the other individual rights that are specifically enumerated in the Constitution. If confirmed, I will abide by

*Heller, McDonald*, and any other Supreme Court and D.C. Circuit precedent that defines the scope of protections that the Second Amendment guarantees.

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

RESPONSE: Please see my response to Question 11.

**13. Is the Religious Freedom Restoration Act a civil rights law?**

RESPONSE: Yes. “Congress enacted [the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb–2000bb4] in 1993 in order to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA’s statutory statement of findings and purpose states, *inter alia*, that, under our constitutional scheme, “governments should not substantially burden religious exercise without compelling justification[,]” 42 U.S.C. § 2000bb(a)(3), and RFRA was promulgated to ensure that the government “justif[ies] burdens on religious exercise imposed by laws neutral toward religion[,]” *id.* § 2000bb(a)(4). The statute is aimed at protecting individuals’ First Amendment right to the free exercise of religion in a manner that is similar to the Civil Rights Act’s protection of the Fourteenth Amendment right to equal protection and due process by prohibiting discrimination. Indeed, in interpreting a phrase “persons acting under color of law” as it appears in RFRA, the Supreme Court observed that RFRA “draws from one of the most well-known civil rights statutes: 42 U.S.C. § 1983, and explained that “[b]ecause RFRA uses the same terminology as § 1983 in the very same field of civil rights law, it is reasonable to believe that the terminology bears a consistent meaning.” *Tanzin v. Tanvir*, 141 S. Ct. 486, 490–91 (2020) (internal quotation marks and citation omitted). Congress has also identified RFRA as a civil rights law by including it among the statutes for which attorneys fees are available under the Civil Rights Attorney’s Fees Award Act. *See* 42 U.S.C. § 1988.

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

RESPONSE: The Supreme Court has made clear that, under certain circumstances, various constitutional protections limit what the government can impose on, or require of, private persons and institutions. These constitutional limits include the First Amendment’s Free Exercise Clause. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020) (per curiam). The Supreme Court has also found that government can lack the constitutional authority to regulate the conduct of private parties under certain circumstances. *See, e.g., United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012).

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

RESPONSE: Under the binding precedents of the Supreme Court, the rights secured by the Free Exercise Clause and the Religious Freedom Restoration Act are not limited to religious practices in the home or in houses of worship.

**16. You served on the advisory board of the Montrose Christian School. While you served, the school had a statement of beliefs, posted on its website, that included traditional Christian moral teachings like “all Christians are under obligation to seek to make the will of Christ supreme.”**

**a. Were you aware of this publicly posted statement of beliefs during your time on the advisory board?**

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12<sup>th</sup> grade private school—for one year, from the fall of 2010 to the fall of 2011. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website. My service on the board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

**b. If so, were you aware of the specific declarations that:**

**i. “Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God’s creation.”**

**1. Yes or no?**

**ii. “In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.**

**1. Yes or no?**

**iii. “A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.”**

**1. Yes or no?**

RESPONSE: Please see my answer to Q.16.a.

- c. I have not, and will not, inquire as to what you believe on these issues, and whether these statements reflect your personal views. Probing a nominee's faith, and making it a matter of public display and ridicule, is and has never been appropriate. Do you agree that an individual's beliefs on these matters do not affect his or her fitness to be a judge?**

RESPONSE: Article VI of the Constitution forbids any religious test for appointment to any public office, including an appointment to judicial service. That provision states, in relevant part, that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Per the oath of office and the Code of Conduct, a judge is required to set aside all personal beliefs, including any religious beliefs, when she undertakes to rule in the cases to which she is assigned.

- 17. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?**

RESPONSE: My understanding is that President Biden is seeking to appoint judges from a variety of professional and personal backgrounds.

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

RESPONSE: As a pending judicial nominee and sitting federal judge, the Constitution and the Code of Conduct for United States Judges prevent me from commenting on the constitutionality of any particular set of factors that the Executive Branch might or does consider when making political appointments.

- 19. Is there systemic racism in public policy across America?**

RESPONSE: I am aware that policymakers in the Executive Branch have expressed views about "systemic racism," including, for example, the view that "systemic racism refers to historic patterns or practices that have had a disparate impact of communities of color and other ethnic minorities, such as the fact that those communities have disproportionately lower rates of employment and wealth accumulation." Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General, at 64 (Feb. 28, 2021). Policymakers routinely consider evidence concerning such matters, and they also make determinations regarding relevant policy changes. The role of a judicial

officer is distinct from that of a policymaker; as a judicial officer, it is my duty to adjudicate individual claims, including claims of race discrimination, that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination and other unlawful conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, and I do not draw upon, reference, or consider my personal views, if any, regarding systemic racism. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such phenomenon.

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

RESPONSE: Please see my response to Question 19.

**21. If you are to join the D.C. Circuit, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the Court to provide its employees trainings which include the following:**

- a. One race or sex is inherently superior to another race or sex;**
- b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**
- c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**
- d. Meritocracy or related values such as work ethic are racist or sexist.**

RESPONSE: To my knowledge, the judges of the D.C. Circuit are not involved in evaluating or selecting training programs for court employees. If I join the D.C. Circuit, and if am asked to participate in evaluating any such program, I would assess the program's teachings and would oppose any instruction regarding race or sex that is unconstitutional or are otherwise contrary to law in light of the binding precedents of the Supreme Court and the D.C. Circuit.

**22. Will you commit to opposing any proposed trainings for D.C. Circuit employees that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

RESPONSE: Please see my response to Question 21.

**23. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?**

RESPONSE: As a sitting federal judge, it is not my role to determine whether a witness's consideration of the race of a perpetrator is "appropriate," as opposed to unlawful, and I assess the lawfulness of a defendant's behavior based solely on the

facts of the particular case and the applicable law, including binding precedents of the D.C. Circuit and the Supreme Court. In any event, this question provides insufficient information to form an opinion about the appropriateness of the hypothesized witness's decision-making process, and as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a witness's consideration of race in this hypothetical situation.

**24. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?**

RESPONSE: As a sitting federal judge, it is not my role to determine whether conduct by individuals is "racist," as opposed to unlawful, but the question itself posits that race played no role in the caller's decision to contact the police. Moreover, as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a person's decision to call the police in this hypothetical situation.

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

- a. Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?**
- b. Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?**

RESPONSE: Under our constitutional system, Congress determines the applicable penalties for conduct that it has declared unlawful, and, by statute, it has determined that the death penalty is an appropriate sentence for certain federal crimes under certain circumstances. The Supreme Court has upheld the death penalty as constitutional, and it is the President's duty to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 3. Acting alone, the President does not have the authority to change the laws that Congress enacts, including the penalties that Congress has prescribed for criminal offenses. As a pending judicial nominee and sitting federal judge, I cannot opine as to any hypothetical scenario in which the President might refuse to implement any aspect of the criminal justice regime that the federal statutes embody.

**26. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that an attack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?**

RESPONSE: I am not familiar with these statements by Attorney General Garland, but the quoted statements appear to refer to alternative hypothetical circumstances involving an attack on a courthouse. Because litigation involving such issues might arise in the future, Canon 3 of the Code of Conduct prohibits me, as a sitting federal judge, from providing any personal view of whether the hypothesized conduct qualifies as “domestic extremism” or constitutes “an attack on our democratic institutions.”

**27. Do you agree that free speech is an essential and irreplaceable American value?**

RESPONSE: Yes. The First Amendment of the Constitution plainly protects the right of free speech, *see* U.S. Const. amend. I, and the Supreme Court has long held that freedom of speech is a “fundamental” right. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 150 (1939).

**a. What are the present threats to free speech in America?**

RESPONSE: Policymakers routinely consider whether free speech in America is being threatened in various ways, and judicial officers also sometimes consider legal actions brought by individuals and entities who claim that their rights to free speech are being threatened. As a judicial officer, it is my duty to adjudicate individual claims of free-speech violations, and when I have jurisdiction to do so, I resolve properly filed legal disputes concerning violations of free speech based solely on the arguments that the parties make, the established facts of the particular case, and the applicable law. *See, e.g., Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013). I do not draw upon, reference, or consider my personal views, if any, regarding present threats to free speech in America. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such threats.

