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S. HRG. 118–29, Part 1

CONFIRMATION HEARING ON FEDERAL APPOINTMENTS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

JANUARY 25, 2023

Serial No. J–118–2

PART 1

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U.S. GOVERNMENT PUBLISHING OFFICE
52–252 PDF WASHINGTON : 2024

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CONTENTS

JANUARY 25, 2023, 10:03 A.M.

STATEMENTS OF COMMITTEE MEMBERS

Page

Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois 1
Graham, Hon. Lindsey O., a U.S. Senator from the State of South Carolina 2
Booker, Hon. Cory A., a U.S. Senator from the State of New Jersey, introducing Michael Farbiarz, Nominee to be a United States District Judge for the District of New Jersey 5

INTRODUCERS

Young, Hon. Todd, a U.S. Senator from the State of Indiana, introducing Hon. Matthew P. Brookman, Nominee to be a United States District Judge for the Southern District of Indiana 2
Menendez, Hon. Robert, a U.S. Senator from the State of New Jersey, introducing Hon. Robert Kirsch, Nominee to be a United States District Judge for the District of New Jersey 3
Murray, Hon. Patty, a U.S. Senator from the State of Washington, introducing Hon. Charnelle Bjelkengren, Nominee to be a United States District Judge for the Eastern District of Washington 6
Schumer, Hon. Charles E., a U.S. Senator from the State of New York, introducing Orelia Eleta Merchant, Nominee to be a United States District Judge for the Eastern District of New York 7

STATEMENTS OF THE NOMINEES

Witness List 27
Bjelkengren, Hon. Charnelle, Nominee to serve as United States District Judge for the Eastern District of Washington 9
questionnaire and biographical information 28
Brookman, Hon. Matthew P., Nominee to serve as United States District Judge for the Southern District of Indiana 10
questionnaire and biographical information 60
Farbiarz, Michael, Nominee to serve as United States District Judge for the District of New Jersey 11
questionnaire and biographical information 119
Kirsch, Hon. Robert, Nominee to serve as United States District Judge for the District of New Jersey 12
questionnaire and biographical information 154
Merchant, Orelia Eleta, Nominee to serve as United States District Judge for the Eastern District of New York 13
questionnaire and biographical information 201

QUESTIONS

Questions submitted to Hon. Charnelle Bjelkengren by:
Chair Durbin 224
Ranking Member Graham 225
Senator Lee 230
Senator Cruz 233
Senator Hawley 237
Senator Tillis 244

Page

Questions submitted to Hon. Matthew P. Brookman by:
Ranking Member Graham 252
Senator Lee 256
Senator Cruz 259
Senator Hawley 265
Senator Tillis 272
Questions submitted to Michael Farbiarz by:
Ranking Member Graham 280
Senator Lee 284
Senator Cruz 287
Senator Hawley 293
Senator Tillis 300
Questions submitted to Hon. Robert Kirsch by:
Ranking Member Graham 308
Senator Lee 312
Senator Cruz 315
Senator Hawley 321
Senator Tillis 328
Questions submitted to Orelia Eleta Merchant by:
Ranking Member Graham 336
Senator Lee 340
Senator Cruz 343
Senator Hawley 350
Senator Tillis 357

ANSWERS

Responses of Hon. Charnelle Bjelkengren to questions submitted by:
Chair Durbin 365
Ranking Member Graham 367
Senator Lee 380
Senator Cruz 387
Senator Hawley 394
Senator Tillis 409
Responses of Hon. Matthew P. Brookman to questions submitted by:
Ranking Member Graham 415
Senator Lee 425
Senator Cruz 432
Senator Hawley 445
Senator Tillis 461
Responses of Michael Farbiarz to questions submitted by:
Ranking Member Graham 468
Senator Lee 478
Senator Cruz 486
Senator Hawley 501
Senator Tillis 520
Responses of Hon. Robert Kirsch to questions submitted by:
Ranking Member Graham 527
Senator Lee 538
Senator Cruz 545
Senator Hawley 559
Senator Tillis 574
Responses of Orelia Eleta Merchant to questions submitted by:
Ranking Member Graham 581
Senator Lee 593
Senator Cruz 600
Senator Hawley 616
Senator Tillis 633

LETTERS RECEIVED WITH REGARD TO HON. CHARNELLE BJELKENGREN

Alliance for Justice (AFJ), January 20, 2023 640
Briney, Laurence D., November 28, 2022 642
Eitzen, Hon. Tari S, December 4, 2022 643
Federal Bar Association of the Eastern District of Washington, January 20, 2023 646

Page

Fitzgerald, Hon. Timothy W., January 23, 2023 648
McGuire, Maureen, November 28, 2022 650
O'Connor, Hon. Kathleen M., December 2, 2022 652
Ormsby, Michael C., January 31, 2023 653
Spokane County Superior Court, January 19, 2023 655
Thomas, Hon. Christopher J., November 21, 2022 658
Tripp, Hon. Gregory J., December 4, 2022 660
Weber, Hon. Juliana K., December 9, 2022 661
Zigler, Kenneth, and Joanna Puryear, January 20, 2023 663

LETTERS RECEIVED WITH REGARD TO HON. MATTHEW P. BROOKMAN

Bolin, Hon. Billy, Chief of Police, Evansville, Indiana, January 12, 2023 665
Criminal Justice Act Panel attorneys, letters to Chair Richard J. Durbin and Ranking Member Lindsey O. Graham, January 24, 2023 666
Evansville Bar Association, January 13, 2023 668
Former U.S. Attorneys for the Southern District of Indiana, January 20, 2023 670

LETTERS RECEIVED WITH REGARD TO MICHAEL FARBIARZ

Association of the Federal Bar of New Jersey (AFBNJ), January 12, 2023 672
DeMarco, Mark S., January 18, 2023 673
Former prosecutors from the U.S. Attorney's Office for the Southern District of New York, January 20, 2023 675
New Jersey State Bar Association, January 13, 2023 678
Port Authority of New York & New Jersey, January 20, 2023 679
Quijano, Peter Enrique, January 18, 2023 681

LETTERS RECEIVED WITH REGARD TO HON. ROBERT KIRSCH

Abdellah, Hassan, et al., trial lawyers in New Jersey, January 4, 2023 683
Association of the Federal Bar of New Jersey (AFBNJ), January 12, 2023 685
Barnett, Brooke M., January 11, 2023 686
Biancamano, Stacy A., January 5, 2022 688
Cavanaugh, Hon. Dennis M., January 5, 2023 690
Dauber, Edward J., et al., former USA and AUSAs for the District of New Jersey, January 9, 2023 692
Espinosa, Roberto J., January 11, 2023 694
Former colleagues and supervisors at U.S. Department of Justice, Washington, DC, January 12, 2023 697
Former Federal prosecutors in the U.S. Attorney's Office for the District of New Jersey, January 13, 2023 700
Former law clerks to Judge Kirsch on the New Jersey Superior Court for Union County, January 11, 2023 704
Hamlin, Raymond L., January 5, 2023 706
Hayden, Joseph A., Jr., January 4, 2023 709
Jackson, Rt. Rev. Reginald T., January 5, 2023 711
Lifland, Hon. John C., January 9, 2023 712
McGreevey, Hon. James E., January 23, 2023 714
New Jersey State Bar Association, January 13, 2023 715
Thomas, K. Anthony, Federal Public Defender, District of New Jersey, January 12, 2023 716
Weathersby, Deandre, January 9, 2023 718
Zloch, Hon. William J., January 11, 2023 720

LETTERS RECEIVED WITH REGARD TO ORELIA ELETA MERCHANT

Alliance for Justice (AFJ), January 20, 2023 722
Capers, Robert L., former U.S. Attorney for the Eastern District of New York, January 24,2023 724
Jordan, Lisa W., January 24, 2023 726

Page

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

American Bar Association's Standing Committee on the Federal Judiciary, evaluation of the professional qualifications of Hon. Charnelle Bjelkengren . 728
American Bar Association's Standing Committee on the Federal Judiciary, evaluation of the professional qualifications of Hon. Matthew P. Brookman . 729
American Bar Association's Standing Committee on the Federal Judiciary, evaluation of the professional qualifications of Michael Farbiarz 730
American Bar Association's Standing Committee on the Federal Judiciary, evaluation of the professional qualifications of Hon. Robert Kirsch 731
American Bar Association's Standing Committee on the Federal Judiciary, evaluation of the professional qualifications of Orelia Eleta Merchant 732
Cantwell, Hon. Maria, a U.S. Senator from the State of Washington, prepared statement introducing Hon. Charnelle Bjelkengren, Nominee to be a United States District Judge for the Eastern District of Washington 733

CONFIRMATION HEARING ON FEDERAL APPOINTMENTS

WEDNESDAY, JANUARY 25, 2023

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Hirono, Booker, Ossoff, Graham, Hawley, Kennedy, and Blackburn.

Also present: Senators Young, Menendez, Murray, and Schumer.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This hearing will come to order. I want to welcome the nominees before us today, as well as Senator Graham, the incoming Ranking Member of the Senate Judiciary Committee.

Today, we will hear from five judicial nominees: Judge Charnelle Bjelkengren, excuse me if I mispronounced that, nominated to the Eastern District of Washington; Judge Matthew Brookman, nominated to the Southern District of Indiana; Michael Farbiarz, nominated to the District of New Jersey; Judge Robert Kirsch, also nominated to the District of New Jersey; and Orelia Merchant, nominated to the Eastern District of New York.

Congratulations to the nominees and their families.

Each of today's nominees has received the blue slip from both of their home State Senators. For those not aware of the process, these are efforts to have the home State Senators of district nominees approve of going forward with this hearing.

This includes Judge Matthew Brookman, who has received blue slips from Indiana Senators, Senator Todd Young, who is with us today, and Senator Braun. I also would like to thank Senator Young and Senator Braun for continuing to work in good faith to fill this Federal vacancy in their home State. They have shown once again the process can work on a bipartisan basis and can result in outstanding nominees.

Now we need more. I am urging my Republican colleagues. We have received 12 blue slips so far. I think we could do better. This is a sharp contrast with the previous President. Under the Trump administration, Democratic Senators returned 130 blue slips for Trump district court nominees, which led to the confirmation of 84 nominees. Almost half of all President Trump's district court nominees were on a bipartisan basis when it came to this Committee.

I encourage my Republican colleagues to follow the example not only by Senators Young and Braun, but a number of other Republican Senators from Ohio and Pennsylvania, Ranking Member Senator Graham, and outgoing Ranking Member, Senator Grassley.

We ask them to engage with the White House in good faith and try to swiftly identify and advance highly qualified nominees for the Federal bench. We have several colleagues joining us today to introduce today's nominees, but first I will turn to my friend and Ranking Member, Senator Graham, for opening remarks.

OPENING STATEMENT OF HON. LINDSEY O. GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Well, thank you, Mr. Chairman. And I would sort of echo what you said. You know, elections have consequences. Let's work together and see if we can get some nominations moving in the spirit of what we did in the last Congress.

To the nominees today, congratulations. This is a big moment in your life. And being a Federal Judge is a big deal, and glad to be with you.

Chair DURBIN. Thank you, Senator Graham. I welcome my colleagues who have come here to help introduce the nominees. And I would first like to recognize Senator Young to introduce Judge Brookman.

STATEMENT OF HON. TODD YOUNG, A U.S. SENATOR FROM THE STATE OF INDIANA, INTRODUCING HON. MATTHEW P. BROOKMAN, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA

Senator YOUNG. Well, thank you, Chairman Durbin, Ranking Member Graham, Members of the Committee. It is a privilege to be before you. Over the last 6 years, I have come before this Committee several times to introduce fellow Hoosiers who have been nominated to serve on the Federal bench.

