

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Elizabeth Prelogar
Nominee to be Solicitor General of the United States

1. Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker? Please explain.

I am not an expert in policing or social work, but it seems to me that it is appropriate for law enforcement to respond to armed aggressors. I am also aware of programs in various jurisdictions in which both police officers and social workers respond to domestic violence incidents as part of a coordinated approach.

2. Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest racial injustice?

People should follow public health guidelines as best they can to keep everyone safe.

3. Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship?

People should follow public health guidelines as best they can to keep everyone safe.

4. Democrats insisted the main reason that Senate Republicans rapidly confirmed now-Justice Amy Coney Barrett to the Supreme Court was to dismantle Obamacare. You authored an amicus brief in *California v. Texas*, on behalf of the Senate Democrats. Senate Democrats boycotted her markup and left in their places pictures of children who would supposedly lose their healthcare if she was confirmed. After her confirmation, Justice Amy Coney Barrett joined the majority in that case, upholding the law in a 7-2 opinion. Do you believe that Justice Amy Coney Barrett deserves an apology for the fear-mongering Senate Democrats engaged in—and that you helped by authoring an amicus brief—particularly after she voted to uphold Obamacare?

Because I am nominated to the position of Solicitor General, I do not think it would be appropriate for me to comment. I have focused my career on Supreme Court and appellate litigation, and I have enormous respect for the Justices and the Court.

5. According to the Customs and Border Protection, “[f]ederal officials have logged more than 1.1 million apprehensions at the U.S. Mexico border this fiscal year, after another busy month in June.”¹

¹ Maria Sacchetti, The Washington Post, “U.S.-Mexico border apprehensions for the fiscal year surpassed 1 million in June,” July 16, 2021, available at: https://www.washingtonpost.com/immigration/border-arrests-june-mexico/2021/07/16/0e2aa4d8-e3dd-11eb-8aa5-5662858b696e_story.html

- a. Given that the United States is now dealing with the Delta strain of the COVID-19 virus, shouldn't we be doing more to screen and/or vaccinate these individuals?

I am not aware of the details of what is happening at the U.S.-Mexico border, but people should follow public health guidelines as best they can to keep everyone safe.

- b. If confirmed as the Solicitor General, how do you intend to use your position to combat:
 - i. The rampant sexual assaults happening to women and children?
 - ii. The devastating deaths due to heat exhaustion?

If I am confirmed as Solicitor General, my responsibilities would include conducting litigation on behalf of the United States in the Supreme Court, determining whether and to what extent appeals will be taken by the government, determining whether to authorize the submission of amicus briefs in appellate courts, and assisting the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy. 28 C.F.R. § 0.20. If the issues you reference arise in a matter that falls within the purview of the Office of the Solicitor General, I will make decisions based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office follows to determine what the position of the United States should be.

6. Is it appropriate for a low-level government official (including law enforcement) to be terminated for "liking" a post on social media that:
 - a. Contains views contrary to yours?
 - b. Contains some allusion to violence?
 - c. Contains views contrary to what you perceive to be the prevailing media narrative?

The Supreme Court has held that the government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). The Supreme Court has articulated "a two-step inquiry into whether a public employee's speech is entitled to protection: 'The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.'" *Lane v. Franks*, 573 U.S. 228, 237 (2014) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). To assess a First Amendment claim in this context, it would be necessary to apply these principles to the particular facts and circumstances.

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

The Supreme Court has articulated a “general rule” that the President possesses “unrestricted removal power” with respect to Officers of the United States. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2197-2198 (2020). The Court has acknowledged “two exceptions” to that general rule: “one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.” *Id.* at 2199-2200. To determine whether the President has the power to remove a senior official at his pleasure, it would be necessary to apply these principles to the particular facts and circumstances.

- a. Is it possible that removing someone—as is the President’s power—can be for wholly apolitical reasons?

Yes.

8. Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?

The Supreme Court has held that “an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Under *Terry*, an officer who has lawfully stopped a suspect may conduct a limited protective frisk for weapons if he has reason to believe that the suspect “may be armed and presently dangerous.” 392 U.S. at 30.

9. Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a “living constitution”?

I am not familiar with the statements referenced in this question and therefore have no basis to comment on them.

10. Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?

The Constitution vests prosecutorial power in the Executive Branch. See U.S. Const. Art. II, §§ 1, 3. Accordingly, “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974). A narrow exception exists for the prosecution of criminal contempt of court. See Fed. R. Crim. P. 42(a)(2); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801-802 (1987). Specifically, a court may appoint a private prosecutor to pursue criminal contempt of court, but only if the court first “request[s] that the contempt be prosecuted by an attorney for the government” and the government “declines th[at] request,” or “the interest of justice requires the appointment of another attorney.” Fed. R. Crim. P. 42(a)(2).

11. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform.

- a. Do you agree with Attorney General Garland, Deputy Attorney General Lisa Monaco, and Associate Attorney General Vanita Gupta that a member of the Federalist Society should be allowed to serve as an Assistant Solicitor General?

Yes.

- b. If so, does that mean you would allow a member of the Federalist Society to serve on the front-office staff?

Yes.

- c. Do you agree with Attorney General Garland, Deputy Attorney General Lisa Monaco, and Associate Attorney General Vanita Gupta that a member of the Federalist Society should be allowed to be promoted to chief, assistant chief, section head, or any other career supervisory position within the Solicitor General’s Office?

Yes.

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

I am not aware of a legal ethics standard that bears on this issue.

13. Do you agree with the propositions that some clients don’t deserve representation on account of their:

- a. Heinous crimes?
- b. Political beliefs?
- c. Religious beliefs?

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.” The Supreme Court has held that the Sixth Amendment requires the provision of counsel to indigent defendants charged with a felony. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right recognized in *Gideon* cannot be denied based on a defendant’s heinous crimes, political beliefs, or religious beliefs.

14. Should judicial decisions take into consideration principles of social “equity”?

Judicial decisions should be based on the law and the facts presented in the case.

15. Is climate change real?

Yes.

16. Is when a “fetus is viable” a scientific question?

The Supreme Court has stated that a “fetus becomes ‘viable,’” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.” *Roe v. Wade*, 410 U.S. 113, 160 (1973) (citing L. Hellman & J. Pritchard, *Williams Obstetrics* 493 (14th ed. 1971); *Dorland’s Illustrated Medical Dictionary* 1689 (24th ed. 1965)).

17. Is when a human life begins a scientific question?

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court stated that the Court “need not resolve” the question of when life begins. *Id.* at 159.

18. Is gun violence a public-health crisis?

President Biden has described gun violence as a public-health crisis.

19. Is racism a public-health crisis?

According to the Centers for Disease Control and Prevention (CDC), racism “affects the mental and physical health of millions of people.” CDC, *Racism and Health*, <https://www.cdc.gov/healthequity/racism-disparities/index.html>.

20. Is the federal judiciary systemically racist?

I am aware of aspects of the criminal justice system that have had a disparate impact on communities of color and other communities. I do not believe that acknowledging the existence of those disparities means that any particular institution is systemically racist.

21. Is the federal judiciary impacted by implicit bias?

As Attorney General Garland observed at his confirmation hearing, implicit bias is part of the human condition. I do not believe that acknowledging the existence of implicit bias means that any particular institution or individual harbors racism.

22. Is the Solicitor General's Office impacted by implicit bias?

As Attorney General Garland observed at his confirmation hearing, implicit bias is part of the human condition. I do not believe that acknowledging the existence of implicit bias means that any particular institution or individual harbors racism.