**b. What role do the courts have in addressing threats to free speech?**

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

**c. Does the First Amendment protect speech that some may consider offensive?**

RESPONSE: Yes. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

**i. If so, what are the limits to that protection?**



RESPONSE: The Supreme Court has made clear that “speech that is ‘vulgar,’ ‘offensive,’ and ‘shocking’ is ‘not entitled to absolute constitutional protection under all circumstances.’” *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978)). For instance, the government can “lawfully punish an individual for the use of insulting “‘fighting’” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Similarly, “obscene material is unprotected by the First Amendment[.]” such that the government may regulate materials that, “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

**d. What is “hate speech”?**

RESPONSE: A plurality of the Supreme Court has described “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” as “hateful[.]” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion). However, the Supreme Court has not defined “hate speech” as a distinct doctrinal category, and the Court has consistently recognized First Amendment limits on the government’s ability to regulate such speech. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (holding that an ordinance that prohibits “plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” is facially unconstitutional); *see also B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009) (observing that “[r]acially offensive speech cannot be restricted for that reason alone”).

**i. Is “hate speech,” as you have just defined it, protected by the First Amendment?**

RESPONSE: Please see my response to Question 27(d).

**ii. If so, what are the limits to that protection?**

RESPONSE: The Supreme Court has held that the government may punish “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[.]” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), consistent with the First Amendment. The government can also permissibly regulate “true threats,” *i.e.*, “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

**28. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?**

RESPONSE: Yes. The Supreme Court has held that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students” in public educational institutions, and that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Thus, “the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups’ viewpoints.” *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 667–68 (2010). However, the Supreme Court has held that public schools can regulate student speech that would “materially and substantially disrupt the work and discipline of the school[.]” *Tinker*, 393 U.S. at 513, and that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Whether the *Tinker* rule applies to student speech that occurs off campus is a matter that the Supreme Court is currently considering in the case of *Mahanoy Area School District v. B.L.*, No. 20-255 (U.S. argued Apr. 28, 2021).

**29. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?**

RESPONSE: The Supreme Court has held that the First Amendment does not directly regulate the actions of private educational institutions, because, by its terms, the First Amendment “appl[ies] to governmental action” and “ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech[.]” *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

**30. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?**

RESPONSE: Whereas Title VI of the Civil Rights Act of 1964 prohibits entities (including educational institutions) that receive federal funding from discriminating on the basis of race, color, or national origin, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972 prohibits educational institutions that receive federal funding from discriminating on the basis of sex, 20 U.S.C. § 1681(a), to my knowledge, no federal statute currently prohibits educational institutions that receive federal funding from discriminating on the basis of speech.

**31. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required schools to adopt a lenient “more likely than not” burden of proof when**

**adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?**

RESPONSE: It is well established that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). Because the “more likely than not” burden of proof is a lower standard than proof beyond a reasonable doubt, it would be easier to establish guilt concerning claims of sexual harassment in the context of DOE adjudications than in criminal prosecutions concerning similar conduct.

**32. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?**

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on this question.

**Responses to Questions for the Record from Senator Mike Lee  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

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

RESPONSE: I do not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. In every case that I have handled as a district judge, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents of the Supreme Court and the D.C. Circuit. And I have consistently applied the same level of analytical rigor to my evaluation of the parties' arguments, no matter who or what is involved in the legal action. If confirmed to the U.S. Court of Appeals for the D.C. Circuit, I would do the same.

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

RESPONSE: I have issued nearly 50 published opinions in which I have engaged in the process of interpreting a federal statute. When I undertook to determine the meaning of statutory text in each of those cases, I started with a comprehensive evaluation of the statute's text, using traditional tools of statutory construction, including a close textual analysis of the words and structure of the statute. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I have also occasionally employed canons of construction. Use of these tools ordinarily results in a conclusion regarding the meaning of the statutory provision. However, if I find that the statutory text is ambiguous insofar as it is susceptible to more than one meaning, I reconsider the parties' arguments and may consult the legislative history, as the Supreme Court permits, in an effort to ascertain the will of Congress. I have never resolved a statutory ambiguity based solely on the legislative history of the statute.

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

RESPONSE: I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the

Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61. As a lower court judge, I am bound by both the precedents of the Supreme Court and its method of analysis, and if called upon to interpret a constitutional provision, I would adhere to the methods of analysis that the Supreme Court and the D.C. Circuit employ, without regard to any personal view of how the Constitution should be interpreted.

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

RESPONSE: Please see my response to Question 3.

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

RESPONSE: The “irreducible constitutional minimum” requirements for standing to invoke the power of a federal court to resolve, as necessary to demonstrate that the plaintiff’s legal claim presents a remediable case or controversy that gives rise to jurisdiction under Article III of the Constitution, are: (1) that the plaintiff has suffered an injury in fact that is “concrete and particularized” and “actual or imminent”; (2) that the asserted injury is fairly traceable to the defendant’s action, and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

**6. Do you believe there is a difference between “prudential” jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?**

RESPONSE: Article III, section 2 defines the scope of a federal court’s jurisdiction—i.e., “[t]he judicial Power” that the Constitution vests in the federal judiciary—and the Supreme Court has developed various doctrines that relate the exercise of a federal court’s jurisdiction. Some of these doctrines are mandated by the Constitution’s text; others are merely “prudential.”

Standing, mootness, and ripeness are all rooted in Article III’s “case” or “controversy” requirement. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 81 (1978). These determinations are mandatory considerations that must be assessed at the outset of a case, and if there is no standing, or if the matter is moot or unripe, the court lacks jurisdiction to proceed to review the merits and resolve the dispute.

Other limits on a federal court’s exercise of jurisdiction that are not grounded in the text of Article III, but the Supreme Court has determined that the exercise of a court’s

jurisdiction over certain cases and controversies is restricted on these grounds nevertheless. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (explaining that “prudential standing encompasses the general prohibition on a litigant’s raising another person’s legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches” (internal quotation marks and citation omitted)); *Duke Power Co.*, 438 U.S. at 81–82 (discussing “prudential considerations embodied in the ripeness doctrine[,]” such as the extent to which the parties would be “adversely affected” by a “delayed resolution” of the case); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33 (1953) (noting that various practical concerns impact mootness determinations, such as the likelihood that an action will recur). Notwithstanding these “prudential” considerations, the Supreme Court has recently reiterated that federal courts must hear cases that have been properly brought, and that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted).

Another potential category of prudential restrictions that pertain to a court’s jurisdiction relate to circumstances under which a court can hear claims that implicate the adjudicative authority of the States. The Supreme Court has sometimes required federal courts to abstain from exercising jurisdiction as a prudential matter, rather than one that is necessarily grounded in Article III. *See, e.g., R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (emphasizing that federal courts should abstain from exercising jurisdiction over a case involving state law when, for instance, resolution of a state law question by state courts can avoid the necessity of deciding a question of federal constitutional law); *see also Younger v. Harris*, 401 U.S. 37, 41 (1971) (holding that federal courts should not grant injunctive relief against state criminal prosecution pursuant to “the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances”).

**7. How would you define the doctrine of administrative exhaustion?**

RESPONSE: Administrative exhaustion is the principle that a plaintiff must pursue administrative remedies before seeking to challenge an agency or state action in federal court. *See, e.g., McKart v. United States*, 395 U.S. 185, 193 (1969).

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

RESPONSE: The scope of Congress’s constitutional authority is a matter that is subject to vigorous and ongoing debate. Article I, section 8 lists various specific powers of the Legislative branch, and it concludes with the statement that the Legislature also has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or

Officer thereof.” U.S. Const. art I, § 8, cl. 18. Similarly, section 5 of the Fourteenth Amendment confers to Congress the “power to enforce, by appropriate legislation, the provisions of this article.” Some have argued that these and other constitutional grants of authority compel the conclusion that the Framers intended for Congress to have implied powers beyond those enumerated in the Constitution.