We have been fortunate to have a string of them who are highly respected jurists, with the potential for broad bipartisan support from this Committee, and more broadly, from the Senate as a whole. Federal Magistrate Judge Matthew Brookman, nominated by President Biden to serve as U.S. District Judge in the Southern District of Indiana, continues this streak. Judge Brookman graduated from DePaul University in 1990 and Washington University School of Law in 1993.

After a stint in private practice, he served as Assistant U.S. Attorney in both Western District of Missouri and the Southern District of Indiana. From 2011 to 2016, in the Southern District, he was the Evansville branch Office Chief, as well as the Chief of the District's Drug and Violent Crime Unit. In 2016, he was appointed Magistrate Judge in the Southern District of Indiana.

Since Judge Brookman's nomination was announced, I have received many notes of support from the community, including the Evansville Bar Association, which called him, "prepared, fair, and extremely knowledgeable." The Evansville Chief of Police who stated, "There isn't a better person for the job."

And local Evansville attorneys, appointed under the Criminal Justice Act, who said then-AUSA Brookman was always honest

and fair, and as Magistrate Judge, he is impartial and considers all arguments from both sides prior to making any decision.

At a time when criminal justice, drug use, and violent crime are a primary concern in my State, Hoosiers will be comforted knowing they have an experienced and fair judge on the bench. I am confident you will come away from today's hearing as impressed as I have been. Thank you, Mr. Chair.

Chair DURBIN. Thanks, Senator Young. And as I mentioned, Senator Braun, your colleague, has also supported this nomination.

I have now the pleasure to turn to my colleague and a Member of the Committee, Senator Booker. There are two nominees from the State of New Jersey, and he and Senator Menendez will introduce them.

Senator BOOKER. Mr. Chairman, I am not sure how things are done in South Carolina or Illinois, but in New Jersey, I always defer first to the senior Senator of the great State.

Chair DURBIN. Good rule—good rule of thumb. Very good. Senator Menendez.

Senator MENENDEZ. Okay, I will remember that in the future.

[Laughter.]

STATEMENT OF HON. ROBERT MENENDEZ, A U.S. SENATOR FROM THE STATE OF NEW JERSEY, INTRODUCING HON. ROBERT KIRSCH, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator MENENDEZ. Let me thank my colleague, Senator Booker, a distinguished Member of this Committee, for giving me the opportunity.

I have a Foreign Relations classified hearing coming up, so. Chairman Durbin, Ranking Member Graham, to my colleague, Senator Booker, distinguished colleagues on the Committee, it's my pleasure to join you today to introduce the second of our two exceptionally qualified nominees to the U.S. District Court for the District of New Jersey.

But first, let me add a thought or two about Michael Farbiarz. Mr. Farbiarz has dedicated his career to public service. From serving as an Assistant U.S. Attorney and Co-Chief of the Terrorism and International Narcotics Unit, to then be the General Counsel of the Port Authority of New York and New Jersey, Michael has shown a commitment to the country and to the rule of law.

He is extremely well respected in the New Jersey legal community, a reputation he earned through years of practicing law in a serious, thoughtful way. Indeed, both of our nominees, Mr. Farbiarz and Judge Kirsch, appear before this Committee as the best that our State has to offer.

I now have the honor of introducing and recommending Robert Kirsch, a Judge in the Superior Court of New Jersey. Judge Kirsch has capably served on the court for over a decade, having been sponsored by then-State Senator Tom Kean, Jr., a Republican, and being appointed by Governor Corzine, a Democrat.

Throughout his tenure, Judge Kirsch has served the Garden State with distinction, often taking on difficult cases involving public safety and the rule of law. There aren't many judges who can

claim to have presided over the widely publicized murder trial of a hatchet-wielding hitchhiker.

But then again, Judge Kirsch has always chosen to do what is right, not what comes easy. Before his appointment to the Superior Court, he spent time as a Federal Prosecutor for the Department of Justice, before serving for 12 years as an Assistant U.S. Attorney for the District of New Jersey, a native of South Orange, and gives back through various State and local leadership positions, particularly those related to juvenile justice.

It was this initiative that led to a landmark juvenile reentry program being implemented for at-risk youth statewide. In short, he has the legal expertise, the lived experiences, and the values to be a Federal Judge. He is an outstanding nominee to fill New Jersey's final Federal judicial vacancy and comes well recommended by the Presidents of both the Association of the Federal Bar of New Jersey and the New Jersey State Bar Association.

But let me close on this, of all the letters of endorsement this Committee has received in support of his nomination, there is one I would like to highlight in particular. It comes from a young man named Deandre Weathersby, who serves New Jersey as an employee of our State's Department of Environmental Protection.

By his own account, Deandre did not have an easy childhood growing up in Chicago. In quick succession, he lost two brothers, one to a heart attack, another to gun violence, when each of them was in their mid-twenties.

In 2017, Deandre's life changed when he was introduced to Judge Kirsch by his son, Jackson Kirsch. Judge Kirsch had no obligation to welcome Deandre Weathersby, a relative stranger, into his home. He had no obligation to let him stay for 2½ years while he built a new life away from his original home of Chicago. He had no obligation to mentor him, to guide him toward a chance at a better life and the American dream. That is exactly what Judge Kirsch did. I submit to my colleagues that this, the small but powerful example of Judge Kirsch's character, is exactly what our Nation should look for in a Federal Judge.

Someone who, in Deandre's words, quote, "is more than just a father, more than just a judge or a pillar of the community. Rather, someone whose real gift comes from wanting the people around him to succeed and make the best of what is in front of them." I couldn't have put it better, Mr. Chairman.

And so on behalf of the great State of New Jersey, it is my honor to thank him for a dedicated service to the people who call it home, and to introduce Judge Kirsch and urge a speedy confirmation, along with Mr. Farbiarz's, for the State of New Jersey.

Chair DURBIN. Senator Menendez, thanks for those words of encouragement. And, of course, we understand your busy schedule. So, if you have to leave, that is accepted. Senator Young, the same. Thank you both for being here today. We appreciate it.

Senator MENENDEZ. Thank you.

Chair DURBIN. I turn to Senator Booker.

OPENING STATEMENT OF HON. CORY A. BOOKER, A U.S. SENATOR FROM THE STATE OF NEW JERSEY, INTRODUCING MICHAEL FARBIARZ, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator BOOKER. Thank you very much, Mr. Chairman. I don't know, this is a special day before this august Committee that we have two candidates from New Jersey before it. These are not just any two candidates. They are better than any Broadway hit. They are, in the judicial sense, the great Jersey Boys.

[Laughter.]

Senator BOOKER. And in fact, like the two patron saints of New Jersey, in the entertainment world of the judicial world, this is the Bruce Springsteen and Bon Jovi of the legal profession. And so, before I go into my more pointed introduction of Mr. Farbiarz, I wanted to just say that we are pleased that Robert Kirsch is here.

He is extraordinary. He is talented. He has earned a reputation in our State to truly make him worthy of this honor. And I am already talking to the Governor about a renaming a New Jersey rest stop after him. But I do want to go into the great Michael Farbiarz. He is a man that is truly of our State.

If you cut him, he bleeds Jersey. He is a man of extraordinary talent. His whole career has been marked by three things: service, service, service. His legal career has been defined by this ideal. He spent much of his time in our Federal courts, first as a district court clerk, then as an appellate clerk, then as a Federal prosecutor.

Today, he is here with his family who are just incredible. In fact, the only person in which his prosecutorial talents has failed on has been his wife, who is here as well, and I am happy that she has joined. His colleagues praise him. I was blown away in our process to hear folks and the way they talked about him behind his back.

I tried to elicit any negativity, but they continued to give him plaudits, like describing him as a public servant, a very strong moral character, unshakable integrity, with a legendary work ethic. In his role in the Southern District of New York as an Assistant U.S. Attorney, he oversaw over 100 investigations, 7 cases which were essential to our country's national security and brought terrorists responsible for hundreds of deaths to justice.

Later, as the co-chief of the Terrorism and International Narcotics Unit at the Southern District of New York, he led more than 20 prosecutors who worked on cases that touched on everything from terrorism to counterintelligence operations to arms trafficking. His incredible work earned him recognition by the DOJ, which had awarded him the Attorney General's Exceptional Service Award, the single highest annual award from the entire agency.

There is just no question that he possesses the legal acumen, the brilliance, and we hope to have him as a Federal Judge in New Jersey. But what also speaks on his behalf are the incredible letters that we had in support of his nomination.

One I want to highlight from a lawyer named Mark DeMarco. Fourteen years ago, Mark and Mr. Farbiarz were adversaries, but Mark described our nominee as, I quote, "the most decent and ethical prosecutor against whom he practiced in the more than 30 years he has spent."

He said that our candidate, quote, "possesses an innate sense of fairness and civility and has governed his relationship with his allies and adversaries equally." Now, it is no secret that I care deeply about the criminal justice system, as my colleagues and I have worked together to do a lot of important things.

We have shown this commitment to fair and equitable justice in a bipartisan fashion. And as I have gotten to know this nominee, I have seen him display the attributes that I believe we must have as a Federal judge, who will have people from all sides and backgrounds appear before him. He is someone that can dispense justice in the highest traditions of our country. His experience will make him a judge committed to the rule of law, to the protection of our Nation, but to being fair and impartial as well.

I want to congratulate this extraordinary New Jersian. I want to congratulate his family. And I want to thank the Committee for their time in giving me for this introduction.

Chair DURBIN. Thanks, Senator Booker. And perhaps you can counsel me because I face the toughest political choice of my career.

I have before me the peerless Leader of the Democratic Majority in the United States Senate, my friend of many years, and the man we look to for real leadership, to introduce Ms. Merchant as a judicial candidate.

And then we have the President Pro Tem of the United States Senate, the first woman to hold that position in constitutional line for the Presidency. Which would you choose?

Senator BOOKER. Sir, as my wise counsel, Chuck Schumer, is known throughout the land, first and foremost for his humility and deference——

[Laughter.]

Senator BOOKER [continuing]. And his humble, soft-spoken nature, and as a man who ran for an office titled President and lost, I always say, we defer to the President.

Senator SCHUMER. I surrender.

Chair DURBIN. Senator Murray.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON, INTRODUCING HON. CHARNELLE BJELKENGREN, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON

Senator MURRAY. Thank you so much. I really appreciate that. And thank you, Mr. Chairman, Ranking Member, Members of this Committee. It is really my privilege to introduce Judge Charnelle Bjelkengren, President Biden's nominee to serve as United States District Judge for the Eastern District of Washington, who I was so glad to recommend.

And I am also pleased to welcome with her, her mother, LaVonne, her sister, Carissa, and her aunt, Brenda, who are with us today. I know you are all very proud. All of you should be.

Charnelle is an exceptional nominee, and I am confident she will serve the people of Washington State with distinction, because that is exactly what she has done throughout her entire career, from her work as Assistant Attorney General in Washington State, to her time as an Administrative Law Judge for the Washington State

Office of Administrative Hearings, to her appointment to the Spokane County Superior Court in 2019.

Judge Bjelkengren has over two decades of experience serving the people of Washington State, working thoughtfully through tough legal questions that affect their daily lives, and ensuring that we have a justice system that treats people fairly and works for everyone, not just the powerful and well connected.