23. Assuming that you are confirmed, how will your implicit bias impact the manner in which you carry out your role as the Solicitor General?

Although implicit bias is part of the human condition, recognizing the existence of unconscious assumptions and stereotypes is important to working to overcome them. That is what I have tried to do and would continue to do if I am confirmed as Solicitor General.

24. Can someone change his or her biological sex?

People can undergo gender-confirmation surgery if their gender identity and the sex they were assigned at birth do not correspond with one another.

25. Should children be allowed to receive hormone blockers without their parents express knowledge and consent?

I am not aware of any federal statute that bears on issue, and I have not studied state-law provisions that address this specific question.

26. Do parents have a right to be notified if their teenage daughter (under the age of 18) seeks to obtain an abortion?

I have not studied state-law provisions that address this specific question. With respect to the question whether parental-notification requirements are constitutional, the Supreme Court has upheld a state statute "that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 506 (1990); *see id.* at 510 (listing the Court's prior "cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context").

27. Do parents have a right to be notified if their teenage daughter (under the age of 18) seeks to obtain birth control pills?

I am not aware of any federal statute that bears on this issue, and I have not studied state-law provisions that address this specific question.

28. Is threatening Supreme Court Justices right or wrong?

It is wrong to threaten anyone with bodily harm.

29. Is second-degree murder a crime of violence under 18 U.S.C. § 924(c)(1)(A)?

The position of the Department of Justice is that second-degree murder is a crime of violence under 18 U.S.C. § 924(c)(1)(A).

30. Does 8 C.F.R. § 1003.14(a), the regulation concerning an immigration court's jurisdiction, set out a limit on the immigration court's subject matter jurisdiction, a claim-processing rule, or something else?

The position of the Department of Justice is that a charging document which initiates proceedings before an immigration judge need not specify the date and time of the initial removal hearing in order for “[j]urisdiction” to “vest[]” in the immigration court under the pertinent regulations. 8 C.F.R. § 1003.14(a). The Department of Justice has further argued that any requirement that the charging document contain the date and time of the initial removal hearing is not a jurisdictional requirement, but rather is a claim-processing rule.

31. How do you distinguish between “attacks” on a sitting judge and mere criticism of an opinion he or she has issued?

That is a difficult question to answer in the abstract; it would depend on the facts and circumstances.

32. Do you think the Supreme Court should be expanded?

Because I am nominated to the position of Solicitor General, I do not think it would be appropriate for me to comment. In Executive Order 14023, President Biden established the Presidential Commission on the Supreme Court of the United States and charged the Commission with producing a report that includes “[a]n analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.”

33. What is the difference between defunding the police and “the divestment/reinvestment approach to policing?”

I am not an expert in this area, but it seems that “defunding” the police would describe no longer paying for police, while “divestment/reinvestment” would describe allocating monies for law enforcement in different ways than before.

34. Do you think we should defund the police or divert police funding to any other social or community activities?

I do not support defunding the police. I have not studied proposals to divert police funding to other social or community activities and therefore have no basis to provide well-developed views on this issue.

35. How do you understand the difference, if any, between freedom of religion and freedom of worship?

The First Amendment protects religious liberty, providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Supreme Court has described the First Amendment as “protecting freedom of worship and freedom of conscience in religious matters.” *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

36. Do you believe potential voter fraud or other elections abnormalities are concerns that the Justice Department should take seriously?

The Justice Department should investigate credible allegations of activity that may violate federal law, including voter fraud and election crimes.

37. Does religious freedom entail a right to externalize costs on to third parties?

Principles of religious liberty are protected under the Free Exercise Clause, the Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes. The scope of the right is defined by these sources of law and precedent interpreting them.

38. Do you agree with Thomas Jefferson that the First Amendment erects “a wall of separation between Church & State”?

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court stated: “The Court has sometimes described the Religion Clauses as erecting a ‘wall’ between church and state. The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.” *Id.* at 673 (citation and footnote omitted).

39. If the Justice Department determines that the prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.

This question appears to refer to the procedural history of the prosecution of Lt. Gen. Michael Flynn. I do not believe it would be appropriate for me to comment on that matter.

40. You participated in the Special Counsel Investigation. During that time, you were issued a cell phone to communicate with other members of the team. When you returned your cell phone, a DOJ report noted that it only contained "215 personal photos."
- a. Did you use your work-issued cell phone to communicate with other members of the Special Counsel Team?

As far as I can recall, the only use I made of my work-issued cell phone to communicate with other members of the Special Counsel's Office was to access work email from my mobile device.

- i. If you used your work-issued cell phone to communicate with other members of the Special Counsel team, why was there no evidence of those communications on your work-issued cell phone?

As far as I can recall, the only use I made of my work-issued cell phone to communicate with other members of the Special Counsel's Office was to access work email from my mobile device. I complied with all record-retention policies and did not delete emails from my cell phone. When my detail to the Special Counsel's Office concluded and I returned to the Office of the Solicitor General, I returned my work-issued cell phone to personnel in the Department of Justice. I have no knowledge of what the Department did with the phone after I returned it.

- ii. Where are the communications from the Special Counsel investigation if you did not wipe your work-issued cell phone?

I did not wipe my work-issued cell phone. As far as I can recall, the only use I made of my work-issued cell phone to communicate with other members of the Special Counsel's Office was to access work email from my mobile device. I complied with all record-retention policies and did not delete emails from my cell phone. When my detail to the Special Counsel's Office concluded and I returned to the Office of the Solicitor General, I returned my work-issued cell phone to personnel in the Department of Justice. I have no knowledge of what the Department did with the phone after I returned it.

- iii. Were you instructed to eliminate all work communication from your work-issued cell phone?

No.

1. If yes, by whom? Or did you eliminate any work-related information from this cell phone on your own?

I did not eliminate work-related information from my work-issued cell phone.

41. You once wrote that cat owners “tend to be successful Wall Street executives” and that dog owners “tend to be those people who wear fluorescent orange vests and stand out in the sun directing traffic around a construction site while yelling obscenities at motorists who make it a point to knock over the cones, and make rude gestures at those who go for the barrels.” Do you still believe this to be the case?

I wrote this humor piece you reference more than 24 years ago for my high school newspaper when I was 17. Today, I have no basis to make generalizations about cat and dog owners and my mother’s dog, Isabelle, is our beloved family pet.

42. Why do you have a problem with workers who have to “wear fluorescent orange vests” as part of their job duties?

I do not have a problem with any workers. I wrote this humor piece you reference more than 24 years ago for my high school newspaper when I was 17.

43. Why did you single out for praise Wall Street executives, as compared to construction workers who do an honest day’s work?

I do not have any memory of my drafting process for this humor piece you reference that I wrote more than 24 years ago for my high school newspaper when I was 17.

44. If you value stability and consistency in the approach of the Solicitor General, how do you justify the number of flip-flops that your office has already undertaken?

I believe that stability and consistency are important values for the Office of the Solicitor General. Changes of position should not be undertaken lightly. As I explained at my hearing, the Office maintained the government’s position in the vast majority of cases we handled while I was serving as the Acting Solicitor General. In the small number of cases where we determined that a change in position was warranted, that decision was based on our assessment of the law and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office follows to determine what the position of the United States should be.

45. Over the course of your career, how many times have you spoken at events sponsored or hosted by the following liberal, “dark money” groups?
- a. American Constitution Society
 - b. Arabella Advisors
 - c. Demand Justice
 - d. Fix the Court
 - e. Open Society Foundation

I have never spoken at any events sponsored by Arabella Advisors, Demand Justice, Fix the Court, or the Open Society Foundation. On April 11, 2017, I moderated a conversation between two federal judges at an event co-sponsored by the Harvard Law Review, the American Constitution Society, and the Federalist Society, as listed in my Senate Judiciary Questionnaire in response to Question 12d.

46. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

The First Amendment guarantees rights for all Americans. I have not studied issues related to the invocation of First Amendment rights that would bear on this issue and therefore have no basis to provide well-developed views on this question.

47. What fact-checking organization(s) should the United States government trust to accurately assess information?

I cannot comment on fact-checking organizations, but the Department of Justice relies on the fact-gathering activities of its law enforcement components.

48. Do you believe that the average citizen is capable of serving as his or her own fact-checker without aid from social media or the media?

I have not studied this issue and therefore have no basis to provide well-developed views on this question.

49. Do you believe that the United States government should partner with social media companies to “identify disinformation campaigns and to weed out fake news planted by foreign intelligence services?”²

- a. Should the United States government team up with social media companies to identify and silence those they disagree with as purported “disinformation campaigns” or “fake news” from:
 - i. Conservative news organizations?
 - ii. Individual conservative influencers or reporters?
 - iii. Children espousing conservative viewpoints?

² SJQ 12(A), Opinion: Russia is still waging cyberwar against Western democracy. It’s time to push back, at *1.

- b. Should President Biden (or his senior officials) encourage the creation of “lists” containing the names of individuals who spread “disinformation”?
- c. How is the aforementioned act different from the activities of communist China?

These questions appear to refer to an opinion piece authored by another Department of Justice nominee in 2017 and listed on his Senate Judiciary Committee questionnaire. I have not studied these issues and therefore have no basis to provide well-developed views on these questions.

50. Is the failure to teach Critical Race Theory in elementary schools a national security threat?

I have not studied this issue and therefore have no basis to provide well-developed views on this question.

51. What is the legal basis for a nationwide injunction?

The Department of Justice has argued that nationwide injunctions generally exceed district courts’ constitutional and equitable authority. The Supreme Court has narrowed injunctions that “improper[ly]” “grant[ed] a remedy beyond what was necessary to provide relief to [the injured parties].” *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

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

The Second Amendment states: “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.” In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to possess arms for lawful purposes, including self-defense. *Id.* at 595. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment right is binding on the States under the Fourteenth Amendment. To evaluate the scope of the Second Amendment’s protection, the Court has started its analysis with the text of the Second Amendment, the history of the right to keep and bear arms, and the tradition of arms regulation in the United States. The Court has stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. And the Court has identified several “presumptively lawful regulatory measures” such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-627.

53. Under the Religious Freedom Restoration Act the federal government cannot “substantially burden a person’s exercise of religion.”
- a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

The Religious Freedom Restoration Act provides that the federal government may not “substantially burden a person’s exercise of religion” unless it “demonstrates that application of the burden to the person” is “in furtherance of a compelling government interest” and is “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. As the Supreme Court’s decisions illustrate, a reviewing court is ultimately responsible for determining whether a law substantially burdens a person’s exercise of religion. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719-726 (2014). But the Court has emphasized that a court making that determination must not second-guess the reasonableness of the religious adherent’s beliefs. *Id.* at 723-726. Instead, the court’s “narrow function” is to determine whether the adherent’s asserted beliefs reflect an “honest conviction” and whether the challenged law “imposes a substantial burden” on the adherent’s ability to act in accordance with those beliefs. *Id.* at 723-724.

- b. How is a burden deemed to be “substantial[]” under current caselaw? Do you agree with this?

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), for example, the Supreme Court held that the contraceptive coverage requirement under the Affordable Care Act imposed a substantial burden on the plaintiffs’ exercise of religion. By requiring the plaintiffs to arrange for such coverage, the Court reasoned, the requirement demanded “that they engage in conduct that seriously violates their religious beliefs,” and if they did not comply, they would have faced “substantial economic consequences” in the form of “substantial” penalty assessments. *Id.* at 720-721. If I am confirmed as Solicitor General and a case arises involving this issue, I would apply the law as the Supreme Court has determined it.

54. Is second-degree murder a crime of violence under 18 U.S.C. § 924(c)(1)(A)?

The position of the Department of Justice is that second-degree murder is a crime of violence under 18 U.S.C. § 924(c)(1)(A).

55. 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?

I believe strongly in principles of religious liberty, which are protected under the Free Exercise Clause, the Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes. The scope of the right is defined by these sources of law and precedent interpreting them. These constitutional and statutory provisions guarantee religious organizations substantial autonomy to act consistently with their religious beliefs.

56. Does illegal immigration impose costs on border communities?

I have not studied this issue and therefore have no basis to provide well-developed views.

57. When was the last time you visited the U.S.-Mexico border?

I have traveled to Mexico by air, but I have not visited the U.S.-Mexico border.

58. When was the last time you visited the U.S.-Mexico border outside of a port of entry?

I have traveled to Mexico by air, but I have not visited the U.S.-Mexico border.

59. Do Blaine Amendments violate the Constitution?

The “Blaine Amendment of the 1870s” was a failed proposal which “would have added to the Federal Constitution a provision * * * prohibiting States from aiding ‘sectarian’ schools.” *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020). In *Espinoza*, the Supreme Court observed that many States had adopted no-aid provisions that shared a “checkered tradition” with the Blaine Amendment. *Ibid.* *Espinoza* involved a provision of the Montana Constitution that prohibited any state aid to any school controlled by a “church, sect, or denomination.” *Id.* at 2251, 2255. The Court held that the Montana Supreme Court’s application of that no-aid provision to strike down a program to provide tuition assistance to parents who send their children to private schools violated the Free Exercise Clause.

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

In April 2021, the White House Office of Presidential Personnel contacted me to begin a vetting and screening process for the position of Solicitor General. Subsequently, I had further contact with the White House Office of Presidential Personnel, including an interview for the vetting process. In August 2021, I spoke with the President and learned that he would nominate me, which he did on August 10, 2021.

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

No.

- a. Did anyone do so on your behalf?

Not to my knowledge.

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

No.

- a. Did anyone do so on your behalf?

Not to my knowledge.

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

No.

- a. Did anyone do so on your behalf?

Not to my knowledge.

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

No.

a. Did anyone do so on your behalf?

Not to my knowledge.

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

Please see my response to Q. 60.

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

The Department of Justice received these questions on September 21, 2021. I consulted with Department attorneys, conducted research, and answered the questions. I finalized answers to the questions and authorized their transmission to the Committee on September 27, 2021.

Senator Blackburn
Questions for the Record to Elizabeth Prelogar
Nominee to be Solicitor General of the United States

- 1. After your work with Special Counsel Mueller’s office, an analysis of your government-issued phone showed that it contained only 215 personal photos. Can you represent to the Committee that neither you, nor anyone else, intentionally cleared data from your government-issued phone?**

I did not intentionally clear data from my government-issued phone and, as far as I am aware, no other person intentionally cleared data from my government-issued phone.

- 2. While at Cooley, you worked on behalf of gun control organizations and on a lawsuit against the ATF related to what gun control advocates refer to as “ghost guns.” When you and I spoke over the phone, you told me that the specific issue in that lawsuit was unrelated to the Second Amendment, but instead related to the Gun Control Act. In my view, attempting to make it more difficult for law abiding Americans to acquire so-called “ghost guns” does at least implicate the right to keep and bear arms, especially when ATF’s statutory authority is questionable at best. Do you disagree, and if so, why?**

In the case we discussed, the plaintiffs raised claims under the Administrative Procedure Act related to ATF’s interpretation of the statutory definition of “firearm” in the Gun Control Act and ATF’s failure to respond to a petition for rulemaking. No constitutional question was presented in the case and the parties accordingly did not brief any issues concerning the Second Amendment.