The Supreme Court has, at times, recognized that Congress has certain implied powers. *See, e.g., Perez v. Brownell*, 356 U.S. 44, 57 (1958) (explaining that, “[a]lthough there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation”), *overruled in part on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967); *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) (holding “that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective”). However, the Supreme Court has also made clear that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The federal government is acknowledged by all to be one of enumerated powers.” (internal quotation marks, citation, and alterations omitted)). Thus, while “[t]he principle [that Congress] can exercise only the powers granted to it . . . is now universally admitted[,]” the significant “question respecting the extent of the powers actually granted[] is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *Lopez*, 514 U.S. at 566 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)) (internal quotation marks and alterations omitted)).

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

RESPONSE: If I were ever called upon to evaluate a congressional enactment that did not reference a specific power enumerated in the Constitution, I would utilize the same methods of evaluation that the Supreme Court has used to assess Congress’s ability to enact laws that have been challenged on those grounds.

In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Supreme Court assessed the authority of Congress to enact the Gun-Free School Zones Act by “start[ing] with first principles[,]” and in this regard, it focused on the text of the Constitution itself. *See id.* at 552 (noting that “[t]he Constitution creates a Federal Government of enumerated powers”). The Court then reviewed prior precedents that had addressed the extent of Congress’s power under the Commerce Clause, *see id.* at 553–59, and gleaned applicable principles from those binding authorities, including confirmation that Congress’s Commerce Clause power “is subject to outer limits[,]” *id.* at 557. The Court also determined, based on the circumstances presented in the prior binding precedents, that even its past decisions affirming Congress’s authority to enact legislation under the Commerce Clause “had involved economic activity in a

way that the possession of a gun in a school zone does not[.]” *id.* at 560, and it also noted that, “as part of [its] independent evaluation of constitutionality under the Commerce Clause” it would have “of course consider[ed] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce[.]” if the statute or its legislative history had contained such findings, *id.* at 562.

I would ascertain if the Supreme Court or the D.C. Circuit has used additional, or different, tools to evaluate the constitutionality of enactments of Congress that do not reference a specific enumerated right. And I would research the applicable methods of interpretation, and apply such tools, if I had to evaluate the constitutionality of any such statute.

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

RESPONSE: The Supreme Court has determined that the Constitution protects certain rights that are not specifically enumerated in the Constitution. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel, and *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), articulate a limited right to terminate a pregnancy, particularly before viability, *Casey*, 505 U.S. at 870. The Supreme Court has also “assumed, and strongly suggested” that there is a “right to refuse unwanted lifesaving medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

According to the Supreme Court, the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights, and the Court has held that, as a general matter, due process protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty[.]” *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks and citations omitted). The Supreme Court has also, at times, suggested that the Ninth Amendment—which provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[.]” and the Privileges and Immunities Clause of Article IV, section 2, which states that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[.]” are sources for unenumerated rights. *See, e.g., Roe*, 410 U.S. at 152–53; *Saenz*, 526 U.S. at 501–02.

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



RESPONSE: Please see my response to Question 10.

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

RESPONSE: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding of the scope of substantive due process have no bearing on the constitutional analysis that I would impose in any case that implicates these issues. Under binding Supreme Court precedent, the substantive due process clause protects unenumerated rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted), and the government’s regulation of such unenumerated personal rights may be subject to heightened scrutiny. The Supreme Court has not afforded the same protection to the unenumerated economic rights that were initially recognized in *Lochner*. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955). The Court has held that the government can regulate in a manner that restricts economic freedom if the regulation at issue is rationally related to a legitimate government interest. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

- 13. What are the limits on Congress’s power under the Commerce Clause?**

RESPONSE: According to the Supreme Court, Congress’s power under the Commerce Clause is broad, but it is not unlimited. The Court has held that Congress may only regulate three categories of activity pursuant to that constitutional provision: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things, and (3) activities that “substantially affect interstate commerce[.]” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

- 14. What qualifies a particular group as a “suspect class,” such that laws affecting that group must survive strict scrutiny?**

RESPONSE: When an act of government distinguishes between groups of people, the Supreme Court has described the “traditional indicia of suspectness” to include those classifications that pertain to “an immutable characteristic determined solely by the accident of birth,” and also those that pertain to classes of persons who are “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Johnson v.*

*Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). To date, when there is a constitutional challenge, the Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened (“strict”) scrutiny. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

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

RESPONSE: Checks and balances play an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others’ accumulation of power. In Federalist 51, James Madison explained that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” The Federalist No. 51 (James Madison); see also *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“[T]he men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny.”). And the structure of our constitutional system prevents autocracy while also promoting “a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); see also *id.* (“While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]” and thereby “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. See *Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) (“Checks and balances were established in order that this should be ‘a government of laws and not of men.’ . . . The purpose [of the doctrine of the separation of powers] was not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments,” in order “to save the people from autocracy.”).

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

RESPONSE: I have yet to be assigned a case involving a claim that Congress was not constitutionally authorized to enact certain legislation. If I had such a case, I would analyze the constitutional text that pertains to the issue in dispute consistent with Supreme Court and D.C. Circuit precedents that evaluate other allegedly unauthorized exercises of congressional authority, including cases such as *Medellin v. Texas*, 552 U.S. 491 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

In a case of mine that involved a claim that the President had overstepped his constitutional authority by issuing executive orders that governed the collective bargaining rights of federal employees in a manner that conflicted with the will of Congress as set forth in the prescriptions of Federal Service Labor-Management Relations Act (“FSLRMS”), 5 U.S.C. § 7101–35, *see Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev’d and vacated on other grounds*, 929 F.3d 748 (D.C. Cir. 2019), I consulted and applied binding Supreme Court and D.C. Circuit case law regarding the authority of the President to regulate federal labor-management relations with or without specific congressional authorization, *see id.* at 412–18, and interpreted the statute’s text in light of precedents that define the statutory right of federal employees to bargain collectively, *see id.* at 418–40.

**17. What role should empathy play in a judge’s consideration of a case?**

RESPONSE: A judge has a duty to decide cases based solely on the law, without fear or favor, prejudice or passion. In all cases, courts should generally be mindful that the exercise of judicial authority has a profound impact on the lives and circumstances of litigants. But to the extent that empathy is defined as one’s ability to share what another person is feeling from the other person’s point of reference, empathy should not play a role in a judge’s consideration of a case.

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

RESPONSE: The statutes that Congress enacts are presumed to be constitutional, and there is no legal authority for a court to invalidate a congressional enactment that is, in fact, constitutional. Furthermore, the Supreme Court has long required lower federal courts to avoid considering constitutional questions that might lead to the invalidation of federal statutes, if possible, and there are often threshold considerations under Article III that limit a federal court’s power to address a constitutional challenge in any event. Thus, I would need significantly more information than this question provides about the laws at issue and the circumstances under which they are being challenged in order to be able to form any opinion about which exercise of judicial authority is “worse.” Even if such information was provided, however, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the relative merits or demerits of hypothesized scenarios regarding judicial treatment of challenged government action.

**19. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?**

RESPONSE: Please see my response to Question 18. As a district court judge, my role has been to consider the facts and arguments that are presented in each case that is assigned to me, and to apply the law (including and especially the binding precedents of the Supreme Court and the D.C. Circuit) to resolve the matter before me. It is well established that “[i]t is emphatically the province and duty of the judicial department to say what the law is[.]” and that this power includes ruling on the constitutionality of legislation that Congress passes and the President signs, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I have not formed any opinions about broader trends or changes in the Supreme Court’s practices concerning invalidation of federal statutes. Even if I had formed such an opinion, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the benefits and disadvantages of difference in the rate at which the Court exercises its power to review the constitutionality of legislative enactments.

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

RESPONSE: Judicial review refers to the power of the judiciary to assess the legality of decisions made by the executive and legislative branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial supremacy refers to the idea that the Supreme Court is the final arbiter on the meaning of constitutional provisions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that, while “[i]t is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference[.] . . . the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.” (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137 (2011) (explaining the doctrine of judicial supremacy).

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

RESPONSE: The Constitution’s tenets are binding on officials who are elected to serve in the government of the United States, and it is clear beyond cavil that such officials have an independent obligation to adhere to the Constitution’s commands. As a judicial officer, my role is to determine whether and to what extent the Constitution and laws of the United States have been violated by anyone, including such officials, in the context of cases or controversies that are properly filed in federal court and assigned to me. As a pending judicial nominee and a sitting federal judge,

it would be inappropriate for me to opine on the antecedent question of how such officials can avoid violating the Constitution as interpreted by the judiciary, or the means by which such officials can accomplish the subsequent duty of balancing their own understanding of what the Constitution requires with the determinations that are made in judicial decisions.