And I, like many of you on both sides of this aisle, believe the American people deserve a judiciary that reflects the diversity of this country. Judge Bjelkengren would be the first Black Federal judge to serve in the Eastern District of Washington State, and that matters.

I was proud to recommend Judge Bjelkengren to President Biden at the suggestion of my nonpartisan judicial merit selection panel, who were equally impressed by her temperament, her sound judgment, and impressive résumé.

I am proud to be introducing her to this Committee today, and I look forward to having her experience and values and her perspective on our Federal bench. Thank you very much, Mr. Chairman.

Chair DURBIN. Thank you, Senator Murray. Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK, INTRODUCING ORELIA ELETA MERCHANT, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Senator SCHUMER. Those remarks were well worth waiting for. Thank you. Thank you, Chairman Durbin, Ranking Member Graham, Members of the Committee for the opportunity to come before you and introduce a truly extraordinary nominee to the Federal bench, Ms. Orelia Merchant, who is nominated to replace the great Judge William "Bill" Kuntz on the Eastern District of New York, from my home borough of Brooklyn.

And before I begin, I want to take a moment to recognize Ms. Merchant's great family who made the trip to Washington and is seated here up front. Her husband, Karim Camara, who I know well, is a former New York State Assemblyman, and pastor at Abundant Life Church in Brooklyn.

They are joined by their two children, Karim and Celia. And I just want to note, one of my fondest memories—as you know, Mr. Chairman, I ride my bicycle through New York and Brooklyn on Saturdays——

Chair DURBIN. I witnessed this.

Senator SCHUMER. Yes. It is a sight to behold.

[Laughter.]

Senator SCHUMER. I am not a spandex guy. I don't go at 40 miles an hour. I stop and look around and talk to people. And I was riding down a street in Bed-Stuy, and there I saw Karim and his family sitting on the stoop and having a great time. And I stopped and we spent about an hour talking and having a great time. So, that is a fond memory that we had. Stoop mean steps, Mr. Kennedy.

[Laughter.]

Senator SCHUMER. I also hear that Orelia's 93-year-old dad is watching online right now from California. He must be so proud, so proud of you, and hello back there in California. My dad passed away, as you know, a little more than a year ago. He was just always with me and one of my great supporters.

And even when our loved ones can't join us in person, they are always there in spirit. So, I am glad he is here, too. It is an exciting day for the whole family. Now, I am confident that by the end of the hearing, and maybe even by the end of my introduction, you will learn that Ms. Merchant has the makings of an outstanding jurist and will be a strong addition to the Eastern District, one of the most diverse districts in the Nation.

Confirming Ms. Merchant would not only add another brilliant legal mind to the bench, it would help ensure that the bench of the Eastern District better reflects the diversity of the people it serves. Ms. Merchant was born in the Bronx.

Her father, a first generation Jamaican American, is a veteran and hospital administrator, while her mother is a graduate of a segregated high school in Louisiana but overcame injustice and served in the Peace Corps and is a New York public school teacher.

So, public service isn't just Ms. Merchant's career, it is her family's very calling. A graduate of Dillard, a prestigious Historically Black University in Louisiana, and William and Mary, and the Tulane Law School, Ms. Merchant could have gone the route of corporate law, private practice.

Instead, she has dedicated herself entirely to serving her community and making sure the law applies equally to all people. After law school, she worked with the EPA in Chicago to prosecute unscrupulous polluters.

As an Assistant U.S. Attorney in the Eastern District of Louisiana, she stood up against workplace discrimination. And at the Eastern District of New York, she was recognized for her valiant efforts, fighting for families who were devastated by Hurricane Sandy, making sure over 1,000 homeowners got the help they were entitled to under the law.

Now, she works within the New York Attorney General's Office, overseeing an operation that handles 8,000 active cases and 500 employees. In short, our courts need more people like Orelia Merchant. We need more people with her talent, her experience, her fervent commitment to the public good.

And don't take my word for it. Her former colleagues describe her as calm, gifted with sound judgment, and affirm that she has an excellent temperament to be a judge. So, again, I say, she would be an outstanding addition to the Eastern District.

Last Congress, I was proud to work with you, Mr. Chairman, and the Members of this Committee to confirm a historic number of highly qualified, diverse judges to the Federal bench. And it wasn't just record setting in quantity.

We confirmed more people of color, more women, more nominees from unique backgrounds than under any other administration. This representation matters enormously. It is how we bring balance and impartiality back to our courts.

A diverse court is essential, essential for Americans' trust in an impartial judiciary and vital for the help of our democratic institu-

tions. So you can be sure that confirming more highly qualified, diverse nominees like Orelia Merchant will be a top priority of mine, and I know the Committee's, in the 118th Congress.

I want to thank Ms. Merchant and her family for being here today and congratulate her on her nomination. And thank my colleagues on the Committee for letting me speak.

Chair DURBIN. Thank you, Senator Schumer and Senator Murray, both of you, for being here today. I am sure your introduction will mean an awful lot to the nominees and to this Committee.

We now are going to transition into the nominees coming forward and taking their place at the table. It just takes a minute or two to rearrange a few things. So if you will relax, ponder your future, it will soon arrive.

Senator WHITEHOUSE. Mr. Chairman.

Chair DURBIN. Senator Whitehouse.

Senator WHITEHOUSE. While we are pondering our future and waiting for the panel to be assembled, let me just say a word of welcome to our new Ranking Member. I think that you, as Chairman, have very good fortune to have Senator Graham in the seat beside you, and I look forward to a lot of very good work being done out of this Committee.

I think the chances for significant bipartisan accomplishments are very, very real here, and I look forward to supporting you both in those endeavors. So to my friend Lindsey Graham, thank you, and to you, bravo and congratulations.

Chair DURBIN. When I tell my family back home in Springfield that I am a friend of Lindsey Graham, they can't believe it, but it's true. And it has been a good working relationship and I am sure it will continue to be.

Senator GRAHAM. I just remain silent, you know——

[Laughter.]

Chair DURBIN. I would ask the nominees please come forward and take their positions at the table. Remain standing for just a moment. If you all please raise your right hand. Do you affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BJELKENGREN. I do.

Judge BROOKMAN. I do.

Mr. FARBIARZ. I do.

Judge KIRSCH. I do.

Ms. MERCHANT. I do.

Chair DURBIN. Let the record reflect that all the nominees have answered in the affirmative and let us proceed. Please have a seat. The first is, Judge, I am going to try to get this right, Bjelkengren? Is that close? Please proceed.

STATEMENT OF HON. CHARNELLE BJELKENGREN, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON

Judge BJELKENGREN. Good morning. Thank you, Chairman Durbin and Ranking Member Graham for holding this hearing. Thank you to all the Members of this Committee for considering my nomination. I would like to offer a special thanks to my home State Senators, Senator Cantwell and Senator Murray.

Senator Murray, thank you so much for your kind and generous words this morning. Thank you to Washington State's Nonpartisan Judicial Selection Committee for recommending me for this nomination.

Today, I am joined by my family, my sister, Carissa Lockhart, my aunt, Brenda Steen, and my mother, LaVonne Pona.

My mother celebrated her 70th birthday yesterday. Thank you for your love and support throughout my life. Thank you to my mom for instilling in me the values of hard work, humility, and a deep faith in God.

My daughter, Eliana Bjelkengren is not here today. She is in her first year of college and attending classes this week. She is viewing by—remotely, hopefully. Eliana is my biggest cheerleader and greatest source of inspiration.

My father, Mel Lockhart, passed away 11 years ago. If he were here, he would be beaming with pride. To me, my father is the epitome of a public servant. My father served in the United States Marines, and he was the only one from his basic training class to make it through the Vietnam War. He then went on to serve the State of Minnesota as a State trooper, and he then served his local community as a school board member. I am so thankful for his pattern of service to his community, his State, and his Nation.

I would also like to thank so many friends, family, mentors, past and present, colleagues, and my Superior Court family in Washington State Superior Court. There are just too many to name. Thank you for your generous guidance, support, and encouragement throughout my entire life and career. I welcome your questions.

Chair DURBIN. Thank you, Judge. Judge Brookman is next.

STATEMENT OF HON. MATTHEW P. BROOKMAN, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA

Judge BROOKMAN. Chairman Durbin, Ranking Member Graham, Members of the Committee, thank you for the opportunity to appear before you today. I would like to thank President Biden for my nomination.

And also thank my home State Senators, Senator Young and Senator Braun, for their support throughout this process, especially thank Senator Young for the kind words of introduction today.

Family has always been very important to me, and I am pleased and happy to have my family here with me today.

First, my wife, Michelle Brookman, who is seated here behind me. Michelle and I have been married for 28 years. We have been partners through thick and thin. She is a constant source of strength, comfort, and encouragement, and I truly don't know where I would be without her.

Michelle and I are very proud of our kids, and they are here with us today, too, starting with my daughter, Katie Brookman. Katie is a high school science teacher back in Bloomington, Indiana, and does a wonderful job with that. Our son, Adam, who is a senior at Wabash College in Crawfordsville, Indiana, and who will be attending Indiana University McKinney School of Law in the fall beginning there. And then last, but certainly not least, our son, Andrew,

who is an eighth grader at Castle North Middle School, who is an excellent student, a soccer player, and a recently budding electric guitar musician. So, I thank them for being here with me.

My mom could not be here today, but she is watching, I think. And my dad passed away several years ago. But my parents taught my brothers and I many important lessons, chiefly that anything worth doing was worth doing right, and that anything was possible if you put your mind to it, and I am grateful for that foundation that they laid for me.

Last, I would like to thank and recognize my core family back in the Southern District of Indiana. I have had the privilege of being a magistrate judge in the trial court there for the past 6 years.

I have had the opportunity to learn from some wonderful mentors, role models, colleagues, both at the district court level and the magistrate judge colleagues, and being supported by a great court family. I am grateful for that. And if I am confirmed, I would look forward to continuing that service. Thank you all for your time.

Chair DURBIN. Thank you very much, Judge. Mr. Farbiarz.

STATEMENT OF MICHAEL FARBIARZ, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Mr. FARBIARZ. Thank you, Chairman, and thank you for convening this Committee today, along with the Ranking Member and to all the Members of the Committee.

First, I would like to thank the President for the honor of this nomination. It is deeply humbling, and I am grateful. And thank you, Senator Booker, for that warm and wonderful introduction and for your support throughout this process.

And thanks as well to Senator Menendez for his kind and generous remarks and his support as well. I began my legal career as a law clerk to two terrific, absolutely extraordinary Federal judges, Judge Michael Mukasey and Judge Jose Cabranes.

And in the years since then, I have been blessed to serve with wonderful and devoted colleagues and adversaries, to work for supervisors who were demanding and rigorous and also kind, to make mentors and to make great friends along the way.

I have been privileged to serve in times of crisis under great leaders from United States Attorneys to the Chairman of the Port Authority of New York and New Jersey, and I have been privileged to see from a front-row seat that the law is an honorable profession, and the public service is its highest calling.

I want to thank each and every member of my work family, and I want to thank my friends, as well, in New Jersey and New York and everywhere. I cherish each of them. I want to thank, as well, my family: my father-in-law and mother-in-law, my brother-in-law and sister-in-law, my sister and her husband, my brother and his wife, my nephews and nieces and cousins and aunt and uncle and many, many others.

And I would like to introduce for a moment the members of my family who are with me here today. First is my son, Gabriel, who is 12 and in seventh grade, my daughter, Alanna, who is 15 and a sophomore in high school. Our daughter, Sara, is a freshman in

college—classes just started up again and she is not with us. And my wife, Meghan, who is my college sweetheart. We have been together since I was 18.