If I am confirmed and a case arises that concerns the Second Amendment, the positions that I advance on behalf of the United States would be based on my assessment of the United States’ interests—and not based on my own personal views or the views of any former clients.

- 3. Please describe your constitutional philosophy. Is the Constitution a living document?**

Because I have never served as a judge, I have approached issues concerning constitutional interpretation only from the perspective of an advocate. In that role, I believe it is appropriate to rely on all interpretive tools that the Supreme Court has identified in construing the Constitution. As a general matter, the Court considers constitutional text, history, tradition, structure, and precedent. In addition, under the Court’s case law, other interpretive tools may be relevant depending on the constitutional provision at issue. For example, in interpreting the Eighth Amendment, the Court considers “evolving standards of decency.” *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). If I am confirmed, I would rely on all relevant interpretive tools the Court has articulated in constitutional cases.

4. **Last year, in *Idaho Department of Corrections v. Edmo* (2020), you authored a brief in support of a transgender prisoner who sought gender reassignment surgery from the state of Idaho. In your view, under what circumstances should the state or federal government fund gender reassignment surgeries?**

In the *Edmo* case, “[f]ollowing four months of intensive discovery and a three-day evidentiary hearing,” the district court made “detailed factual findings” that gender-confirmation surgery was “medically necessary for Edmo” and that prison officials had violated the Eighth Amendment by declining to “provide[] that treatment despite full knowledge of Edmo’s ongoing and extreme suffering and medical needs.” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019). The court of appeals affirmed the district court’s decision, emphasizing that resolution of the Eighth Amendment claim turned “on the district court’s factual findings” and that the court “emphatically d[id] not speak to other cases.” *Id.* at 785, 803. As the decisions observe, under settled Eighth Amendment standards, whether a particular treatment is medically necessary for an individual and whether officials have been deliberately indifferent to a prisoner’s serious medical needs depends on all the facts and circumstances.

If I am confirmed and a case arises concerning the Eighth Amendment’s deliberate-indifference standard, the position that I advance on behalf of the United States would be based on my assessment of the United States’ interests—and not based on my own personal views or the views of any former clients.

**Nomination of Elizabeth Prelogar to be Solicitor General of the United States Questions for
the Record**

Submitted September 21, 2021

QUESTIONS FROM SENATOR COTTON

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

No.

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

No.

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

The Department of Justice received these questions on September 21, 2021. I consulted with Department attorneys, conducted research, and answered the questions. I finalized answers to the questions and authorized their transmission to the Committee on September 27, 2021.

- 4. 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.**

No individual outside of the United States federal government wrote or drafted my answers to these questions or the written questions of the other members of the Committee. Before finalizing my answers, and as I considered helpful and appropriate, I consulted with other individuals at the Department of Justice.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: “Nominations”
September 14, 2021

Questions 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?**

No. I have not participated in any events in which I have called into question the legitimacy of the United States Constitution and, as far as I know, I have not participated in any events in which other participants called into question the legitimacy of the United States Constitution.

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

No. I have not willfully damaged public or private property and, as far as I know, I have not participated in any rallies, demonstrations, or other events in which other participants have willfully damaged public or private property.

Questions for the Record for Elizabeth Prelogar, to be Solicitor General of the United States

I. Directions

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

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

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

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

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

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

II. Questions

- 1. When we met in my office, you said that the Solicitor General's office should defend laws and executive actions, if a "reasonable argument can be made." But, when you were acting Solicitor General, you declined to defend the lawfulness of a DHS rule—the so-called "Public Charge Rule." Even though the Supreme Court had granted review to determine the lawfulness of the rule, you and the Biden administration instead filed a joint stipulation to dismiss the appeal. In a later filing to the Court, you admitted that the only reason you did not defend the rule was because the administration disagreed with it—you wrote that "DHS announced that the**

government had determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources.”

- a. If the role of Solicitor General's office is to defend laws and rules that are on the books if a reasonable defense can be made, why didn't you defend the Public Charge rule?**

Because litigation concerning the public charge rule remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation.

As a general matter, and as we discussed when we met in your office, I agree with prior Solicitors General who have expressed the view that it is appropriate to defend executive actions and the policies and rules of executive agencies when a reasonable legal defense is available.

It is important to distinguish the decision not to defend—that is, to affirmatively argue that an action or policy is unlawful—from the decision whether to pursue an appeal of an adverse decision. The United States does not appeal every adverse decision entered against it and the decision not to proceed with an appeal can be based on a variety of factors—including factors unrelated to whether a reasonable legal defense is available. To determine whether to proceed with an appeal, the Office of the Solicitor General follows an extensive deliberative process that includes soliciting recommendations from Executive Branch departments, agencies, and components with subject matter expertise or a stake in the dispute. Career attorneys in the Office of the Solicitor General also weigh in with recommendations on whether an appeal is warranted. The determination whether to press forward with an appeal is fact- and case-specific and ultimately turns on the long-term institutional interests of the United States as identified and informed by that deliberative process. I participated in the appeal-authorization process for many years as a career attorney in the Office of the Solicitor General and, more recently, as the Acting Solicitor General. If I am confirmed, I am firmly committed to following the Office's time-honored process for purposes of making decisions about whether to pursue appeals in individual cases.

b. Did you simply defer to DHS when they decided, for policy reasons, that they did not want to defend the Public Charge rule?

Because litigation concerning the public charge rule remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation.

As a general matter, to determine whether to proceed with an appeal, the Office of the Solicitor General follows an extensive deliberative process that includes soliciting recommendations from Executive Branch departments, agencies, and components with subject matter expertise or a stake in the dispute. Career attorneys in the Office of the Solicitor General also weigh in with recommendations on whether an appeal is warranted. The determination whether to appeal is fact- and case-specific and ultimately turns on the long-term institutional interests of the United States as identified and informed by that deliberative process. As prior Solicitors General have observed, the views of the department or agency that is the party in a case may be entitled to particular weight in determining whether an appeal is warranted, but those views are not controlling. By regulation, the Solicitor General is vested with the ultimate authority to “[d]etermin[e] whether, and to what extent, appeals will be taken by the Government to all appellate courts.” 28 C.F.R. § 0.20(b).

2. Will you refuse to defend laws that the Congress has passed because you disagree with the policy? Even if there is a clear constitutional defense?

No, I will not refuse to defend laws that Congress has passed because I disagree with the statute as a matter of policy. The Department of Justice’s longstanding practice is to vigorously defend the constitutionality of the laws passed by Congress, subject only to limited exceptions. One exception applies when the Department concludes that there are no reasonable arguments to be made in defense of the law. Another applies when the law raises separation-of-powers concerns by infringing on the Executive Branch’s constitutional authorities. If I am confirmed as Solicitor General, any personal policy views I have will play no role in my determination whether a statute should be defended against a constitutional attack.

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

The Supreme Court has made clear that prosecutors and other government agencies may exercise discretion in invoking their enforcement authorities when deciding how to allocate their limited resources. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court explained that, in exercising that discretion, an agency may appropriately consider not only “whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Id.* at 831.

4. **Over the last few weeks, this administration has abused the legal process to institute policies that it knows are unlawful.**

First, President Biden imposed an eviction moratorium. Days before President Biden extended the moratorium, White House Press Secretary Jenn Psaki said President Biden would have supported extending the moratorium, but “unfortunately, the Supreme Court has made clear that this option is no longer available.” Another White House official said that the CDC had “been unable to find the legal authority for even new, targeted eviction moratoriums.” But President Biden had the CDC impose a new, plainly unlawful moratorium, saying, “by the time it gets litigated, it will probably give some additional time while we’re getting that \$45 billion out.”