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

The Federalist Papers speak to the Framers’ intent concerning the powers that the Constitution confers upon the branches of the federal government. In No. 78, Hamilton asserts that “the judiciary is beyond comparison the weakest of the three departments of power[.]” and he also makes clear that the judicial power to review and invalidate legislative action for conformity with the Constitution’s commands—which is in “the proper and peculiar province of the courts”—does *not* “imply a superiority of the judiciary to the legislative power.” The Federalist No. 28 (Alexander Hamilton). To this end, the Supreme Court has established various doctrines to ensure that courts, which are not accountable to the people by design, cannot exercise unlimited power. These doctrines include the Supreme Court’s interpretation of Article III to confine courts to the consideration of “cases” or “controversies,” and it is important for courts to keep the judiciary’s limited authority in mind when judging, consistent with the Framers’ intent. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (preventing the Judiciary from intruding into the executive sphere).

23. **How would you describe your approach to reading statutes – how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

RESPONSE: As a district court judge, I routinely undertake to interpret statutes, and have issued nearly 50 opinions that involve some form of statutory interpretation. Based on my past practice, I give the statute’s text controlling weight. I have considered the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff’d*, 947 F.3d 849 (D.C. Cir. 2020). I also apply Supreme Court and D.C. Circuit precedents regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue. I have not considered the meaning of a statute to change as social norms and linguistic conventions evolve.

And I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

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

RESPONSE: It is the duty of a judge to apply Supreme Court and circuit precedent that governs the resolution of the issue at hand faithfully, regardless of that judge's personal opinion about either the matter at issue or the correctness of the holdings in those cases. However, if a particular Supreme Court or D.C. Circuit precedent is not applicable to an issue before me, I would look for analogous precedents to glean principles that could be applied to the circumstances of the case at hand. It might also be necessary to distinguish the instant circumstances from other seemingly applicable precedents, and to explain why the principles articulated in such other cases do not control the outcome of the case.

- 25. Would it ever be appropriate for a judge to review a decision of the President or an Officer of the United States that Congress has committed to the “sole and unreviewable discretion” of the executive?**

RESPONSE: I confronted this question in *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), and my analysis of the facts and arguments in that matter, in light of D.C. Circuit precedents, yielded a nuanced answer.

The text of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act (“INA”) grants DHS “sole and unreviewable discretion” to designate categories of unauthorized noncitizens for expedited removal, which plainly indicates Congress’s intention to confer to DHS exclusive discretion to make that determination, insofar as the statute anoints the agency as the “sole” decider, and suggests that once DHS makes that determination, the agency’s decision regarding how long a noncitizen must be present in the United States to warrant more extensive removal procedures is final (i.e., “unreviewable”). But Congress has also elsewhere directed executive agencies as to *how* they must go about exercising the discretion that it confers. See Administrative Procedure Act, 5 U.S.C. §§ 551–59. And the D.C. Circuit has long recognized that judicial review of the procedures that an agency employs to make congressionally authorized determinations may be authorized, despite broadly worded delegations of authority. See, e.g., *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (per curiam) (explaining that a “‘statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency’s exercise of its discretion to avoid abuse,’ especially

on procedural grounds” (quoting 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.6 (4th ed. 2002)). Thus, the question of first impression that I addressed in *Make the Road* was whether the “sole and unreviewable discretion” language in section 1225(b)(1)(A)(iii)(I) of the INA conferred discretion that was not *only* exclusive, but was *also* preclusive of the standard procedural requirements that would otherwise apply to govern DHS’s decision making process.

As the opinion explains, in my view, the language of section 1225(b)(1)(A)(iii)(I) can be read together with the APA’s procedural requirements, per the *in para materia* cannon and other traditional tools of statutory interpretation, to mean that Congress intended to provide DHS with the exclusive authority to make the expedited removal designation determination within the statutory limits, but that the agency must exercise its broad discretion consistent with its standard decision making obligations under the APA. Given this reading of the relevant statutes, section 1225(b)(1)(A)(iii)(I) serves to bar judicial review of the substantive merits of the agency’s expedited removal designation decision (except, perhaps, for constitutional challenges), but judicial review of the procedures that DHS employs when it exercises the broad discretion that Congress has provided remains available, under the APA. *See Make the Road NY*, 405 F. Supp.3d at 43 (observing that, while the INA confers broad discretion to DHS to make the designation decision, it does not address the procedures that the agency must use, nor does it plainly indicate that Congress intended to authorize DHS to opt to forego the procedural mandates that would ordinarily apply); *see also id.* (reasoning that Congress’s preservation of the federal court’s subject matter jurisdiction to hear challenges to the validity of the implementation of the expedited removal system in 8 U.S.C. § 1252(e)(3) further suggests that Congress intended to authorize judicial review of the agency’s abandonment of procedural standards with respect to the expedited removal process). On appeal, the D.C. Circuit panel disagreed with this analysis, *see Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020); it held, in essence, that where Congress has delegated to an agency “sole and unreviewable discretion” to make a specified determination, that language is sufficient to establish that Congress has necessarily granted decision making authority that is *both* exclusive *and* preclusive of APA review of the procedures that the agency employs. *See id.* at 633–34. That Circuit determination is binding precedent, which means that, going forward, it is not appropriate in this jurisdiction for a judge to review an executive decision that Congress has committed to the “sole and unreviewable discretion” of the executive based on a claim that the agency’s exercise of that discretion violates the APA.

**26. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?**

RESPONSE: No. My uniform practice in the eight years that I have served as a district judge has been to determine whether or not I have subject matter jurisdiction as a threshold question, and to dismiss the case where I have no jurisdiction, without reaching the merits. *See, e.g., New England Anti-Vivisection Soc’y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 148 (D.D.C. 2016) (explaining that, because the

plaintiff lacked standing, “the Court is constrained to refrain from passing on the merits of Plaintiffs' arguments or granting them the relief they seek”); *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 206 (D.D.C. 2015) (finding that, because the plaintiffs lacked standing, “this Court has no authority to reach the merits of their case” and dismissing case as a result), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015); *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 53–54 (D.D.C. 2014) (“As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction.” (quotation marks and citation omitted)), *aff'd sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015).

**27. Once again, for the record, please explain your statement that “observed inconsistencies are largely attributable to factors other than group-based bias by judicial decisionmakers.”**

RESPONSE: The quoted statement is from a presentation that I made in May of 2019, as participant in Columbia Law School’s Courts & Legal Process colloquium, which is a long-standing series that brings judges and other legal experts to campus to critique draft academic articles about judicial process for the benefit of students in Professor Burt Huang’s seminar on the courts. The draft article that I was asked to review was entitled “Is Judicial Bias Inevitable?” and the authors opened with the contention that, while impartiality is a key tenet of any fair judicial system in theory, in practice, “judges cannot be impartial” because “[s]ocial science has uncovered the prevalence and inevitability of biases, heuristics, and stereotypes in human decision making, which operate automatically and, at times, unconsciously.” The article cited and described the findings of various social scientists who study implicit bias, including Harvard Professor Mahzarin R. Banaji, as support for the proposition that “the particular identities and roles of parties have proven a significant factor in shaping judicial outcomes, casting a shadow on judicial impartiality.” And due to what the authors called “the growing recognition of the prevalence and impact of implicit bias” in judicial decision making, the article’s primary contribution was its exploration of the authors’ proposed solution: “the use of online court proceedings” that “substitut[e] physical meetings with online interaction” and thereby “limit judicial exposure to, and hence the impact of, the group identities of the parties, thus mitigating disparities in judicial outcomes that stem from visible markers of group-based identity (for example, age, gender and race).”

In critiquing the article, I accepted the authors’ premise that inconsistencies in judicial outcomes with respect to different demographic groups have been observed, and that the implicit bias phenomenon that social science research documents may be a factor. But I argued—as the quoted statement indicates—that such inconsistencies might also be attributable to factors other than implicit bias. I further maintained that, regardless, any judicial system that is devoid of human interaction would be unlikely to produce fair and just results. *See* KBJ Reflections on Courts & Legal Process Article, at 1 (“My concern is that the article both *overestimates* the extent to which disparate outcomes are in fact attributable to bias (unconscious or otherwise), and



*underestimates* the importance of human interaction as an indispensable feature of a fair and just[] dispute resolution system.”) (emphasis in original ).