My family is the great source of meaning and joy in my life, and I feel lucky, and I feel happy to share life's journey with the Farbiarzes and Louises and Laskys that I have mentioned. I love them all very deeply.

I want to introduce two other people, my parents. My father is Baruc Farbiarz. He was born in 1946, just after the war, in Germany, in a displaced persons camp. He came to America just shy of his 13th birthday. And here he met my mother, who was then Elsa Arditti. Her parents had come to the United States as adults from what was the Ottoman Empire.

America has been a blessing for my family. I have spent virtually my entire career in service to our country and our community, and I am honored, and I am humbled by the possibility of continuing that service as a United States District Judge. Thank you.

Chair DURBIN. Thank you, Mr. Farbiarz. Judge Kirsch.

STATEMENT OF HON. ROBERT KIRSCH, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Judge KIRSCH. Thank you, Chairman Durbin. Thank you, Ranking Member Graham. Members of the Committee, it is a great honor to appear before you today. I want to thank President Biden for this nomination, especially to a court that I hold in such high regard, having appeared before it for so many years.

I want to thank Senator Menendez for his unfailing support and his kind words today, and, of course, to Senator Booker, as well, for his continued support.

I have a host of people here today, from near and far, but due to the time constraints, I cannot introduce them all individually. So I will do so in categories until I get to my mom, who deserves proper billing. I have got nieces and nephews here. I have got cousins. I have got childhood friends. My oldest friend, since I am four, is here. I have got friends from elementary school that are here. From college. My brother and my sister. My brother, Michael, is an accomplished physician at the Cleveland Clinic. Flew in for today. My sister, who successfully raised three boys into men from New Jersey, she is here. One of my law clerks from the dozen or so law clerks that I have been privileged to serve is here. My second son, Deandre, is here. And now my mom.

My mom is and has always been my greatest champion. My whole life, every time I walk into a room, her face lights up. To this day, there is no greater gift that a parent can give to a child than that. And frankly, that is all a kid really needs. My mom gave up her career teaching to take care of the three of us and raise us because our father was basically working all the time.

My dad was a lawyer for almost 50 years. His law practice was where he was born and raised in the great City of Newark, the city he loved. Almost to the day, he died 19 years ago. If he were here, he would be beaming.

My kids, my two college kids are here off their college campuses. My son, Jackson, is a senior at the great Wake Forest University

in North Carolina. My daughter, Ned, who is named after my father, whose name was Ned, is a freshman at the great university of the University of Virginia. They are the light of our lives. We love them beyond the beyond.

My wife is here. I met her when she was 18, a freshman at Emory University. I was 19. I was instantly smitten. I still am. She is the rock, the glue, the heart and soul of our family. She is everybody's favorite, including, truth be told, my mother.

My entire career has been in public service for two reasons. One, I have loved every job I have ever had. And two, in some small way, on behalf of my grandparents who came here with nothing, I have tried to repay the debt to this magnificent country, to live up to the promise of America, its freedoms, its ideals, and its opportunities. It has been a great privilege to be here before you. I welcome your questions.

Chair DURBIN. Thank you, Judge. Ms. Merchant.

STATEMENT OF ORELIA ELETA MERCHANT, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Ms. MERCHANT. Good morning. Good morning, Senator Durbin, Ranking Member Graham, and Committee Members. Thank you for holding this hearing today. Thank you to Senator Schumer for his gracious remarks and for his recommendation, and to Senator Gillibrand for her support.

I would like to thank President Biden for my nomination. It is such an honor and a privilege. I am deeply humbled.

I would like to recognize some family members that are here with me today, my brothers and their families. My brother, Roland Samuel Merchant, Jr., is here today. His wife, Jennifer Anderson Merchant, and my nephew, Brendon, are watching from afar. My brother, Dr. Hughie Merchant, and his husband Steve Arteaga, and their twin children, Eliana and Gabriel, who just landed this morning from California, are here with me today. My brothers are my first friends and my fiercest supporters.

I would also like to acknowledge my parents. My mom, Audrey Bartley Merchant, who sadly just passed a few months ago, but her spirit is very much alive. After attending college, my mom served in the Peace Corps and Volunteers in Service to America. When I was a child, my mom taught in public schools. She was also my first and best teacher. The very best of me is a reflection of her.

And to my 93-year-old dad who is watching remotely from California, he is a proud first gen—first American generation-born Jamaican and Antiguan. At a young age when his father died, he took responsibility for supporting his family. He served in the United States Army. He went on to college and graduate schools. He was a provider and a nurturer for his family. He sacrificed so much to move us all forward.

My parents challenged me to enlarge my life to a purpose greater than myself. Together, they modeled and instilled in me the value of education, family, service, and a strong work ethic. All that I am, and ever hope to be, I owe to them.

I also have with me my husband, Karim Camara. I am grateful for his love, the wonderful life, and the family we have created.

And to our children, Karim, who is 15, a sophomore in high school, my daughter, Celia, 13, in eighth grade, I love them both dearly. I am so very proud to be their mom. Daily, they inspire me, and they ground me. They remind me each day is an opportunity to be better and to do better, and I give my best every day because I know that they are watching.

I also have with me my mom's sister, my maternal aunt, Gloria Bartley Moultrie. I have two dear friends that are with me, my sister friends, one from childhood, Elena Francisco, and one from college, Colette Chatters Branch.

Finally, I have a host of extended family members, dear friends, classmates, current colleagues, former colleagues who have supported and encouraged me along my journey. They were not able to be here in person. They are watching from afar, and I thank them.

Senators, I thank you so much for considering my nomination and the opportunity to appear before you today. I look forward to your questions. Thank you.

Chair DURBIN. Thank you very much, Ms. Merchant.

Five minutes has been allotted to each of the Senators on the panel here to ask questions of the nominees. And as you could tell from the introductions, that is not nearly enough time to even ask questions of one nominee, let alone five.

But thank you all for stepping forward today and offering yourselves for this position. I believe the Nation will be well served by each of you. I would just say, Judge Kirsch, that the comment that was made by Senator Menendez about your support of the gentleman you described as your other son, Deandre, really is inspiring, and I thank you for showing us that side of your character.

Of those nominees at the table, there is one that has a very unique background that has not been addressed and I would like to, for a moment. Mr. Farbiarz, you—I am sure I have butchered your name three or four different times. But you mentioned that your parents were refugees to this country?

Mr. FARBIARZ. Senator, my father was born in a displaced persons camp in Germany just after the war.

Chair DURBIN. I think your microphone may not be on.

Mr. FARBIARZ. I am sorry, Senator. My father was born in a displaced persons camp in Germany after the war. He lived there for 2 years, and then he moved to the young state of Israel. He lived there until he was just shy of his 13th birthday, and then he came to the United States.

And it was here in the United States that he met my mother. My mother's family had come here as adults from what had been the Ottoman Empire. My wife and I are college sweethearts, as I mentioned. My parents are high school sweethearts. That is when they met, and that is our family's story.

Chair DURBIN. Which I think is an interesting introduction to what you have done with your life. I can't help but note the counterintelligence and counterterrorism cases you helped investigate and prosecute.

First, Operation Ghost Stories. In 2010, the FBI arrested 10 Russian sleeper agents in the United States who had been planted here. The Russian foreign military service, foreign intelligence

service was responsible, and they were here to infiltrate our Government. Not only were you the lead prosecutor in this case, before their arrest, you were the Assistant U.S. Attorney overseeing their investigation. As an Assistant U.S. Attorney, you also supported the investigation and prosecution of Abduwali Muse, a Somali pirate who hijacked the MV Maersk Alabama by kidnaping and ransoming the crew.

Additionally, you were the lead prosecutor in the case against Ahmed Ghailani, an al-Qaeda member who helped orchestrate the 1998 truck bombings at the U.S. Embassy in Nairobi and Dar es Salaam, Tanzania, that killed 224 and injured thousands.

I am afraid to think of what I might ask you here that would do justice to your service to our country, but could you please comment on the lessons learned from your experiences with these cases?

Mr. FARBIARZ. Well, what I would say, Senator, is that each of those cases are very different, one from the next. But in those cases, and in all cases I prosecuted, I hope I brought to them the same approach, which is the approach described by the Supreme Court in 1935 with respect to the special obligations of Federal prosecutors.

That is, to seek justice and not victory, to pursue the guilty but to protect the innocent at the same time, and to see one's self not as using the law, but so much as a servant of the law. I think that sensibility held me in good stead throughout all of those different kinds of cases.

Chair DURBIN. I would just say, and I will close here and turn over to my colleagues, I can still remember my early practice before the Federal courts of Springfield, Illinois, and the number of judges that I faced in those courtrooms.

And I have a mind's eye picture of each one of them and an opinion of each one of them as judges, and more importantly as people. I hope that you understand that this lifetime appointment gives you an opportunity to serve our Nation, but also to serve the people who come before you.

And I would ask for something that can be asked of me as well, and that is humility in your effort and understanding that you respect the people who come in your courtroom, should that day occur, and I think it will. Thank you all for being here, and I turn it over now to Senator Graham.

Senator GRAHAM. Thank you. I want to add my congratulations to you and your families. I would sit here, listened to your life stories. Very impressive. Very reassuring, to be honest with you. And I think you sort of represent the best of the American experience. You seem to all be highly qualified, and unless you screw up, you are going to make it. So, in that regard, how do you say your name, sir, Michael?

Mr. FARBIARZ. Michael Farbiarz.

Senator GRAHAM. Yes, I got the Michael part, okay.

[Laughter.]

Senator GRAHAM. So, along the line of terrorism, you know, it is kind of a different crime, still a crime, I guess. How would you—based on your experience, do the terrorists still want to kill us all?

Mr. FARBIARZ. Senator, I don't have a broad, systematic answer to that question. I have continued to follow national security——

Senator GRAHAM. Well, the ones you have met, did they want to kill us all?

Mr. FARBIARZ. Senator, the ones I met were deeply motivated ideologically. People I met——

Senator GRAHAM. To do what?

Mr. FARBIARZ. To kill Americans.

Senator GRAHAM. Okay. So, do you believe that anything has changed since 2014? That the terrorist organizations that you are familiar with, were their primary desires is to attack America? Do you believe that still to be the case?

Mr. FARBIARZ. Senator, I do believe that still is the case.

Senator GRAHAM. So we need to keep our guard up, right?

Mr. FARBIARZ. I agree with that, Senator.

Senator GRAHAM. Okay. Narcotics. Was there an intersection between international drug trafficking and terrorism?

Mr. FARBIARZ. Senator, I believe there was. During the years I worked as a prosecutor, I saw that firsthand.

Senator GRAHAM. Yes. So, like, do you ever see any cases of drug cartels, say, in Mexico working with terrorists?

Mr. FARBIARZ. I did, Senator. And I can give you an example. During the time I was an Assistant United States Attorney, one of the cases I worked very intensely on and that I oversaw was a plot by the IRGC in Iran to recruit a member of a drug cartel to kill the Saudi Ambassador to the United States.

It was an urgent and important case, and it was a case that resulted in the conviction. But I think it exemplifies, Senator, what you are speaking about, which is that nexus between narcotics sometimes and terrorist practices sometimes.

Senator GRAHAM. And in your experience in this area, ungoverned spaces is sort of a great deal for terrorist and narcotic organizations, right? When there is no law and order?