Second, President Biden announced a vaccine mandate on all employers with over 100 employees, even though OSHA lacks authority to compel private employers to enforce a vaccine mandate on employees, because the mandate it will take time for legal challenges to be resolved in the courts.

a. **Is it the job of the Solicitor General to stand up to the President when he abuses the legal process and takes executive actions that are plainly unlawful?**

Because litigation involving the CDC’s eviction moratorium and the vaccine mandate remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation.

As a general matter, I agree with prior Solicitors General who have expressed the view that it is appropriate to defend executive actions and the policies and rules of executive agencies when a reasonable legal defense is available.

b. It is appropriate for a Solicitor General to argue that a policy is lawful, even when the President has previously stated that policy is unlawful?

Because litigation involving the CDC's eviction moratorium and the vaccine mandate remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation.

As a general matter, I believe that the best way to assess the legal issues in a given case for purposes of determining what positions to advance on behalf of the United States is to follow the traditional practice in the Office of the Solicitor General of obtaining recommendations from Executive Branch departments, agencies, and components with subject matter expertise or a stake in the dispute. Career attorneys in the Office of the Solicitor General also weigh in to provide perspectives on the legal issues and how various positions will affect the institutional interests of the United States. In my view, the President—and the country—are best served by having a Solicitor General who will follow this practice and will exercise independent judgment in determining what legal positions to press in litigation. If I am confirmed, I am committed to exercising that judgment and providing honest and independent legal advice.

c. If it is not the duty of the Solicitor General to vigorously defend the Constitution and existing federal laws, whose duty is it?

If I am confirmed as Solicitor General, I will take an oath—as all Department of Justice employees do—to support and defend the Constitution of the United States. I am firmly committed to defending the Constitution and laws of the United States in accordance with this oath.

5. **Recently, a court held that the Biden administration's decision to terminate the Migrant Protections Protocols—the so-called "Remain in Mexico" policy was unlawful. As a result, it issued a preliminary injunction that ordered the administration to reinstate the policy, and the Supreme Court affirmed that temporary relief. I sent a letter to the administration demanding to know how it plans to reinstate this program because I feared that President Biden and Secretary Mayorkas would not comply with the order. Since then, it is my understanding that President Biden's administration is intentionally slowwalking the implementation of MPP in direct violation of the court's order that the administration implement MPP in good faith.**

- a. **Is it your view that the Biden administration is complying with the Court’s order in good faith? If so, what about these actions indicate that they are?**

Because I was reassigned to a different component following my nomination, I was not involved in this litigation and am not currently working on this matter. I am aware that on September 15, 2021, the Department of Justice filed a notice of the government’s compliance with the injunction in the United States District Court for the Northern District of Texas. See Defendants’ Notice of Compliance With Injunction, *Texas v. Biden*, No. 2-21-cv-67, Dkt. 105 (Sept. 15, 2021). The filing explained that “Defendants are actively engaged in attempting to re-implement MPP in good faith in accordance with the Court’s order” and identified “numerous steps” the government is taking “to re-implement MPP,” including “engag[ing] in discussions with the Government of Mexico,” “rebuilding infrastructure and reorganizing resources and personnel along the southwest border that are necessary to operate MPP,” “working to make space available on immigration court dockets to schedule hearings for individuals in MPP,” and “engag[ing] in extensive planning regarding how to operationalize MPP at the southwest border.” *Id.* at 1-3. The government’s notice of compliance also stated that, as of that filing, “Mexico has not yet agreed to accept returns under the Court-ordered restart of MPP.” *Id.* at 1.

- b. **If the administration were held in contempt for this behavior, would you be willing to defend the administration in any contempt proceedings?**

The Office of the Solicitor General would not typically be directly responsible for defending the administration in contempt proceedings before a district court, but it would play a role in authorizing an appeal from an adverse decision or in conducting any litigation in the Supreme Court if a matter reaches that stage. If I am confirmed, I would make determinations about whether to authorize an appeal or how to conduct any litigation in the Supreme Court based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

- c. **Because this case has already been to the Supreme Court, do accept that you have an obligation to ensure that the administration is complying with the order?**

Because I was reassigned to a different component following my nomination, I was not involved in this litigation and am not currently working on this matter. If I am confirmed as Solicitor General, I will handle any matters that fall within the purview of the Office of the Solicitor General in accordance with my strong belief that the Executive Branch must comply with court orders in good faith.

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

No.

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

No.

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

No.

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

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made clear that the Second Amendment protects an individual right to possess arms for lawful purposes, including self-defense. *Id.* at 595.

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

The protection afforded to the right to own a firearm is defined by the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court instructed that the interpretation of the Second Amendment should begin with the text of the Amendment, the history of the right to keep and bear arms, and the tradition of arms regulation in the United States. The Court further stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. The Court identified several “presumptively lawful regulatory measures” such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-627.

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

I am aware of aspects of the criminal justice system that have had a disparate impact on communities of color and other communities. I do not believe that acknowledging the existence of those disparities means that any particular institution is systemically racist.

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

As Attorney General Garland has observed, he and President Biden value a process that brings diverse perspectives and expertise to the table. The Attorney General has committed that the Department of Justice shall conform fully with all applicable law in this area, including Executive Order 11478, which, as amended, directs executive departments and agencies “to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation, gender identity, or status as a parent, and to promote the full realization of equal employment opportunity through a continuing affirmative program.”

13. Is the federal court system infected with systemic racism?

I am aware of aspects of the federal court system that have had a disparate impact on communities of color and other communities. I do not believe that acknowledging the existence of those disparities means that any particular institution is systemically racist.

14. Can you give examples of this racism in the American court system?

One example of an aspect of the American justice system that produced a disparate impact on communities of color was the prior treatment of crack-cocaine offenses, which were treated 100 times more harshly than corresponding powder-cocaine offenses for purposes of sentencing. In a 2002 report, the United States Sentencing Commission observed that this 100-to-1 ratio created significant racial disparities in the criminal justice system. See U.S. Sent. Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 102-103 (May 2002). In 2010, Congress enacted the Fair Sentencing Act of 2010 to reduce the statutory penalties for crack-cocaine offenses in line with the Sentencing Commission’s recommendations. I do not believe that acknowledging the existence of disparities like the ones previously produced by the 100-to-1 ratio means that any particular institution is systemically racist.

15. Can you name any limits that the states can put on abortion which you find unobjectionable?

If I am confirmed as Solicitor General, whatever personal views I might have respecting these issues will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

Senator Josh Hawley
Questions for the Record

Elizabeth Prelogar
Nominee, Solicitor General, U.S. Department of Justice

1. The First Amendment of the United States Constitution protects the free exercise of religion.

- a. Under Supreme Court precedent, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

The Supreme Court’s most recent case involving the Free Exercise Clause of the First Amendment is *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). The Court observed that it had previously held in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that “laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Fulton*, 141 S. Ct. at 1876. However, “[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Id.* at 1877. And “[a] law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing “a mechanism for individualized exemptions.”” *Ibid.* (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J., joined by Powell and Rehnquist, JJ.)). “A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Ibid.* Applying these standards to the facts in *Fulton*, the Court concluded that a city’s contractual non-discrimination requirement was not generally applicable and imposed “a burden on [Catholic Social Services’] religious exercise,” thus triggering review “under the strictest scrutiny.” *Id.* at 1881. If I am confirmed as Solicitor General and a case arises involving these issues, I would consider the facts, the law as articulated by the Supreme Court in cases like *Fulton*, and the institutional interests of the United States.