- 28. In your hearing testimony, you mentioned that the sentencing disparity between crack and powder cocaine has resulted in disparities in criminal convictions and sentencing. What additional factors—other than unconscious bias—have you seen come into play that could account for some of the disparities we see in criminal convictions and sentencing?**

RESPONSE: During my confirmation hearing, when I was asked whether I would agree or disagree “with someone who said that most racial disparities in criminal convictions and sentencings are result from an unconscious racial bias of judges, juries, and other judicial decisionmakers[,]” I began my response by explaining that “as a judge now, it is very important for me not to make personal commitments about things like the question that you asked.” I then stated that I am “aware of social science research” regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission’s body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission’s October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study. I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors in response to this policy question.

- 29. Does it concern you that so called “dark money” groups, like Demand Justice and the Leadership Conference on Civil and Human Rights, support your nomination to the U.S. Court of Appeals for the D.C. Circuit?**

- a. Have you ever spoken with anyone at Demand Justice or the Leadership Conference on Civil and Human Rights Regarding your nomination to the D.C. Circuit?**

RESPONSE: Among the many people who have offered me congratulations with respect to this nomination was Chris Kang, who I understand is affiliated with Demand Justice. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

- 30. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant’s group identit(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges’ sentencing analysis?**

RESPONSE: Pursuant to section 3553(a) of Title 18 of the United States Code, district judges must impose sentences that are “sufficient, but not greater than necessary” to promote the purposes of punishment, including providing just punishment, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3553(a). When the Court undertakes to “determin[e] the particular sentence to be imposed” under this statute, Congress has directed the judge to consider “the nature and circumstances and the history and characteristics of the defendant[,]” among other things. 18 U.S.C. § 3553(a)(1).

- 31. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?**

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider “the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *Id.* § 3553(a)(6) (emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) “are not relevant in the determination of a sentence.”

- 32. It has been reported that you met with President Biden to discuss your potential nomination to the D.C. Circuit. Once again, for the record, will you confirm that President Biden did not discuss or ask for a commitment from you on any of the following issues:**

- a. Abortion or *Roe v. Wade*?**
- b. The Second Amendment, *District of Columbia vs. Heller* or *MacDonald v. Chicago*?**
- c. Efforts to defund the police?**
- d. Illegal immigration?**

RESPONSE: President Biden did not discuss any of these issues with me or ask for any commitments related to these matters.

**Responses to Questions for the Record from Senator Ben Sasse  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

For all nominees:

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

RESPONSE: No.

- 2. Since becoming a legal adult, have you participated in any rallies or demonstrations where you or other participants have willfully damaged public or private property?**

RESPONSE: No.

- 3. Was *Marbury v. Madison* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

*Marbury v. Madison* is one of three exceptions to the general principle that a judge should not critique or comment on the Supreme Court’s precedents. *Marbury* warrants this special status because the principle of judicial review that that decision established—i.e., its holding that, per the design of our Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is[,]” *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. See Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

- 4. Was *Brown v. Board of Education* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to

their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

*Brown v. the Board of Education* is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Brown* warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing 'separate but equal' as consistent with the Constitution's Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that "separate but equal is inherently unequal"—is beyond dispute, and judges can express their agreement with that principle without calling into question their ability to apply the law faithfully to cases raising similar issues. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

#### **5. Was *Loving v. Virginia* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

*Loving v. Virginia* is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Loving* reaffirmed the rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 8 (1967), and as such, it is a direct outgrowth of *Brown*. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Loving* was rightly decided without calling into question my duties under the Code of Conduct.

#### **6. Was *Roe v. Wade* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

**7. Was United States v. Virginia correctly decided?**

RESPONSE: My response to Question 6 applies to this question.

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

RESPONSE: My response to Question 6 applies to this question.

**9. Was Boumediene v. Bush correctly decided?**

RESPONSE: My response to Question 6 applies to this question.

**10. Was Citizens United v. FEC correctly decided?**

RESPONSE: My response to Question 6 applies to this question.

**11. Was Obergefell v. Hodges correctly decided?**

RESPONSE: My response to Question 6 applies to this question.

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

RESPONSE: D.C. Circuit precedents make clear that it is appropriate for that court, sitting en banc, to overturn its own precedents only in a narrow set of circumstances. The primary circumstance in which that action is warranted is when “an intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress, necessitates a shift in the Court’s position.” *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). In addition, “it is appropriate for the en banc court to set aside circuit precedent when, ‘on reexamination of an earlier decision, it decides that the panel’s holding on an important question of law was fundamentally flawed.’” *Allegheny Def. Project v. Fed. Energy Regul. Comm’n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)). It is also permissible for the en banc court to overturn its own prior precedent “where the precedent ‘may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.’” *Burwell*, 690 F.3d at 504 (quoting *Patterson*, 491 U.S. at 173).

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

RESPONSE: Please see my answer to Question 12. It does not appear that the D.C. Circuit's practices concerning overturning its own past precedents turns on whether the prior precedent conflicts with the original public meaning of *the Constitution* as opposed to the circumstance in which a prior precedent conflicts with the original public meaning of the text of *a statute*. In the latter context, however, the D.C. Circuit has found that "[a] court of appeals sitting en banc may also reexamine its own interpretation of a statute 'if it finds that other circuits have persuasively argued a contrary construction.'" *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Critical Mass Energy Proj. v. NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)).

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

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider "the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6)(emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) "are not relevant in the determination of a sentence."

Additional Questions For Judge Ketanji Brown Jackson:

**1. Please list some examples from your time as a federal district court judge of when your rulings conflicted with your personal policy preferences.**

RESPONSE: My role as a district court judge has been to consider the facts and arguments that are presented in each case and controversy that is presented, and to apply the law faithfully to resolve the issues before me. Because my personal policy preferences play no role in the performance of my duties, in every case that I have handled, I have set aside my personal policy preferences completely, and have considered only the parties' arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly identify those opinions of mine in which my personal

policy preferences conflicted with the ruling that I made in the case based on what the law required. This is because judges are duty bound not to act or speak in a manner that might call into question their impartiality or their ability to rule consistently with the law, rather than their stated policy preferences, and the discussion of a judge's own policy preferences gives rise to that concern.

**2. Why did you choose to become an Assistant Federal Public Defender?**

RESPONSE: I chose to become an Assistant Federal Public Defender because public service is a core value in my family, and after becoming a lawyer, I determined that being a public defender was the highest and best use of my time and talents. Both of my parents spent most of their careers in the public sector—my mother as a public school science teacher to start, and, later, the principal of a public magnet school in South Florida. My father started his working life as a public high school history teacher and ended it as chief legal counsel to the Miami-Dade County School Board. Two of my uncles were career law enforcement officers: one was a Miami-Dade County sex crimes detective, and the other rose through the ranks of the City of Miami Police Department to become the Chief of Police. And my younger brother (my only sibling) served as an undercover police officer in a drug sting unit in Baltimore after graduating from college, before he joined the Maryland Army National Guard, trained to be an infantry officer, and led two battalions during two tours of duty in Iraq and the Sinai Peninsula.

Given this family background, there was no question that I would gravitate toward public service at some point in my legal career. After clerking for three federal judges and working briefly in private practice, I served as a staff attorney at the Sentencing Commission in a legislative drafting and policymaking role. I soon discovered that I lacked a practical understanding of the actual workings of the federal criminal justice system, and I decided that serving “in the trenches,” so to speak, would be helpful. A position with the Federal Public Defender was a highly competitive and extraordinary opportunity to hone one's litigation skills and to gain knowledge about critical aspects of federal criminal justice processes. I also viewed working in the office of the Federal Public Defender as an opportunity to help people in need, and to promote core constitutional values, such as the Sixth Amendment principles that the government cannot deprive people who are subject to its authority of their liberty without meeting its burden of proving its criminal charges, and that every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusations, is entitled to the assistance of counsel.