Mr. FARBIARZ. Senator, that was my experience. In addition to prosecuting terrorists, there was also prosecutions that I oversaw of narcotics traffickers from Afghanistan, from Colombia, who operated as warlords, who controlled territories, who controlled men and weapons, and were very dangerous.

Senator GRAHAM. Do you think there is the equivalent of warlords in Mexico?

Mr. FARBIARZ. Senator, I don't know that, sitting here today. During the time that I worked on prosecutions, there were men who controlled space in Mexico, including a person who goes by the name "Chapo," who the unit I supervised indicted.

Senator GRAHAM. Did you ever deal with any cases involving fentanyl?

Mr. FARBIARZ. Senator, I did not.

Senator GRAHAM. Are you familiar with the drug fentanyl?

Mr. FARBIARZ. I am, Senator.

Senator GRAHAM. Okay. Do you understand the deadly nature of it?

Mr. FARBIARZ. I do. In my current capacity, Senator, I am the general counsel of a large public agency, the Port Authority of New York and New Jersey. We have a police force of about 2,000 people,

and one of our duties, one of the police's duties is to police the bus terminal in New York City.

It is the busiest bus terminal in the United States, second busiest in the world. And I know firsthand from the work that they do how deadly fentanyl is.

Senator GRAHAM. Well, you seem to be very qualified. And all of you, to be honest with you.

One last question, there is a trend in America to go to a district judge to enjoin a law, a Federal law. A single district court judge stopping a Federal law. Sometimes the left likes it, sometimes the right likes it. The Supreme Court is trying to get a handle on how to do that. How do you view, very quickly each of you, issuing a national injunction as a district court judge?

Judge BJELKENGREN. Thank you, Senator. For a national injunction, I would refer to Civil Rule 65. And there is a standard that I would follow from that.

Senator GRAHAM. Would you be reluctant to do it?

Judge BJELKENGREN. For—I would have to look at the specific facts of the case.

Senator GRAHAM. Okay. Does that pretty well sum it up for the rest of you?

Judge KIRSCH. Senator, I suspect we are going to get some guidance shortly from the Supreme Court.

Senator GRAHAM. Well, my advice for whatever it is worth and not much, is be reluctant to do it. I know there are a lot of people on the right like it when we win. A lot of people on the left like it. But it is just, to me, it seems an abuse of the process. Thanks so much.

Chair DURBIN. Thanks, Senator Graham. I might say that in order of arrival, we will recognize Senator Booker, Senator Kennedy, Senator Whitehouse, and Senator Hawley. Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. I want to congratulate all the nominees before us. You are an extraordinary array of Americans who show a deep level of patriotism that should be humbling to all of us that are gathered here. And this is a remarkable day.

This is not a routine hearing. It is really one that affirms our commitment to the judiciary. I got a chance to sit and go see Ketanji Brown Jackson get sworn in, and one of my favorite moments, as a Senator, was when the President of the United States walked into the Supreme Court chamber last and nobody moved, nobody stood up, because we are a Nation that believes that everyone is equal before the judiciary.

And so, it is very meaningful to me that all five of you are here, but if you allow me a point of just personal observation to the two African-American women that are before me. James Baldwin wrote that, in essence, this destructive delusion that race is—the damage it has done to our Nation.

I have been on this Committee now just for a few Congresses, been a Senator for about 10 years, and this last Congress, since President Biden has been the President of the United States, has shown us more minority women coming before this body than ever before in history.

And far more African-American women have been placed in the circuit court than every other President combined. And as I look at these two extraordinary women before me, I can't help but think about my mom. I actually called her to regale her about the two Jersey boys here. But we got to talking about the diversity on the bench.

My mom was like, I am sure the two of you, often found herself to be the only Black woman in many rooms. As a trailblazer herself, I grew up around a kitchen table listening to a Black woman come home as one of IBM's earliest Black women executives and tell her stories. And some of them were very painful and very hard.

I just want you all to know, very personally, how good it is to see you two sitting where you are sitting in a Nation that has a Senate with no Black women, in a Nation that has never seen a Black female governor. To see the diversity now happening on our Federal bench, I think, gives every American a reason to be proud.

We have had qualified African-American women for generations, but this is the first time we have seen them now going on to our Federal bench at this number. And you two are indeed worthy of the positions you are nominated for and worthy of note and celebration, so thank you.

Mr. Farbiarz, I just want you to say—as this boy grew up in a Black church, you give me great naches, and I want to say baruch Hashem. Your story is incredible. And it has just been an honor to get to know you over this process, and I cannot tell you what it means to see your family here.

Mr. Kirsch, I have been very moved by your story as well and your career, and I think I would like to have my one question for this panel, with no disrespect to Mr. Brookman, who is extraordinary in his own right. I just want to just center on you. And I know your values and I know your commitment to serving as AUSA.

You got very involved with the area of reentry. And it is not a job requirement. It is not something that was requested of you. You get no mark in your career. I just was hoping that maybe for my one question to this panel, would you maybe describe to me why it was important for you to get involved, so involved with the issue of reentry?

Judge KIRSCH. Thank you, Senator. So for 4 years, I served as the sole juvenile judge in Union County, a population of 550,000 people. During those 4 years, I handled 4,400 juvenile matters, from murder on down.

This might be the most challenging, difficult assignment that a State court judge has to handle because you are really dealing with children, some children who do some very serious or commit rather serious offenses. But they are children in crisis who oftentimes lacked any semblance of a support system.

And so, while I was presiding over these matters and visiting my kids in the juvenile detention center, it occurred to me that maybe more could be done to break this chain. And so, I initiated, created a juvenile reentry initiative.

We took it statewide. We went to every juvenile detention center. The feedback was overwhelmingly positive. Maybe we moved the

needle for a kid or two, and it is probably the proudest professional accomplishment of my career.

Senator BOOKER. Thank you, yasher koach, and I wish you the best.

Chair DURBIN. Thank you, Senator Booker. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. And congratulations to all of you. Judge, on the far end, tell me what Article V of the Constitution does.

Judge BJELKENGREN. Article V is not coming to mind at the moment.

Senator KENNEDY. Okay, how about Article II?

Judge BJELKENGREN. Neither is Article II.

Senator KENNEDY. Okay. Do you know what purposivism is?

Judge BJELKENGREN. In my 12 years as an Assistant Attorney General and my 9 years serving as a judge, I was not faced with that precise question. We are the highest trial court in Washington State, so I am frequently faced with issues that I am not familiar with, and I thoroughly review the law, I research, and apply the law to the facts presented to me.

Senator KENNEDY. Well you are going to be faced with it as a—if you are confirmed. I can assure you of that. Mister—I can't really see from this angle. I apologize. Mr. Brookman, define "originalism" for me.

Judge BROOKMAN. Thank you, Senator, for that question. My understanding of originalism——

Chair DURBIN. Turn your microphone on.

Judge BROOKMAN. Thank you, Senator, for that question. My understanding of originalism is the notion that the Constitution has an enduring and a fixed nature, an enduring quality and a fixed nature to it.

Senator KENNEDY. What does that mean?

Judge BROOKMAN. It means that the words matter, and that the word that the—that the words that the Framers used to draft the Constitution matter, and that it has a fixed quality to it and has an enduring nature.

Senator KENNEDY. Well, how do you determine the fixed quality? Who determines what the words mean—perspective——

Judge BROOKMAN. Senator, in my time as a magistrate judge, I have not dealt with issues of constitutional interpretation, but my understanding is that you would begin with the language of the Constitution itself.

Senator KENNEDY. Yes, okay. I agree with that. All right. Anybody want to add, counselor, Ms. Merchant? I mean, here is what I am getting at. When you say originalism, the words mean what they mean from whose perspective?

Ms. MERCHANT. Thank you for the question, Senator. Similar to my colleagues, I would look to the texts in terms of originalism. When you are asking—to the extent that you are asking what I would look to, if so fortunate to be confirmed as a judge, I would look to the precedent, first of the text——

Senator KENNEDY. Yes, ma'am, but I am trying to get you to define originalism for me. What is your understanding of it?

Ms. MERCHANT. Yes, thank you, Senator. To clarify, my understanding of originalism is similar to that of my colleagues. And in

looking at the texts and the meaning that was intended in that text, that is the spirit of it.

Senator KENNEDY. Intended by whom?

Ms. MERCHANT. By the original writers of that text.

Senator KENNEDY. So to you, originalism, you try to interpret what the writers, the authors meant?

Ms. MERCHANT. In analysis, a constitutional analysis, it would be the original wisdom of the text and the intent of those that drafted the Constitution.

Senator KENNEDY. I don't think that is accurate. Does anybody disagree with that? When the Supreme Court says it is following an originalist approach, and in a number of cases, all particularly dealing with Second Amendment, U.S. Supreme Court has said on this one, we are all originalists. I think it was Judge Sotomayor who said that—Justice Sotomayor.

And on many areas, she is more of a—she is more of a purposivist, but on that, she was an originalist. She didn't say, we look at—we are looking for the meaning that the Drafters intended. Was she? Anybody want to add to that?

Mr. FARBIARZ. Senator, I am happy to add to that. My understanding is that——

Senator KENNEDY. It is okay, let me just ask one more. I am about to run out of time. Judge on the far end, can you tell me what the independent State legislature theory is? Just, I am just asking you, not what your opinion of it. What is it? It's before the Supreme Court now.

Judge BJELKENGREN. In my 12 years as a Washington State Assistant Attorney General——

Senator KENNEDY. Right.

Judge BJELKENGREN [continuing]. That particular doctrine was not presented to me.

Senator KENNEDY. I am out of time. Thanks, Mr. Chairman.

Chair DURBIN. Senator Whitehouse.

Senator WHITEHOUSE. Well, lest the record of this Committee hearing confer any implication that we all agree that originalism is a legitimate judicial theory, let me offer the contrary view, and I would commend to all of you, as a piece of light reading, a Dean Chemerinsky's book, "Worse Than Nothing," which I think does an effective job at debunking originalism.

Another canard that turns up in this Committee all the time is the notion that you all need to come in bearing a judicial philosophy. Too often, in my experience, the notion of having a judicial philosophy is a mask for a series of doctrines that tend to benefit certain litigating interests.

And I don't think you need much more to be a good judge than to know the Constitution, to understand what words mean, and to be able to honestly read statutes in light of their language and what the Constitution says. And if you bring honor and rigor to that inquiry, you will be just fine without having to know one damned thing about originalism.

So, I want to just make sure that's clear in this room. We are not uniform in our view that originalism is something you need to adhere to. And in my view, I think it is actually a tainted doctrine

that was cooked up and designed with the specific intention of favoring certain classes of litigants.

So there, now you heard both sides. What I would like to ask you about is juries. You all, as district judges, are going to be managing juries. They are very obviously an important fact-finding appendage in your courtrooms.

But for a very long time, people who have been very thoughtful about American Government and about judicial systems have seen juries as being actually much more important than that, that they are actually a part of our American system of Government, and that going out of your way to make sure that juries hear cases and that everything isn't driven away from juries and driven to settlement conferences and so forth, actually contributes to the civic health of our country.

And the juries have a very specific role, all the way back to Blackstone, which is that they stand as a safeguard against the power and wealth of the most powerful and wealthy citizens. It is really hard to fix a jury. Messing around with a legislature happens all the time. Influence on Presidents, part of the standard operating principles of American influence-making.

But when you mess with a jury, particularly if you tamper with a jury, that is actually a crime. And you don't get to go back at them because they always turn over new juries, new juries, new juries, and it is all part of a design to make sure that no matter how wealthy and powerful and important you are, when you come before a jury, you stand equal with your accuser.