- b. Under Supreme Court precedent, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.**

The Supreme Court has held that a law violates the Free Exercise Clause if it “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). The Court has likewise made clear that the government “cannot in a selective manner impose burdens only on conduct motivated by religious belief.” *Id.* at 543. In general, the application of those tests requires a careful assessment of the facts and circumstances of each case. If I am confirmed as Solicitor General and a case arises involving these issues, I would consider the facts, the law as articulated by the Supreme Court in cases like *Church of the Lukumi Babalu Aye*, and the institutional interests of the United States.

- c. What is the standard for evaluating whether a person’s religious belief is held sincerely? Please cite any cases you believe would be binding precedent.**

The Supreme Court has held that the question whether a person’s belief is “rooted in religion” does not “turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Review Bd. Of Indiana Employment Sec. Division*, 450 U.S. 707, 713-714 (1981). Lower courts have observed that “courts will investigate an adherent’s sincerity and will then invoke free exercise analysis where a belief is asserted and acted upon in good faith.” *International Soc. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981). If I am confirmed as Solicitor General and a case arises involving these issues, I would consider the facts, the law as articulated by the Supreme Court in cases like *Thomas*, and the institutional interests of the United States.

- 2. In *Terry v. United States*, 593 U.S. __ (2021), you abandoned the Justice Department’s longstanding position and adopted a new argument. The Supreme Court unanimously rejected your new argument, going even so far as to suggest that your new argument was a “sleight of hand” designed to manipulate the Court.**

- a. Describe the process you went through in making this decision.**

Following the change in Administration, the Department of Justice began a process of reviewing the government’s interpretation of Section 404 of the First Step Act. That process included soliciting views within the government on whether a conviction under 21 U.S.C. 841(a)(1) and (b)(1)(C) qualifies as a “covered offense” under the First Step Act—an issue that had divided the circuit courts and that the Supreme Court had agreed to review in *Terry*. In making the decision that we should argue that the lowest-level crack-cocaine offenders may seek resentencing under the First Step Act, I focused on the legal issues involved and my assessment of the United States’ interests.

b. Whom did you consult with when making this decision?

As Noel Francisco observed in response to questions from this Committee when he was the nominee for Solicitor General, it would be inappropriate to comment on internal Executive Branch deliberations as to the handling of any specific case. As a general matter, the Department of Justice solicits views from entities within the Executive Branch that have subject matter expertise or a stake in the dispute.

c. Why did you wait until the very day your brief was due to inform the Court that you were switching positions?

Following the change in Administration on January 20, 2021, the government began a process of reviewing its interpretation of the First Step Act, including Section 404. That process included soliciting views within the government on whether a conviction under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) qualifies as a “covered offense” under the First Step Act—an issue that had divided the circuit courts and that the Supreme Court had agreed to review in *Terry*. As I explained at my confirmation hearing, I found the determination of whether to confess error in this case to be a very difficult decision. Once I had made a final decision, we notified the Court promptly of our position in the case on March 15, 2021.

d. What did you learn from the Supreme Court’s unanimous rejection of your decision to abandon the Justice Department’s longstanding position?

The Court concluded in *Terry v. United States*, 141 S. Ct. 1858 (2021), that a crack-cocaine offender who was sentenced under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) does not have a “covered offense” within the meaning of Section 404 of the First Step Act. *Id.* at 1864. Accordingly, and as Justice Sotomayor observed in her opinion concurring in part, Congress would have to enact further legislation to provide sentencing relief to such offenders. *Id.* at 1868 (Sotomayor, J., concurring in part) (observing that “[t]here is no apparent reason that career offenders sentenced under [21 U.S.C. §§ 841(a)(1) and (b)(1)(C)] should be left to serve out sentences that were unduly influenced by the 100-to-1 ratio” between crack and power cocaine, that “the bipartisan lead sponsors of the First Step Act” had urged the Court to interpret the statute to provide sentencing relief to such low-level offenders, and that “Congress has numerous tools to right this injustice”).

e. The Court rejected your argument that crack offenders like Terry were entitled to resentencing hearings to obtain reduced sentences. Some reports state that Joe Biden, when he was a Senator, was responsible for writing the statute under which Terry was sentenced but that he is trying to distance himself from that statute to appease the far left. Did the President or Attorney General instruct you to change your argument?

As I explained at my confirmation hearing, I made the decision to confess error in the *Terry* case.

3. **The U.S. Court of Appeals for the Sixth Circuit recently ordered the Biden administration to stop discriminating on the basis of race. It found in *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), that the Biden administration was “awarding [stimulus funds] based on the race of the applicants” and that these actions led to the “inescapable” conclusion that the Biden administration had adopted an unconstitutional policy of “racial gerrymandering.” It further ordered the Biden administration to “stop discriminating on the basis of race.” Many other courts have held similarly.**

- a. **Do you agree that there is no place for discrimination on the basis of race in the government?**

Because litigation concerning these issues remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation. Without referring to any specific litigation, I believe that it is never acceptable to discriminate in violation of federal law.

- b. **If the President or the Attorney General asks you to defend decisions such as these to discriminate on the basis of race, will you decline?**

Because litigation concerning these issues remains pending, it would be inappropriate for me to comment on the specific issues involved in those cases outside the context of the ongoing litigation. If I am confirmed as Solicitor General and a case arises involving these issues, I would consider the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

- c. **Have you been involved in any decision to decline to appeal an adverse judgment against the Biden administration for racially discriminatory actions? Cite all such cases.**

No.

4. **On July 30, 2021, the Office of Legal Counsel (OLC) issued an opinion entitled *Ways and Means Committee’s Request for the F066ormer President’s Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __ (2021). This opinion abrogated a prior opinion, *Congressional Committee’s Request for the President Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. __ (2019).**

a. Were you in any way involved in the 2021 OLC opinion?

No.

b. What weight was *stare decisis* given in this decision?

Because I was not involved in any way in the 2021 OLC opinion, I am not aware of what weight *stare decisis* was given in the decision.

c. If confirmed, what standard would you apply to decisions to overturn prior OLC precedents if you are consulted on such decisions?

As far as I am aware, the Office of the Solicitor General is not usually consulted on whether OLC should overturn prior OLC precedents. If I am confirmed and am consulted on such an issue, I would seek to understand and apply OLC's traditional standards in order to provide advice as appropriate.

5. During your time serving under Robert Mueller in the Office of Special Counsel:

a. Did you work on any interviews, prosecution, or appeals concerning Lt. Gen. Michael Flynn?

My responsibilities as an Assistant Special Counsel included analyzing legal issues facing the investigative and trial teams as they conducted the investigation into Russian interference in the 2016 election and obstruction-of-justice issues. In that role, I worked with the prosecutors in Lt. Gen. Michael Flynn's case, but I did not have primary responsibility for any actions related to Lt. Gen. Michael Flynn such as interviews, prosecution, or appeals.

b. Did you ever advise on whether the President could be prosecuted by the Department of Justice? Do you believe it is lawful for the President to be prosecuted while in office?

My responsibilities as an Assistant Special Counsel included analyzing legal issues facing the investigative and trial teams as they conducted the investigation into Russian interference in the 2016 election and obstruction-of-justice issues. The Office of Legal Counsel (OLC) has issued an opinion stating that "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions" in violation of "the constitutional separation of powers." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000). The regulations governing the Special Counsel provide that "[a] Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice." 28 C.F.R. § 600.7(a). The Special Counsel accordingly accepted OLC's legal conclusion that it would not be lawful to prosecute the President while in office.