**3. Were you ever concerned that your work as an Assistant Federal Public Defender would result in more violent criminals—including gun criminals—being put back on the streets?**

RESPONSE: The primary concern of lawyers of who work as public defenders is the same as that of the Framers who crafted the Sixth Amendment of the Constitution:



that, in order to guarantee liberty and justice for all, the government has to provide due process to the individuals it accuses of criminal behavior, including the rights to a grand jury indictment, a fair trial by a jury of one's peers, and competent legal counsel to hold the government accountable for providing a fair process and otherwise assist in the preparation of a defense against the charges. The Constitution guarantees that every person who is compelled to enter into the criminal justice system by virtue of being accused of a crime will receive representation in the context of their interactions with government authorities, and attorneys in the federal public defender's office perform this crucial function. Having lawyers who can set aside their own personal beliefs about their client's alleged behavior or their client's propensity to commit crimes benefits *all* persons in the United States, because it incentivizes the government to investigate accusations thoroughly and to protect the rights of the accused during the criminal justice process, which, in the aggregate, reduces the threat of arbitrary or unfounded deprivations of individual liberty.

**4. While working as an Assistant Federal Public Defender, why did you choose to work on behalf of Guantanamo detainee Khi Ali Gul? If you did not have a choice as to whether working on behalf of this client, did you ever consider resigning from your position?**

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government without charge or trial at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Khi Ali Gul was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

At the time of this representation, my brother was an enlisted U.S. Army infantryman who was deployed outside of Mosul, Iraq, and I was keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government's apprehension and detention of the persons who were secured at Guantanamo Bay. In the wake of the horrific terrorist attacks in September of 2001, I was also among the many lawyers who were keenly aware of the threat that the 9-11 attacks had posed to foundational constitutional principles, in addition to the clear danger to the people of the United States.

Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her

client. Because these standards apply even after termination of the representation, it would be inappropriate for me to comment on whether I disagreed with Khi Ali Gul, found his alleged crimes offensive, or considered resigning my position as an Assistant Federal Public Defender based on any such disagreement or offense.

**5. Were you ever concerned that your work on behalf of Guantanamo detainee Khi Ali Gul would result in him returning to his terrorist activities?**

RESPONSE: Please see my response to Additional Question 4.

**6. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioners in *Boumediene v. Bush* and *Al-Odah v. United States*?**

RESPONSE: Between 2007 and 2010, I was employed as Of Counsel in the Supreme Court and Appellate Group of a private law firm. The firm represented both paying clients and clients who retained our services pro bono. During that time, the Supreme Court was considering several cases that involved Guantanamo Bay detainees, including a challenge to the detention review procedures that the government was providing to such detainees, which it addressed in the consolidated cases of *Boumediene v. Bush* and *Al-Odah v. United States*, and a case that raised the issue of whether Congress had authorized the President to detain as enemy combatants, without criminal charge or trial, lawful residents of the United States who were apprehended within the United States (*Al-Marri v. Spagone*).

I co-authored Supreme Court amicus briefs for clients in two of these cases. One of the briefs that I drafted was filed on behalf of twenty former federal judges, who argued, on the basis of the examination of Founding-era historical texts, that the Framers would not have intended for our constitutional scheme to permit reliance on evidence that had been extracted from torture during criminal trials. I filed another amicus brief on behalf of The Cato Institute, The Constitution Project, and the Rutherford Institute, arguing that Congress's authorization for the use of military force did not permit lawful residents of the United States to be detained indefinitely as enemy combatants. I believe that I was assigned to work on these amicus briefs because of the knowledge of the military tribunal processes that I had accumulated from my prior work as an Assistant Federal Public Defender.

**7. Were you ever concerned that your work in support of the petitioners in *Boumediene v. Bush* and *Al-Odah v. United States* would result in more terrorists being released back into the fight against the United States?**

RESPONSE: Please see my response to Additional Question 5. The work that I did in relation to these cases was on behalf of clients who were filing amicus briefs to inform the Supreme Court concerning the clients' views of particular legal issues that the Court may have sought to address in the context of its review. The brief I filed on behalf of my clients—retired federal judges—in the consolidated *Boumediene* and *Al-*

*Odah* cases argued that the judicial review that the Detainee Treatment Act provided was not an adequate substitute for the common law writ of habeas corpus, because it did not appear that the reviewing court was authorized to determine the extent to which the Combatant Status Review Tribunal had relied on statements extracted by torture when the court ruled on the legality of the detention.

**8. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioner in *Al-Marri v. Spagone*?**

RESPONSE: Please see my response to Additional Question 6.

**9. Were you ever concerned that your work in support of the petitioner in *Al-Marri v. Spagone* would result in more terrorists being released back into the fight against the United States?**

RESPONSE: Please see my response to Additional Question 7.

**Responses to Questions for the Record from Senator Thom Tillis  
to Judge Ketanji Brown Jackson, Nominee to the  
United States Court of Appeals for the D.C. Circuit**

1. **Judge Jackson, do you believe that a judge’s personal views are irrelevant when it comes to interpreting and applying the law?**

RESPONSE: Yes. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge’s own personal views regarding a matter must not have any bearing on her interpretation and application of the law.

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

RESPONSE: Judicial activism occurs when a judge is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with the law, despite the judge’s own personal views of the matter, even when the cases pertain to controversial political issues. Judicial activism, so defined, is not appropriate.

3. **Judge Jackson, do you believe impartiality is an aspiration or an expectation for a judge?**

RESPONSE: Impartiality is much more than a mere “aspiration” or “expectation.” Ruling without fear or favor is the essence of judicial independence, which is the constitutional mandate of judicial service. *See* The Federalist No. 78 (Alexander Hamilton). My record of rulings in cases challenging government action demonstrates my ability to rule independently and impartially, regardless of the presidential administration that promulgates the policy being challenged.

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

RESPONSE: No. The role of a judge is evaluate legal claims that are made about an act of the defendant (who may well be a policymaker), and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law, including the binding precedents of the Supreme Court. At no point in the process of judicial decision making can a judge substitute her own policy preferences for those of Congress or state legislative bodies, either to reach a desired outcome or for any other purpose.

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

RESPONSE: Faithfully interpreting the law can sometimes result in an outcome that conflicts with a judge's own personal view of the matter. It is the judge's duty to set aside her personal view of the matter, and/or the outcome that she would personally prefer, and faithfully apply the law. An outcome that comports with the law, as set forth in the binding precedents of the circuit and the Supreme Court, is required by the judge's oath and the Constitution. Thus, that outcome *is* the most desirable one, regardless of a judge's own personal beliefs.

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

RESPONSE: No. Please see my response to Questions 1, 2, 4 and 5. A judge has a duty to set aside her own politics and/or policy preferences when she is interpreting and applying the law.

**7. What is the longest decision you have issued as a District Court Judge?**

RESPONSE: I have written dozens of lengthy written opinions (defined as written rulings that are 50 or more pages long), dating back to the early days of my appointment as a federal judge. (See my response to Question 10, *infra*.) Although I may have missed one or more of my lengthy opinions in searching my records and electronic databases to respond to this question, it appears that the longest decision that I have issued as a district court judge was *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which is 126 pages long.

**8. What is the shortest decision you have issued as a District Court Judge?**

RESPONSE: I have handled hundreds of cases, and have made thousands of decisions in connection with those matters, in the eight years that I have been a district court judge. I cannot accurately identify my "shortest decision," because many decisions at the trial-court level take the form of short orders that are not published in electronic case reporting databases such as Westlaw or LEXIS. The shortest written decisions I have issued as a district court judge take the form of paperless Minute Orders that consist of a sentence or two on the docket of a case. See, e.g., *Tarque v. Biden*, No. 21-cv-338, Min. Order of Apr. 4, 2021 (granting motion for extension of time to answer complaint); *Citizens for Responsibility & Ethics in Wash. v. Dep't of Trans.*, No. 21-cv-610, Min. Order of Apr. 29, 2021 (requiring the parties to file a status report in a FOIA case); *Centro Presente, Inc. v. Wolf*, No. 19-cv-2480, Min. Order of Mar. 17, 2021 (granting motion for leave to appear pro hac vice). I have also routinely issued short paper orders regarding a variety of legal issues. See, e.g., *Hogue v. Costal Int'l, Inc.*, No. 18-cv-389, Order Dismissing Case for Lack of Prosecution, ECF No. 39 (D.D.C. May 4, 2021); *In re Subpoena Duces Tecum to Verizon Wireless*, No. 19-mc-103, Order Transferring Case, ECF No. 4 (D.D.C. July 18, 2019); *Nugent v. Nat'l Pub. Radio, Inc.*, No. 14-cv-0416, Order, ECF No. 8 (D.D.C. March 28, 2014) (granting the defendant's motion to withdraw its notice of removal and remanding the case to the Superior Court of the District of Columbia).