So, I just want you to share any thoughts you may have about what kind of importance you will give the role of the jury in managing your courtrooms. And you have 1 minute for five people.

[Laughter.]

Judge BJELKENGREN. Senator, it is a crucial aspect of our justice system, as provided by the Sixth and Seventh Amendments of the Constitution. I have had the honor of presiding over juries. I don't want to take all the time, but I am amazed to see 12 people come from professional—different professional backgrounds, economic backgrounds, parts of the district come together and truly listen to the evidence and apply the law from the court.

Judge BROOKMAN. And Senator, I will just add that almost my entire professional career has been in service of the American jury trial, as a trial attorney for 20 plus years, in criminal trials and civil trials, and then over the past 7 years as a Federal magistrate judge at the trial court level. I presided over seven jury trials in that job, as well. So I share your admiration and importance for the American jury trial.

Judge KIRSCH. Senator, over the last 13 years where I served as a trial court judge in New Jersey, I have presided over approximately 70 jury trials. It is inspirational to see folks come from every corner of the county, from different socioeconomic backgrounds, races, ethnicities, career options. And what I tell my juries is, they are collectively smarter and wiser than the sum of its parts.

Senator WHITEHOUSE. Ms. Merchant, Mr. Farbiarz, you are spared by the clock, but I look forward—if you have any different

views, please let me know, and as a response to questions for the record.

And Mr. Chairman, I raise this point because I see the United States Supreme Court is having a very persistent effort to degrade and diminish the role of the civil jury in our system, and I think it is very important that we see the price of that. Thank you.

Chair DURBIN. Thank you, Senator. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. And to each of you, congratulations. I love hearing your stories. And Ms. Bjelkengren, it is your mother that had a birthday yesterday?

Judge BJELKENGREN. Yes, her 70th birthday.

Senator BLACKBURN. Well, happy birthday. The seventies are not a bad decade——

[Laughter.]

Senator BLACKBURN [continuing]. Enjoy. And, Mr. Kirsch, I would hate to have your check at lunch. I think—sounds like you have got about 50 people to go buy lunch for. And I thought, good gracious, that is going to be quite a bill. And so, I am delighted that they are here.

But your stories are inspiring, and your backgrounds. It is so interesting to hear your backgrounds and a little bit about you, and I appreciate that you take the time to kind of lay that out for us.

Ms. Merchant, let me ask you this. You have never been a judge.

Ms. MERCHANT. I have not.

Senator BLACKBURN. And I just wanted to ask you, when I had looked at your background, it appears that most of it is agencies and agency work. Talk to me a little bit about what you will take to the bench with you that would inform your work, what experiences.

How are you going to kind of make that jump since you have not been a county judge or a State judge or have—you just don't have that experience? So lay that out.

Ms. MERCHANT. Thank you for the question, Senator. I have served as an Assistant Attorney General, Chief Deputy Assistant Attorney General——

Senator BLACKBURN. Right, yes——

Ms. MERCHANT. And have also served as an Assistant United States Attorney. I have had over 20 years of Federal litigation experience. And I——

Senator BLACKBURN. But no private sector experience, right?

Ms. MERCHANT. During law school, I did clerk for law firms, both large and small, and boutique law firms. I clerked at Phelps Dunbar in Louisiana for two summers. I also clerked for a small boutique law firm——

Senator BLACKBURN. Okay.

Ms. MERCHANT [continuing]. And I also served as a——

Senator BLACKBURN. But you have done no corporate——

Ms. MERCHANT [continuing]. And also with ARCO, with Atlantic Richfield——

Senator BLACKBURN. Okay.

Ms. MERCHANT [continuing]. I was also there for a stint.

Senator BLACKBURN. Thank you for that. I did not see that part in your—that was not in your bio. The Government-related experience was.

So, I wanted to see where you were. I know that Senator Kennedy asked you about original public meaning and your understanding of that, and those are important to us. And, are you submitting and writing a response to that to him? If not, I would like it submitted to me in writing.

Ms. MERCHANT. I am happy to do that. Thank you, Senator.

Senator BLACKBURN. Perfect, that sounds great. Judge Bjelkengren, let me come to you. In 2020, you were on a panel, and you noted that you wished you, and I am quoting you, "had known how significant criminal law is on the bench."

That is a pretty striking statement. And I am sure you know that criminal matters are a substantial part of a Federal district judge's docket, so that is going to be a big part of what is in front of you. And these matters really are sometimes high stakes, intense issues. And you have also had zero experience practicing in Federal court and you were not involved in a single criminal case during your time as a practicing attorney, from what we saw in your record.

So, talk with me about that. How can we be confident that you are going to properly apply Federal criminal law and sentencing guidelines in a position as a Federal district judge?

Judge BJELKENGREN. Thank you for that question, Senator. I made those remarks to attorneys who are aspiring to be judges and emphasizing to them how helpful it is to have criminal experience.

Prior to being a Superior Court judge, my criminal experience was limited. As a Superior Court judge, again, the highest trial court in Washington State, I presided over felony jury trials, and I have presided over hundreds of sentencing hearings. And so I know what it means to get up to speed on the law.

Senator BLACKBURN. Okay. All right. Can you walk me through what current Supreme Court precedent says about the Second Amendment right?

Judge BJELKENGREN. Thank you for that question, Senator. In *Heller*, the Supreme Court did hold that there is an individual right to bear arms. And in *McDonald*, the Court applied that to the States through the Fourteenth Amendment. And then more recently in *Bruen*, that also applies not only to bearing arms in the home, but outside of the home, as well, in brief.

Senator BLACKBURN. So you support an individual's right to bear arms, to own and bear arms?

Judge BJELKENGREN. I would faithfully apply the Supreme Court precedent to any case that came before me.

Senator BLACKBURN. Okay, thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. I think that diversity in our courts is a very important factor. And we see, once again, a very diverse group of nominees. And I thank President Biden for that because experiencial background, racial diversity, I think, is very much needed on our courts.

To ensure the fitness to serve of all of the nominees, I ask the following two initial questions of all nominees who come before any of the Committees on which I sit. So, I will start with asking these

two questions of each of you, and we will just go right down the line, starting with Judge Bjelkengren.

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?

Judge BJELKENGREN. No, I have not.

Judge BROOKMAN. No, Senator, I have not.

Mr. FARBIARZ. No, Senator, I have not.

Judge KIRSCH. No, Senator.

Ms. MERCHANT. No, Senator.

Senator HIRONO. Second question. Have you ever faced—excuse me, discipline or entered into a settlement related to this kind of conduct?

Judge BJELKENGREN. No, I have not.

Judge BROOKMAN. No, I have not.

Mr. FARBIARZ. No, Senator.

Judge KIRSCH. No, Senator.

Ms. MERCHANT. No, Senator.

Senator HIRONO. I would also like to note that the so-called doctrine of originalism is certainly not anything that I would request of any of our judicial nominees. My assumption is that, and what I look for in our nominees is an ability to be fair and objective, and as district court judges, that you will apply the precedent of the Supreme Court.

I will start with a question for Judge Kirsch. You have participated in several panels on prison reentry, and I think you focused on juveniles. I think that is a really important aspect of the criminal justice system that the reentry of our prisoners into our communities. And I understand that, as you noted, you also initiated a statewide juvenile reentry program.

The Board of Prisons ran a halfway house which closed in 2019 in Hawaii. And I have been trying to reopen this Federal halfway house to enable prisoners leaving our Federal prisons some ability to reenter in a more successful way.

How important do you think it is for halfway houses to exist within our prison system?

Judge KIRSCH. Well, thank you—thank you for the question, Senator. I think halfway houses in any aspect to seg an individual from a custodial location and reintegrate them into society is critical and may be dispositive in terms of one's success. And obviously it is a policymaking decision on how to allocate resources.

But in my experience, fronting money upfront might save an awful lot of recidivism down the road and help reintegrate folks back into their families and their communities to be productive individuals. So I think it is critically important.

Senator HIRONO. Do any of the other nominees have any experience or have any thoughts about the importance of a reentry program? Anybody else want to add to what the Judge just noted? Okay.

For Mr. Farbiarz. Yes, like the Chairman, I know that you come from a background where your parents were immigrants and who truly came here with nothing. Can you just talk a little bit more about how much that experience really informed your life or career choices?

Mr. FARBIARZ. Senator, thank you for that question. I was privileged to grow up in a house where all four of my grandparents were alive and had grown up speaking different languages than English.

I grew up in a household where my grandparents, there were four of them, three of them didn't know how to drive a car and one was a New York City taxi driver. It was a wonderful and exciting place to be a child.

And what I would say is, I remember that, and I carry it with me. And I am not sure if I could itemize all the different ways it has influenced my life, but it is part of what has driven me to public service.

Senator HIRONO. I think that that kind of a life experience really informs you what you want to do with your life, and I certainly can relate to that because I grew up here with—English is not my first language. So, I want to thank all of the panelists and nominees because I think you will all make very excellent judges. Congratulations to each of you. Aloha.

Chair DURBIN. In the nick of time, the Senator from Georgia has arrived. That is all you are going to get, is one moment.

Senator OSSOFF. Thank you for your patience and indulgence, Mr. Chairman, and congratulations. And Senator Booker, and those in the audience.

Congratulations to all of you for these extraordinary nominations to lifetime appointments on the Federal bench. We would like to just briefly ask each of you the following question. We can begin with you, Judge Bjelkengren, and please move down the panel. Will you pledge to faithfully apply the law without bias, without regard for your personal policy or political preferences?

Judge BJELKENGREN. Yes, I will.

Judge BROOKMAN. I have, and I will.

Mr. FARBIARZ. Yes, Senator.

Judge KIRSCH. I have, and I will.

Ms. MERCHANT. Yes, Senator, I will.

Senator OSSOFF. Thank you to you all. Judge Bjelkengren, I would like to discuss your approach, please, to cases involving the First Amendment. How will you approach cases that may come before you involving First Amendment issues?

Judge BJELKENGREN. Thank you for that question, Senator. I approach my cases by thoroughly researching the law. So there certainly are various precedents that apply specifically to the First Amendment. I thoroughly review the record before me. I impartially without any prejudgment—I apply that law to the facts before me and in that way decide each case. And I would do that with First Amendment cases, as well.

Senator OSSOFF. And why, in your view, Judge, are freedom of speech and publication, the free exercise of religion, petition and assembly so essential in our constitutional system, in our society?

Judge BJELKENGREN. It is—those are—the First Amendment are extremely crucial to our democracy. And there—again, there are a number of Supreme Court precedents that have addressed freedom of religion, freedom of speech, and I would faithfully apply those cases to the facts that came before me.

Senator OSSOFF. And Judge Bjelkengren, the Sixth Amendment right to counsel is vital. The precedent set in *Gideon v. Wainwright*, which affirms the right to counsel, is vital.

Based upon your experience judging cases involving indigent defendants and those who lack the resources to hire their own counsel, why is the right to counsel so fundamental to the application and provision of equal justice in the United States?

Judge BJELKENGREN. I have had the experience, while I was an Assistant Attorney General, of litigating cases against pro se litigants. As a judge, I have had multiple cases with individuals who are unrepresented because they don't have the right to counsel. And it is very difficult for them to navigate the legal system. It is an overwhelming system. Legalese and the assistance of counsel is crucial. And so for criminal cases and any time that there is the right to counsel, certainly that assists an individual in receiving equal justice.

Senator OSSOFF. Thank you, Judge Bjelkengren. Thank you, Mr. Chairman. I yield back.