- c. **Did you ever advise on whether it was appropriate to publish a report that declined to “exonerate” the President, rather than simply stating that the Special Counsel declined to bring charges?**

My responsibilities as an Assistant Special Counsel included analyzing legal issues facing the investigative and trial teams as they conducted the investigation into Russian interference in the 2016 election and obstruction-of-justice issues. I also assisted with preparation of the Special Counsel’s Final Report.

- d. **In your view, how is the Mueller Report consistent with the central tenet of American criminal law that every person is presumed innocent until proven guilty?**

The regulations governing the Special Counsel provide that, “[a]t the conclusion of the Special Counsel’s work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.” 28 C.F.R. § 600.8(c). To comply with the regulation, the Special Counsel submitted a confidential final report explaining his prosecution and declination decisions.

6. **In *Alabama Assoc. of Realtors v. Dep’t of Health & Human Servs.*, 594 U.S. __ (2021), the Supreme Court addressed the Centers for Disease Control and Prevention’s (CDC) eviction moratorium. Despite Justice Kavanaugh’s clear language about the lawfulness of extending the moratorium, President Biden later extended the moratorium, saying “I’ve sought out constitutional scholars to determine what is the best possibility that would come from executive action [w]hat could they do that was most likely to pass muster, constitutionally.” Were you consulted on the legality of extending the CDC’s eviction moratorium?**

Yes.

7. **Under Supreme Court precedent, is it lawful for the government to mandate that an individual obtain a vaccine or other medical treatment? Please cite all precedents that you believe are relevant to this analysis.**

Because litigation concerning these issues remains pending, it would be inappropriate for me to comment on this issue outside the context of the ongoing litigation.

8. **If confirmed, do you commit to notifying Congress immediately if any person in the White House or Office of the Attorney General directs you to take a legal position before the U.S. Supreme Court that conflicts with your good-faith legal judgment?**

My understanding is that the Department of Justice works to appropriately respond to all congressional inquiries through the Office of Legislative Affairs, consistent with the Department’s law enforcement, national security, and litigation responsibilities.

**Questions for the Record for Elizabeth Barchas Prelogar
From Senator Mazie K. Hirono**

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

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

No.

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

No.

Senator Mike Lee
Questions for the Record
Elizabeth Prelogar, Solicitor General

1. The Religious Freedom Restoration Act is the leading federal civil rights law that protects all Americans' religious freedom. It was championed by Senator Ted Kennedy and Senator Orrin Hatch to pass the Senate by a vote of 97-3 and to pass the House by a unanimous voice vote. President Bill Clinton proudly signed it into law in 1993. For nearly three decades, it has protected the religious freedom of all Americans of all faiths. If confirmed, will you commit to oppose any legislative or executive action that would alter in any way the Religious Freedom Restoration Act's protection for Americans of all faiths?

I believe strongly in principles of religious liberty. I am not familiar with proposals to alter the Religious Freedom Restoration Act. If I am confirmed and consulted on such alterations, my position would be informed by the facts, the law, and the institutional interests of the United States.

2. As Solicitor General, what will you do if the President takes a position that is contrary to the law or not in the interests of the United States?

In my view, the President—and the country—are best served by having a Solicitor General who will exercise independent judgment in analyzing the bounds of the law and determining what positions will advance the institutional interests of the United States. If I am confirmed and I disagree with the President on what position to take in a case being handled by the Office of the Solicitor General, I would attempt to persuade the President of the correctness of the Office's views or the importance of deferring to the Office's judgment. If the disagreement could not be resolved and I were asked to carry out an order that I believed would breach my essential obligations to the Court or to the United States, I would not carry out the order and would instead resign. I do not expect, however, that the President would ask me to carry out such an order.

3. As a nominee for a position in the Executive branch, do you think there are any limits on the President's use of prosecutorial discretion?

The exercise of prosecutorial discretion is necessary; there are not enough resources for prosecutors to investigate and prosecute every crime. I believe prosecutorial decisions should be made based on the facts, the law, and considerations such as those set forth in the *Principles of Federal Prosecution*.

4. Please state for the record your thoughts on the Second Amendment.

The Second Amendment states: “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.” In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to possess arms for lawful purposes, including self-defense. *Id.* at 595. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment right is binding on the States under the Fourteenth Amendment. To evaluate the scope of the Second Amendment’s protection, the Court has started its analysis with the text of the Second Amendment, the history of the right to keep and bear arms, and the tradition of arms regulation in the United States. The Court has stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. And the Court has identified several “presumptively lawful regulatory measures” such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-627.

5. A number of states have enacted so-called “red flag laws” that authorize judges to issue orders for the seizure of otherwise lawfully owned firearms when the owner is found to be a danger to self or others. Do you support the use of red flag orders to seize lawfully-owned firearms? If so, what due process protections should apply to the issuance of these orders? Should a judge be able to order firearm seizures in *ex parte* proceedings, before the respondent has had a chance to answer the allegations in the petition?

I am aware that in July 2021, the Department of Justice issued model legislation to help States draft their own extreme risk protection orders, but I have not studied these issues or any legal questions related to them. If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

6. Do you support banning specific types of firearms?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

7. Do you support banning large magazines?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

8. Do you support holding firearms manufacturers liable for damage caused by people using their firearms to commit a crime?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

9. Would you have any difficulty defending a federal statute that you disagreed with as a matter of policy?

No, I would not have difficulty defending a federal statute that I disagreed with as a matter of policy. The Department of Justice's longstanding practice is to vigorously defend the constitutionality of the laws passed by Congress, subject only to limited exceptions. One exception applies when the Department concludes that there are no reasonable arguments to be made in defense of the law. Another applies when the law raises separation-of-powers concerns by infringing on the Executive Branch's constitutional authorities. If I am confirmed as Solicitor General, any policy views I have will play no role in my determination whether a statute should be defended against a constitutional attack.

10. What's worse: A court invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

As a general matter, if a court invalidates a law that is, in fact, constitutional, the decision would displace Congress's constitutional authority to make the laws. If a court upholds a law that is, in fact, unconstitutional, the decision would fail to implement the power of judicial review. I would need to examine the specific facts and context to reach a judgment as to which result is worse.

11. 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?

I have not studied this issue and therefore do not have well-developed views to offer. As a general matter, I fully accept the Supreme Court’s holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177.

12. 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 government officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

I am not a historian and have not studied this historical account in detail. As a general matter, executive officers must act in accordance with the Constitution; with respect to the President, “[t]his obligation is reflected in the Take Care Clause and in the President’s oath of office.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994). In announcing the principle of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177.

13. There’s been a lot of rhetoric over the last year from critics of our criminal justice system suggesting that we should “defund” the police. Do you agree with those critics?

I do not support defunding the police.

14. Do you believe our federal criminal justice system requires reforms, and if so, what reforms?

I am not an expert in criminal justice reform and have not given this complex topic sufficient study to comment.

15. For purposes of federal law, when does life begin?

In *Roe v. Wade*, 410 U.S. 113 (1983), the Supreme Court stated that the Court “need not resolve” the question of when life begins. *Id.* at 159.

16. Does the definition of when human life begins for purposes of federal law differ from the scientific definition of when human life begins?

In *Roe v. Wade*, 410 U.S. 113 (1983), the Supreme Court stated that the court “need not resolve” the question of when life begins. *Id.* at 159.