**9. What is the average length of all of the decisions you have issued as a District Court Judge?**

RESPONSE: Please see my responses to Questions 7 and 8. I am unable to determine accurately the length of my shortest decisions and/or the precise number of short orders that I have issued as a district court judge. As a result, it is impossible to determine “the average length of all of the decisions that [I] have issued[.]”

**10. During the Senate Judiciary Committee Hearing, you said that your opinion in the McGhan case was “just another opinion.”**

- **How many pages was the opinion you issued in this case?**
- **Is this the longest opinion you have issued?**
- **Were you overruled at any level in full or in part upon appeal?**
- **Can you explain why you think an opinion that is so lengthy is “just another opinion?”**

RESPONSE: Please see my response to Question 7. It is routine for judges seated in the District of Columbia to issue lengthy opinions, such as the one in *McGahn*, because federal judges in Washington, D.C. regularly handle some of the most complex and consequential legal disputes that can be resolved by an Article III judicial officer under our constitutional scheme, due to the unique nature of our docket, which is largely comprised of legal disputes concerning the scope and application of the federal government’s power. The length of a written opinion that resolves such a dispute depends on the complexity and number of legal arguments that the parties make concerning the significant legal claims brought in the case.

The opinion that I issued in *McGahn* was 118 pages long (excluding the table of contents). The following description documents my opinion-writing practices during the eight years that I have been on the bench and establishes that *McGahn* is the third longest opinion that I have issued as a district court judge.

In September of 2013, approximately six months after I received my judicial commission, I issued a 76-page opinion in *American Meat Institute v. U.S. Department of Agriculture*, 968 F. Supp. 2d 38 (D.D.C. 2013). The following year, in 2014, I issued four more opinions that were over 50 pages in length. *See Pencheng Si v. Laogai Rsch. Found.*, 71 F. Supp. 3d 73 (D.D.C. 2014) (51 pages); *Nat. Res. Def. Council v. Nat’l Marine Fisheries Serv.*, 71 F. Supp. 3d 35 (D.D.C. 2014) (61 pages); *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376 (D.D.C. 2014) (69 pages); *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F. Supp. 3d 104 (D.D.C. 2014) (58 pages).

In 2015, I issued five lengthy opinions, including *Takeda Pharmaceuticals, U.S.A., Inc. v. Burwell*, 78 F. Supp. 3d 65 (D.D.C. 2015), which was 77 pages long; *XP Vehicles, Inc. v. Department of Energy*, 118 F. Supp. 3d 38 (D.D.C. 2015), was 67 pages long, and *Otay Mesa Property, L.P. v. U.S. Department of the Interior*, 144 F.

Supp. 3d 35 (D.D.C. 2015), was 62 pages long. Likewise, in 2016, I issued *Yah Kai World Wide Enterprises, Inc. v. Napper*, 195 F. Supp. 3d 287 (D.D.C. 2016), which was 65 pages long, and four other opinions that qualify as lengthy: *Otsuka Pharmaceuticals Co., Ltd. v. Burwell*, 302 F. Supp. 3d 375 (D.D.C. 2016) (57 pages); *Abington Memorial Hospital v. Burwell*, 216 F. Supp. 3d 110 (D.D.C. 2016) (59 pages); *Pacific Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196 (D.D.C. 2016) (51 pages); *New England Anti-Vivisection Society v. U.S. Fish & Wildlife Service*, 208 F. Supp. 3d 142 (D.D.C. 2016) (59 pages).

In 2017 I wrote an opinion that was more than 100 pages long. *Kubicki on behalf of Kubicki v. Medtronic, Inc.*, No. 12-cv-734, sealed slip. op., ECF No. 158 (D.D.C. Dec. 12, 2017), published at 293 F. Supp. 3d 129 (D.D.C. 2018), was 103 pages. I also issued *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174 (D.D.C. 2017), that year (52 pages). Similarly, I issued three lengthy opinions in 2018, including one that was 119 pages. *See Am. Fed. of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018); *see also In re Air Crash over S. Indian Ocean on Mar. 8, 2014*, 352 F. Supp. 3d 19 (D.D.C. 2018) (61 pages); *Yah Kai World Wide Enters., Inc. v. Napper*, 292 F. Supp. 3d 337 (D.D.C. 2018) (62 pages).<sup>1</sup>

Thus, the 118-page opinion in *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), which I issued in November of 2019, was not unusual. Indeed, just two months prior, in late September of that same year, I had issued *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which was 126 pages long. And I issued the 51-page opinion in *Center for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019), at the beginning of September of 2019 a few weeks prior to *Make the Road New York*. In 2020, I issued three additional lengthy opinions: *Las Americas Immigrant Advocacy Center v. Wolf*, 19-cv-3640, --- F. Supp. 3d ---, 2020 WL 7039516 (D.D.C. Nov. 30, 2020) (60 pages); *Kiakombua v. Wolf*, --- F. Supp. 3d ---, No. 19-cv-1872, 2020 WL 6392824 (D.D.C. Oct. 31, 2020) (96 pages); *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020) (52 pages).

*McGahn* was a lengthy opinion because it required me to resolve cross-motions for summary judgment concerning “three legal contentions of extraordinary constitutional significance.” 415 F. Supp. 3d at 152 (internal quotation marks and citation omitted). In particular, I held that (1) the inter-branch subpoena dispute between the President and the House Judiciary Committee was a justiciable matter that the Judiciary Committee had Article III standing to pursue in federal court; (2) the Judiciary Committee had a cause of action to seek enforcement of its subpoena; and (3) the President does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity. On appellate review, over the course of two opinions, a divided panel of the D.C. Circuit reversed my rulings on the standing and cause of action issues, but the entire D.C. Circuit granted en banc

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<sup>1</sup> *Yah Kai* was a trademark matter in which I presided over two bench trials: one in 2016 addressing liability and one in 2018 addressing damages. Taken together, my findings of fact and conclusions of law in this matter totaled 127 pages.

review twice, and has now vacated both panel reversals. To date, the en banc D.C. Circuit has affirmed my conclusion that the House Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the inter-branch nature of the dispute. The cause of action and merits questions remain pending.

**11. As of November 1, 2019, were you a lawyer and former public defender?**

RESPONSE: On November 1, 2019, I was a lawyer and a federal district judge. I was also a former Vice Chair of the United States Sentencing Commission; a former law firm Of Counsel and associate; and a former Assistant Federal Public Defender who had been employed in the appellate division of the Office of the Federal Public Defender in Washington D.C.

**12. Are you a bold progressive champion? If yes, please explain.**

RESPONSE: I have never called myself or anyone else a “bold progressive champion” nor do I have a clear understanding of the meaning of that phrase. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

**13. Have you been on the front lines advancing the law for progressive values? If yes, please explain.**

RESPONSE: I have never purported to be “on the front lines advancing the law for progressive values” or stated anything of the sort. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

**14. You said that “you have served on “many boards” and that you “don’t necessarily agree with all of the . . . statements of any of all the things those boards might have in their materials.” Please list the name and length of service for each board on which you served that you do not entirely agree with all of their materials. For each one please identify each statement or material with which you do not agree.**

RESPONSE: During my confirmation hearing, Senator Hawley referenced various statements that apparently once appeared on the website of Montrose Christian School, a private kindergarten through 12<sup>th</sup> grade school. Montrose Christian School is now defunct; I served as an advisory school board member with respect to that school for one year, spanning 2010 and 2011. In the context of his question, Senator Hawley stated that he had defended Justice Amy Coney Barrett’s right to serve on a religious school board, and that he would also “defend [my] right to religious liberty and to serve on this board whatever your opinions may be[.]” He also stated that he had gleaned “from [my] service” that I “believe in the principle of the constitutional right of religious liberty[.]” In response, and primarily to clarify that my board service did



not itself portend any personal belief about religious liberty or anything else, I explained that my views about religious liberty “come[] from my duty to observe Supreme Court precedent [and] to follow its tenets, not from any personal views that I might have.” Emphasizing that “any personal views that I might have about religion would never come into my service as a judge,” I also said that “I have served on many boards, and that I don’t necessarily agree with all of the statements of all of the things that those boards might have in their materials.” I did not state any personal view concerning the statements that Senator Hawley identified and that Montrose Christian School purportedly posted on its website. Nor did I express any agreement or disagreement with any statements of any other board on which I have served.