Chair DURBIN. Thank you very much. Since there are no other Members of the panel present to ask questions, I will just tell you that questions for the record may be sent by Members by 5 p.m. on Wednesday, February 1st. The record will likewise remain open until that time to submit letters and materials. And I would ask you to, in a timely fashion, respond to those questions if they come your way.

I would like to make one general observation, and that is that from my days of practicing law, I can recall that I learned a lot in law school, but I had to share that learning experience many times as a lawyer and judges as well. There are certain aspects of the law which you may have a general knowledge of, but a conscientious judge like a lawyer, will take the time to study and research the issues that they are going to face in the courtroom to make sure their information is timely and accurate in their own minds.

And so this notion that your appearance is an instant bar exam with many questions to see just what you know as a lawyer, I think does not reflect on the reality of conscientious judge who will constantly try to learn more about the issues before them and the law that applies. I thank you all for being here.

This experience, I hope, is one that you will have a positive feeling about. The Committee has had a remarkable record in the first 2 years, and we hope to continue that. Having said that, there will be many judicial nominees before the Senate in a matter of weeks, some 39 or 40 more will be added to the calendar from the last year's session. And there is no guarantee at what point these nominations will move forward, but I can tell you that we will do it in a thoughtful way and try to make sure that they are timely. I know that there is a lot of pride in this room by your friends and family who have joined you here today.

It must give you a great feeling of support and ebullience as you face questions from these Senators. I thank you for being part of this process, and I adjourn this meeting of the Senate Judiciary Committee.

[Whereupon, at 11:24 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List
Hearing before the
Senate Committee on the Judiciary

"Nominations"

Wednesday, January 25, 2023
Dirksen Senate Office Building, Room 226
10:00 a.m.

Charnelle Bjelkengren, to be United States District Judge for the Eastern District of Washington

Matthew P. Brookman, to be United States District Judge for the Southern District of Indiana

Michael Farbiarz, to be United States District Judge for the District of New Jersey

Robert Kirsch, to be United States District Judge for the District of New Jersey

Orelia Eleta Merchant, to be United States District Judge for the Eastern District of New York

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Charnelle Marie Bjelkengren
   Charnelle Marie Lockhart

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Eastern District of Washington

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Spokane County Superior Court
   1116 West Broadway Avenue
   Spokane, Washington 99260

   Residence: Spokane Valley, Washington

4. **Birthplace**: State year and place of birth.

   1975; Great Lakes, Illinois

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1997 – 2000, Gonzaga University School of Law; J.D., 2000

   1993 – 1997, Mankato State University; B.A., B.S. (*cum laude*), 1997

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2019 – present
   Spokane County Superior Court

1116 West Broadway Avenue
Spokane, Washington 99260
Superior Court Judge

2013 – 2019
State of Washington, Office of Administrative Hearings
16201 East Indiana Avenue
Spokane Valley, Washington 99216
Senior Administrative Law Judge (2017 – 2019)
Administrative Law Judge (2013 – 2017)

2001 – 2003, 2004 – 2013
Washington State Office of the Attorney General
1116 West Riverside Avenue
Spokane, Washington 99201
Assistant Attorney General

2000
Express Employment Professionals
331 West Main Avenue
Spokane, Washington 99201
Legal Assistant

1998 – 2000
United States Attorney's Office
Eastern District of Washington
920 West Riverside Avenue, Suite 340
Spokane, Washington 99201
Legal Intern

Other Affiliations (uncompensated)

2021 – 2022
Washington State Superior Court Judges' Association
P.O. Box 41170
Olympia, Washington 98504
Member, Board of Trustees

2022 – present
Spokane Valley Kiwanis Club
P.O. Box 1275
Spokane Valley, Washington 99037
Member, Board of Directors

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social

security number) and type of discharge received, and whether you have registered for selective service.

I did not serve in the military. I was not required to register for the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Gonzaga University School of Law Diversity Scholarship (1997 – 2000)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   National Association of Unemployment Insurance Appeals Professionals Conference Committee (June 2018)

   Spokane County Bar Association (2019 – present)
   - Diversity Section (2019 – present)
     - Carl Maxey Scholarship Committee (2021)
   - Systemic Racism Taskforce (2022)
   - Volunteer Lawyers Program Advisory Committee (2021 – present)

   Spokane County Juvenile Court Triplett Award Selection Committee (2021)

   Washington State Bar Association (2001 – present)

   Washington State Office of Civil Legal Aid Right to Counsel Technical Advisory Workgroup (2021)

   Washington State Superior Court Judges' Association (2019 – present)
   - District Six Trustee (2021 – 2022)
   - Equality and Fairness Committee (2019 – present)
     - Spokane County Superior Court Color of Justice Planning Committee (March 2020)
   - Judicial Ethics Committee (2019 – 2021)
   - Legislative Committee (2020 – 2021)
   - Washington State Racial Justice Consortium (2020 – 2022)
   - Racial Justice Workgroup (2020 – 2021)

10. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Washington, 2001

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

I have not been admitted to practice in any other courts.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

NAACP, Spokane Chapter (2020 – present)

Spokane Valley Kiwanis Club (2020 – present)
Elected to the Board (2022)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, the organizations listed above do not currently discriminate on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies. Prior to 1987 and prior to my membership, Kiwanis did not permit women to be members.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Micdrop What I know, Spokane Coeur d'Alene Living Magazine, May 2019. Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Action Plan, Washington State Racial Justice Consortium (2022). Copy supplied.

Right to Counsel for Indigent Tenants: Implementation Plan, Washington State Office of Civil Legal Aid (2021). While my name is listed as helping to guide the process, I did not prepare or contribute to the drafting of the Implementation Plan. I participated in meetings that formed the basis for this plan. Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Personal and Professional Commitment to Equality, Spokane Superior Court (June 26, 2020). I participated in drafting this statement with my bench mates. Copy supplied.

While I served as a trustee on the board for the Washington State Superior Court Judges' Association, the president of the association issued the following letters on letterhead which included my name. Although my name is on the letterhead, I had no role in drafting or approving these letters.

Washington State Superior Court Judges' Association Letter regarding ESHB 1169 Concerning Sentencing Enhancements (Mar. 2, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding Funding for Re-entry Support and Teleservice Staffing (Feb. 28, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding Right to Counsel Program (Feb. 7, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding One Time Budget Request Benefiting Washington Superior Courts (Feb. 5, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding One Time

Budget Request Benefiting Washington Superior Courts (Feb. 5, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding One Time Budget Request Benefiting Washington Superior Courts (Feb. 4, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding HB 1916 – Supporting crime victims and witnesses (Jan. 24, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding SB 5663 Blake Stream-lined Procedures (Jan. 24, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter regarding Enforcement of Residential Landlord-Tenant Act (Jan. 7, 2022). Copy supplied.

The following Washington State Superior Court Judges' Association Board of Trustee Meetings Minutes identify me as offering comments at the meeting.

Washington State Superior Court Judges' Association Board of Trustees Meeting Minutes (Apr. 2, 2022). Copy supplied.

Washington State Superior Court Judges' Association Board of Trustees Meeting Minutes (Feb. 5, 2022). Copy supplied.

Washington State Superior Court Judges' Association Board of Trustees Meeting Minutes (Jan. 8, 2022). Copy supplied.

Washington State Superior Court Judges' Association Letter to Washington State Supreme Court Justice Gonzalez (Nov. 10, 2021). Copy supplied.

As an assistant attorney general for the state of Washington, I represented Big Bend Community College from approximately 2005 to 2013, advising the college on all legal issues. I attended the majority of meetings (both open and closed) of the College's Board of Trustees. These meetings were open to the public and meeting minutes are publicly available upon request. The following Big Bend Community College Board of Trustees Regular Meeting Minutes identify me as speaking at the meeting.

Big Bend Community College Board of Trustees Regular Meeting Minutes (Apr. 5, 2012). Copy supplied.

Big Bend Community College Board of Trustees Regular Meeting Minutes (Mar. 5, 2012). Copy supplied.

Big Bend Community College Board of Trustees Regular Meeting Minutes (Feb.

17, 2012). Copy supplied.

Big Bend Community College Board of Trustees Regular Meeting Minutes (June 26, 2007). Copy supplied.

Big Bend Community College Board of Trustees Regular Meeting Minutes (May 29, 2007). Copy supplied.

Big Bend Community College Board of Trustees Regular Meeting Minutes (Apr. 10, 2007). Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

April 27, 2022: Speaker, Superior Court Judges' Association Annual Business Meeting, (virtual). I made brief remarks encouraging the Association to attend listening sessions to learn about the Racial Justice Consortium Action Plan and provide feedback. I have no notes, transcript, or recording. The address for the Superior Court Judges' Association is P.O. Box 41170, Olympia, Washington 98504.

April 12, 2022: Speaker, Mock Trial Team Banquet, The Oaks Classical Christian Academy, Spokane Valley, Washington. I encouraged the team to give back to their community. I have no notes, transcript, or recording. The address for the Oaks Classical Christian Academy is 1171 East 24th Avenue, Spokane Valley, Washington 99206.

March 13, 2022: Panelist, "A Day in the Life of a Judge," Fellows Clinic, Washington State Judicial Institute (virtual). I answered questions about a judge's daily schedule, duties, community involvement, and work/life balance. I have no notes, transcript, or recording. The address for the Washington State Judicial Institute is 1001 4th Avenue, Suite 4200, Seattle, Washington 98154.

May 14, 2021: Panelist, Volunteers Lawyer's Program, Justice Breakfast, Spokane County Bar Association, Spokane, Washington. I talked about the struggles of unrepresented litigants, and the benefits of volunteer lawyers in family law cases. I have no notes, transcript, or recording. The address for the Spokane County Bar Association Volunteers Lawyer's Program is 1116 West Broadway Avenue, Fourth Floor, Spokane, Washington 99260.

April 19, 2021: Competition Judge, Gonzaga Law School Trial Advocacy Mock Trial, Spokane, Washington. I judged the Trial Advocacy class mock trial. I have no notes, transcript, or recording. The address for Gonzaga Law School is P.O. Box 3528, 721 North Cincinnati Street, Spokane, Washington 99220.

March 19, 2021: Competition Judge, YMCA Mock Trial Competition (virtual). I judged a round of the competition. I have no notes, transcript, or recording. The address for the YMCA Mock Trial, Washington Administrative Office of the Courts is 1112 Quince Street Southeast, Olympia, Washington 98501.

January 26, 2021: Panelist, High School for Recording Arts (virtual). I discussed being the first in my family to graduate with a bachelor's degree and my path to the bench. I have no notes, transcript, or recording. The address for the High School for Recording Arts is 1166 University Avenue West, St. Paul, Minnesota 55104.

October 15, 2020: Panelist, Bridging the Gavel Gap, Washington State Judicial Institute (virtual). I discussed my professional experience, why I became a judge, my path to the bench, challenges of being a judge and advice for the attendees. I have no notes, transcript, or recording. The address for the Washington State Judicial Institute is 1001 4th Avenue, Suite 4200, Seattle, Washington 98154.

October 14, 2020: Panelist, Pathways to the Bench, Washington State Judicial Institute (virtual). Notes supplied.

February 21, 2020: Panelist, Beyond Justice: From Incarceration to Liberation, The Steering Committee of the Peer Navigator Training Program, and Community Engagement Initiative in partnership with the Spokane Regional Law & Justice Council Racial Equity Committee and Wilburn and Associates. Notes supplied.