17. At what point in human development does the United States have a compelling interest in protecting a human life?

In *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed “the essential holding of *Roe v. Wade*” that the Constitution protects a woman’s decision whether to terminate her pregnancy and provided guidance on the standards that apply to assess whether limits on abortion comply with the Constitution. *Id.* at 846. First, the Court explained that a woman has a right “to choose to have an abortion before viability and to obtain it without undue interference from the State.” *Ibid.* “Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.” *Ibid.* Second, a state may “restrict abortions after fetal viability, if the law contains exceptions” for “the woman’s life or health.” *Ibid.* Third, “the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” *Ibid.*

18. Do you support laws penalizing fetal homicide?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

19. Do you support the Unborn Victims of Violence Act of 2004, which provides that a person guilty of killing a child in utero may be punished to the same extent as if they had killed the child’s mother, and that a person who intentionally kills a child in utero may be charged as a homicide (i.e., murder or manslaughter)?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

20. Given that “homicide” requires the killing of an innocent human being, do you agree that in order to punish someone for violating this statute, the child in utero would have to be a human being?

The Unborn Victims of Violence Act of 2004 provides that, “[a]s used in this section, the term ‘unborn child’ means a child in utero, and the term ‘child in utero’ or ‘child, who is in utero’ means a member of the species homo sapiens, at any stage of development, who is carried in the womb.” 18 U.S.C. § 1841(d).

21. Are there any circumstances which justify the killing of an innocent human being?

Federal and state laws prohibit homicide. The law further prescribes the situations where an intentional killing may be justified (e.g., self-defense).

22. Do you support the Born Alive Infants Protection Act?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

23. Relatedly, would you support any policy that would prohibit the killing of children who survive failed abortions outside the womb?

If I am confirmed as Solicitor General, whatever personal views I might have will play no role in determining what positions to advance on behalf of the United States in litigation. My decisions will be based on the facts, the law, and the institutional interests of the United States, as identified and informed by the extensive deliberative process the Office of the Solicitor General follows to determine what the position of the United States should be.

24. The Biden Administration has defined “equity” as: “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.” Do you agree with that definition?

Like the Attorney General and the Deputy Attorney General, I believe this definition of “equity” aligns with foundational legal principles and is consistent with federal laws.

25. What is the difference between “equity” and “equality?”

As I understand it, equity usually refers to treating people fairly and impartially, and equality refers to the state of being equal.

26. In order to achieve “equity,” is it ever necessary to discriminate *against* members of some groups in favor of others?

It is never acceptable to discriminate in violation of federal law.

27. If treating people equally before the law results in disparate outcomes, is it acceptable to discriminate against those with favorable outcomes before the law in order to correct that disparity?

It is never acceptable to discriminate in violation of federal law.

28. Congresswoman Ayanna Presley has said, in relation to criminal justice policy: “[w]e must now be every bit as intentional in legislating justice and equity, and that starts with embracing anti-racism as a central tenet of the policymaking process.” Do you plan to institute “anti-racist” policies in the solicitor general’s office at the Justice Department? If so, which policies do you plan to institute?

I am not familiar with the statements referenced in this question and therefore have no basis to comment on them. If confirmed, I plan to treat everyone in the Office of the Solicitor General fairly and impartially.

29. Do you believe that members of historically oppressed minority groups should be treated more favorably than those of other races in prosecutions and sentencing decisions to correct for the effects of systemic racism?

Current DOJ guidance on prosecutorial discretion, charging, and sentencing calls for decisions to be “based on the merits of each case and reflect an individualized assessment of relevant facts.” January 29, 2021 Memorandum from the Acting Attorney General regarding Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing.

30. Do you think that speech alone—without a threat or accompanying action— should be prosecuted?

I believe that the First Amendment’s protection is a fundamental American value. Generally, the categories of speech that the Supreme Court has described as unprotected include only “well defined and narrowly limited classes of speech,” *United States v. Stevens*, 559 U.S. 460, 468-469 (2010), such as “advocacy intended, and likely, to incite imminent lawless action,” “defamation,” “so-called ‘fighting words,’” “child pornography,” “fraud,” “true threats,” and certain “speech presenting some grave and imminent threat the government has the power to prevent,” *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion). The question whether Congress can permissibly criminalize speech would have to be evaluated based on the specific facts in light of the Court’s First Amendment doctrines.

Questions from Senator Thom Tillis
for Elizabeth Prelogar
Nominee to be United States Solicitor General

- 1. Do you believe it is the role of the Solicitor General to be an advocate for the United States government, or for the President of the United States? How do you draw that distinction as a presidentially-appointed officer?**

The Solicitor General is an advocate for the United States and its institutional interests. As part of the Executive Branch, the Office of the Solicitor General defends executive action and the policies and acts of executive departments and agencies in litigation—but the Solicitor General is not the President’s personal lawyer. If I am confirmed, I will follow the traditions of the Office to draw these distinctions and ensure that my decisions are based on the facts, the law, and the interests of the United States.

- 2. President Biden has shown his willingness to push the bounds of executive power, like his decision to issue an eviction moratorium despite the recent decision by the Supreme Court overruling the moratorium. How will you balance the pressure to adopt legal positions that meet certain policy goals compared to decisions which are legally sound but do not effectuate the President’s desire policy goal?**

I believe that the best way to assess the legal issues in a given case for purposes of determining what positions to advance on behalf of the United States is to follow the traditional practice in the Office of the Solicitor General of obtaining recommendations from Executive Branch departments, agencies, and components with subject matter expertise or a stake in the dispute. Career attorneys in the Office of the Solicitor General also weigh in to provide perspectives on the legal issues and how various positions will affect the institutional interests of the United States. In my view, the President—and the country—are best served by having a Solicitor General who will follow this practice and will exercise independent judgment in determining what legal positions to press in litigation. If I am confirmed, I am committed to exercising that judgment and providing honest and independent legal advice.

- 3. How will you separate your personal political views from your responsibility to take legal positions consistent with the Constitution and law, regardless of the policy outcome?**

I believe strongly that decisions the Solicitor General makes about what positions to take in litigation on behalf of the United States must be based on the law and the interests of the United States—and not based on personal policy views or partisan considerations. If I am confirmed, I will follow the traditions of the Office and the time-honored process of obtaining recommendations from Executive Branch departments, agencies, and components with subject matter expertise or a stake in the dispute to assess the legal

issues in the case and the interests of the United States. Having served as a career attorney in the Office of the Solicitor General for several years, I have a profound appreciation and respect for how that process assists the Solicitor General in making decisions. I am confident I can set aside my personal political views and carry out the Solicitor General's responsibilities by seeking to defend and advance the interests of the United States.

4. **The Supreme Court recently asked the Solicitor General's Office [*in American Axle v. Neapco*] whether it's time to revisit Section 101 of the Patent Act – the third such request in three years. In the past two requests, the Solicitor General recommended denying cert., but has recommended it in other cases.**

As you may know, I'm laser focused on patent eligibility and filed an amicus brief in this case.

- a. **Are you planning to respond to the Supreme Court's request for views on this controversial area of patent law?**

In response to the Supreme Court's invitation, the Office of the Solicitor General will file a brief in this case expressing the views of the United States. Because I was reassigned to a different component following my nomination, I am not currently working on this matter.

- b. **If so, are you planning to recommend granting cert to help clarify the substantive and procedural issues raised in this case? Why or why not?**

Because I was reassigned to a different component following my nomination, I am not currently working on this matter. If I am confirmed and the United States has not yet filed a brief in the *American Axle* case, I will assess what position to take based on the facts, the law, and the institutional interests of the United States.