The various boards on which I have served—all without compensation—and my length of service are listed at questions 6 and 9 of my Senate Judiciary Questionnaire for Judicial Nominees. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to identify any statements or policy positions of those boards and indicate my personal agreement or disagreement with those statements.

**15. Is there any board on which you served in the past that you would not serve on today were you not a federal judge?**

RESPONSE: As a pending judicial nominee and sitting federal judge, I cannot give voice to any regrets concerning prior board service, because to do so would give rise to speculation about my personal views concerning such boards and their policy positions, which could undermine the public’s confidence in my ability to set aside such personal views and rule only with respect to the facts and law in any case concerning parties that hold similar policy positions.

**16. Senator Hawley asked if you believe in the constitutional right of religious liberty based on your affiliation with a board you served on. You seemed to indicate in your answer that the reason you believe in the individual right to religious liberty is because of Supreme Court Precedent. Is that what you intended to say? Is it correct that the reason you believe in an individual’s right to religious liberty is because of Supreme Court Precedent?**

RESPONSE: Please see my response to Question 14, which clarifies the intended scope of my answer to Senator Hawley concerning religious liberty. My duty as a federal judge is to uphold the Constitution, and the First Amendment states that the “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” The Supreme Court has repeatedly reaffirmed that the First Amendment to the Constitution expressly protects a fundamental individual right to religious liberty.

**17. Some are demanding that Justice Breyer retire. Do you agree that should Justice Breyer retire this year, President Biden would have the right to nominate someone to fill that seat on the Supreme Court?**

RESPONSE: Article II, section 2 of the Constitution vests the President with the “Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the supreme Court.” *See* U.S. Const., art. II, § 2. I am obligated to apply binding precedents of the Supreme Court, regardless of its size.

**18. How would you respond if a group ran ads and publicly called for you to retire as a District Court Judge? Would this answer change as a Circuit Court Judge? As a Supreme Court Justice?**

RESPONSE: Under Article III, section 1 of the Constitution, all judges “both of the supreme and inferior Courts, shall hold their Offices during good Behaviour[.]” To promote judicial independence and impartiality in the performance of a federal judge’s duties, the Code of Conduct for United States Judges prohibits judges from engaging in public debates of a political nature or publicly responding to public pressure of any kind. *See* Code of Conduct for United States Judges, Canon 5. Therefore, it would likely be inappropriate for me to respond in any way to advertisements that call for my retirement as a district judge. The Code of Conduct for Judges applies to circuit judges as well, so in the unlikely event that a response to a group’s public call for retirement would be appropriate for me as a district judge, such response would also be inappropriate for me as a circuit judge, if I am confirmed.

**19. Do you agree with that Justice Breyer should retire? If not, why not?**

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court’s precedents, regardless of that Court’s composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

**20. Judge Jackson, if you are confirmed, what will you do to protect Americans’ right to practice their faith during this incredibly difficult time?**

RESPONSE: As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the First Amendment’s fundamental right to the free exercise of religion. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

**21. Judge Jackson, is there a line where a First Amendment activity or peaceful protesting becomes rioting and is no longer protected? What is that line? Do you agree that looting, burning property, and causing other destruction is not a protected First Amendment activity?**

RESPONSE: The First Amendment expressly protects “the right of the people *peaceably* to assemble,” U.S. Const. amend. I (emphasis added), and the Supreme Court has recognized that “peaceful demonstrations in public places are protected” but that “where demonstrations turn violent, they lose their protected quality as expression under the First Amendment[.]” *Grayned v. City of Rockford*, 408 U.S. 104, 116

(1972); *see also, e.g., Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (explaining that a “march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment”). The precedents of the Supreme Court and the D.C. Circuit concerning this and all other legal issues are binding on me, and, if confirmed, I would faithfully apply those precedents if I were ever assigned a case on appeal that involved these issues. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to opine as to hypothetical circumstances that test of the limits of these principles, as such matters are regularly litigated in the Supreme Court and the lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

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

RESPONSE: I would evaluate any case concerning handguns or COVID-19 restrictions consistent with the binding precedents of the Supreme Court. Two weeks ago, in the case of *New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, the Supreme Court granted *certiorari* in case that involved the denial of applications to carry a gun outside the home for self-defense individuals that had been submitted pursuant to a New York statute. In a similarly recent series of *per curiam* opinions, including *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court has also addressed the application of Free Exercise principles to restrictions that various localities have issued out of COVID-related public health concerns. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of such firearm and religious-liberty restrictions while these issues are being actively litigated in the Supreme Court and other lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

**23. Judge Jackson, what will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

RESPONSE: As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the Second Amendment individual right to keep and bear arms. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

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

RESPONSE: According to my records, I have considered whether qualified immunity shielded a law enforcement officer from liability for alleged constitutional violations nine times over the past eight years, and in each case, I carefully considered the particular facts and circumstances that the case presented and adhered to Supreme Court and D.C. Circuit precedents when reaching my decision. Under binding Supreme Court and D.C. Circuit case law, a court must grant summary judgment or dismiss a civil action against an officer “when [the] official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). Thus, the two relevant questions in determining whether qualified immunity applies are (1) “whether a constitutional right would have been violated on the facts alleged[,]” and (2) “whether the right was clearly established” at the time of the violation.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). In my rulings, upon consideration of these questions in light of the particular facts at issue, I have both granted defense motions for summary judgment on the grounds that the law enforcement officers are entitled to qualified immunity, and denied defense motions for qualified immunity based on a finding that the officer violated the plaintiff’s clearly established rights. *See, e.g., Kyle v. Bedlion*, 177 F. Supp. 3d 380 (D.D.C. 2016); *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013); *Page v. Mancuso*, 999 F. Supp. 2d 269 (D.D.C. 2013).

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

RESPONSE: The existing standards that the Supreme Court has adopted for determining whether a law enforcement officer is entitled to qualified immunity are binding on me, and are explained in my response to Question 24. If confirmed, I will faithfully apply all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to qualified immunity, and my past practices demonstrate that any personal views that I might have regarding the sufficiency of qualified immunity doctrine have played no role in my determination of whether to grant or deny a motion for qualified immunity. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on whether the Supreme Court’s qualified immunity jurisprudence provides sufficient protection for law enforcement officers.

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

RESPONSE: Please see my response to Question 25.

**27. Do you agree with the current state of the *Chevron* deference doctrine? Or do you believe there should be either more or less deference given to agencies?**

RESPONSE: *Chevron* deference refers to the Supreme Court’s requirement that “a court review[ing] an agency’s construction of the statute which it administers” must defer to the agency’s authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Consistent with the current state of Supreme Court jurisprudence, I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. *See, e.g., Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at \*13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep’t of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep’t of Health & Hum. Servs.*, 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst. v. Dep’t of Agric.*, 968 F. Supp. 2d 38, 52 (D.D.C. 2013). As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on my personal beliefs regarding the current state of the *Chevron* doctrine. If confirmed as a circuit judge, I would continue to apply faithfully all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies.

**28. How have your views on agency deference developed during your time as a district judge?**

RESPONSE: Prior to my work as a district judge, my expertise was in federal criminal sentencing policy, rather than administrative law. During my work as a district judge over the past eight years, I have handled many cases involving challenges to agency action, including challenges to an agency’s interpretation of a statute. I have faithfully applied all binding precedents of the D.C. Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies, and would continue to do so if am confirmed as a circuit judge.