2020 (specific date unknown): Speaker, spoke to home school student group about my job and Superior Court, Spokane, Washington. Notes supplied.

August 30, 2019: Guest, Roundtable, Legal Education and Networking Group, Spokane, Washington. I introduced myself as a recently appointed judge and spoke about superior court practice. I have no notes, transcript, or recording. The Legal Education and Networking Group does not have a mailing address.

July 15, 2019: Panelist, Law Enforcement and Criminal Justice Update, NAACP, Spokane Chapter, Spokane, Washington. I introduced myself as a recently appointed judge and answered questions about diversity in the legal system. I have no notes, transcript, or recording. The address for the NAACP, Spokane Chapter is 25 Main Avenue #239, Spokane, Washington 99201.

May 2019 (specific date unknown): Speaker, Campaign for Equal Justice, Legal Foundation of Washington, Spokane, Washington. I spoke about access to justice in the court system and my experience with unrepresented litigants. I have no notes, transcript, or recording. The address for the Legal Foundation of Washington is 1325 4th Avenue, Suite 1335, Seattle, Washington 98101.

April 1, 2019: Speaker, Chase Middle School Scholars event, Spokane, Washington. Notes supplied.

June 17, 2018: Speaker, The Elements of a Sound Decision, National Association of Unemployment Insurance Appeals Professionals Conference Committee, Annapolis, Maryland. PowerPoint supplied.

Fall 2017 (specific date unknown): Speaker, University of Idaho School of Law, Moscow, Idaho. I discussed administrative law and hearings. I have no notes, transcript, or recording. The address for the University of Idaho School of Law is 711 South Rayburn Street, Moscow, Idaho 83844.

2014 (specific date unknown): Panelist, State of Washington Attorney General's Office, Spokane, Washington. I discussed and answered questions about best practices for appearing at the Office of Administrative Hearings. I have no notes, transcript, or recording. The address for the State of Washington Attorney General's Office is 1116 West Riverside Avenue, Spokane, Washington 99201.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Emma Epperly, *'It's Watching Life Unfold in Front of You' Judge Maryann Moreno to Retire After Nearly 20 Years on Bench*, The Spokesman-Review, June 29, 2022. Copy supplied.

Julie Griffith, *Beyond the Bench: An Interview with Judge Charnelle Bjelkengren*, Spokane County Bar Association Calendar Call, Sept. 8, 2020. Copy supplied.

Chantell Cosner, *All Rise Podcast*, Gonzaga School of Law, Apr. 22, 2020. Video available at https://www.youtube.com/watch?v=RJuExC6w3S0.

Will Campbell, *Gov. Inslee appoints first female African American judge in Eastern Washington to Spokane County Superior Court*, The Spokesman-Review, Apr. 10, 2019. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed by Governor Jay Inslee to the Spokane County Superior Court, State of Washington, effective May 1, 2019. On November 5, 2019, I was elected (unopposed) to complete the term of my predecessor on the Spokane County Superior Court. On November 3, 2020, I was elected (unopposed) to a four-year term on the Spokane County Superior Court. Washington superior courts are courts of general jurisdiction, handling criminal, civil, domestic, and juvenile matters. Since July 1, 2021, I have been assigned to the individual (trial) calendar docket.

In 2013, I was hired as an administrative law judge for the Washington State Office of Administrative Hearings, effective December 2013. This agency presides over hearings involving multiple state agencies, including the Department of Social and Health Services, the Department of Children, Youth and Families, the Employment Security Department, the Liquor Control Board, Department of Licensing, Department of Labor and Industries and more. The majority of the orders I issued were Initial Orders that were appealable to a commissioner or board who then issued a Final Order.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

   Since May 1, 2019, according to court records, I have presided over 130 jury or bench trials that have gone to verdict or judgment.

   i. Of these cases, approximately what percent were:

jury trials:	17%
bench trials:	83%

   ii. Of these cases, approximately what percent were:

civil proceedings:	82%
criminal proceedings:	18%

b. Provide citations for all opinions you have written, including concurrences and dissents.

   All orders, opinions, and decisions I have entered are available in the individual Spokane County Superior Court case files maintained by the Spokane County Superior Court Clerk's Office. Opinions and Orders from superior court judges are not published in the State of Washington.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Deviney v. Deviney*, No. 20-3-00727-32 (Wash. Sup. Ct Spokane Cnty. May 3, 2021); No. 38237-1-III (Wash. Ct. App. Aug. 30, 2022). Copies supplied.

In Washington state, all property acquired during marriage is presumed to be community property, except when property is acquired by inheritance it is considered separate property. Respondent purchased real property and an investment account with an inheritance he received during the marriage. The property was placed in both parties' names. In this contested divorce proceeding, Petitioner asserted that placing her name on the property indicated an intent to transfer the separate property to the community. I rejected this argument because the law is well settled that a name on a title or deed is not determinative of intent to transfer separate property to the community. Respondent credibly testified that he did not intend to transfer his separate property to the community. Therefore, I concluded the property Respondent purchased with his inheritance remained his separate property. Petitioner appealed and the court of appeals upheld my decision.

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Counsel For Respondent:

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2. *State of Washington v. Cardon*, No. 20-1-10785-32, 22-1-00933-32 (Wash. Sup. Ct. Spokane Cnty. Aug. 23, 2022). Copies supplied.

Defendant was the restrained party in a no-contact order. Mr. Temple observed Defendant contacting the protected party and attempted to intervene. As Mr. Temple did so, Defendant hit him in the arm with a bat, breaking Mr. Temple's arm. Defendant was charged with second-degree assault and violation of a no-contact order. While incarcerated, Defendant made phone calls to the protected party and was subsequently charged with six counts of violating a no-contact order and two counts of tampering with a witness. After a jury trial, Defendant was found guilty of all counts. At sentencing, Defendant requested a mental

health sentencing alternative which would have resulted in approximately 12 months of incarceration. I ruled that the evidence did not establish that Defendant and the community would benefit from the mental health sentencing alternative or that Defendant was willing to participate in mental health treatment, which is required by the statute. I sentenced Defendant to 75 months incarceration and 18 months community custody, which was within the standard sentencing range.

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Counsel for Defendant:

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3. *State of Washington v. Carillo*, No. 22-1-00465-32 (Wash. Sup. Ct. Spokane Cnty. Aug. 10, 2022).

An officer observed Defendant walking with a female in a grocery store parking lot toward a vehicle that was registered to a male with an outstanding warrant. Defendant did not match the booking photo of the vehicle owner so the officer asked Defendant about the owner. Defendant explained he had not seen the owner in a while and did not have contact information for him. He identified himself with his brother's name and returned to the store. The officer learned that Defendant provided false information and went to the store to locate Defendant who then ran out of the store. Multiple officers and a K-9 unit joined in the pursuit before Defendant was apprehended hiding behind a residence and arrested. Defendant was charged with violating a no contact order because the female with whom he had been walking in the parking lot was the protected party in the order. He was also charged with resisting arrest and making a false or misleading statement to a public servant. After a jury trial, Defendant was found guilty of all charges. At sentencing, Defendant requested a mental health sentencing alternative. I denied the request because Defendant did not establish, as required by statute, that he had a serious mental illness.

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4. *State of Washington v. Gilmore*, No. 22-1-00322-32 (Wash. Sup. Ct Spokane Cnty. May 27, 2022). Copy supplied.

Defendant was stopped by law enforcement for a vehicle license trip permit violation. During the course of the traffic stop, law enforcement learned that the defendant had an outstanding misdemeanor warrant. After Defendant was arrested and before he was given a Miranda warning, he asked the officers to retrieve his phone from his car so he could contact his employer. He indicated it would be on the passenger-side seat. He did not give consent to search his vehicle. The officer went through the driver's-side door and lifted a baseball cap which was covering a firearm. Defendant subsequently consented to search of his vehicle indicating that there was nothing of value besides the firearm. Defendant was charged with unlawful possession of a firearm and moved to suppress the firearm. I granted the motion to suppress, reasoning that the officers conducted an unlawful search of the vehicle. Defendant had not been advised of his Miranda rights and did not give consent to search his vehicle, beyond the passenger seat, prior to the seizure of the firearm. The state subsequently moved to dismiss the case. I granted the motion to dismiss.

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5. *Thurman v. Cowles Company*, No. 21-2-01609-32 (Wash. Sup. Ct Spokane Cnty. June 1, 2022). Copy supplied.

The Sheriff's Department issued a press release regarding Mr. Thurman's termination from employment following allegations that that he made violent, racist, and threatening comments. The Cowles Company/Spokesman Review (Cowles), a news organization, published articles regarding the termination. Mr. Thurman filed a defamation lawsuit and a Consumer Protection Act (CPA) cause of action against Cowles. Cowles filed a special motion for expedited relief under Revised Code of Washington 4.105, the Uniform Public Expression Act (Act). At the time of the special motion, there was no Washington case law addressing this law, which had been enacted in 2021. Mr. Thurman argued the Act is indistinguishable from a prior Washington anti-SLAPP law that had been struck down as unconstitutional. I rejected that argument because the Act employs a standard similar to the summary judgment standard, which is constitutional. I also held, however, that because the instant defamation claim was brought before the effective date of the Act, it was therefore not subject to a special motion. I dismissed the CPA claim as it was based on acts which did not occur within trade or commerce. Both parties appealed this decision to the court of appeals, which is where the matter is currently pending.

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Counsel for Defendant:

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6. *In the Matter of the Marriage of Mulholland & Leuser*, No. 18-3-00842-32 (Wash. Sup. Ct. Spokane Cnty. Oct. 27, 2020); No. 37864-1-III (Wash. Ct. App. Jan. 25, 2022).

Petitioner was awarded spousal support in a stipulated order. The agreement was unconventional – allowing for spousal support until Petitioner obtained

employment or began receiving social security disability (SSD) benefits. The judge made a notation in the order explaining that the arrangement was discussed with the Petitioner, that it was vague, and may not be enforceable. Nearly two years later, after Petitioner had not obtained employment or SSD benefits, Respondent brought a motion for post-judgment relief seeking declaratory judgment that the precondition of Petitioner seeking employment or SSD benefits had been met, allowing an end to spousal support. The court commissioner denied post-judgment relief and I was assigned to hear Respondent's revision motion, which is an appeal of a commissioner's decision. On revision, Respondent characterized his motion as a motion for clarification. I ruled that he had not made this motion to the court commissioner. Further, I did not have sufficient evidence to determine whether Petitioner had been given a "reasonable time" to obtain employment or SSD benefits. I denied the motion for revision because Respondent should have brought a motion to terminate spousal support or a motion to clarify the order awarding spousal support. Respondent appealed to the court of appeals. The court of appeals ruled that both the commissioner and superior court should have addressed the merits of Respondent's motion. The court of appeals agreed that Respondent did not present sufficient evidence for the superior court to render a decision as to whether Petitioner had been given a reasonable amount of time to obtain employment or SSD benefits. The court remanded to the superior court to determine the reasonable time in which Petitioner should have obtained employment or benefits. Ultimately, on remand, the parties settled the matter.

Petitioner did not participate.

Respondent:

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7. *West Terrace Golf LLC v. City of Spokane*, No. 17-2-02120-7 (Wash. Sup. Ct. Spokane Cnty. Dec. 2, 2021). Copy supplied.

The City of Spokane owns and operates a municipal water system providing water service to customers inside and outside city limits. Plaintiff argued the city charges customers located outside city limits nearly 200 percent what it charges customers who are within the city limits, in violation of Revised Code of Washington (RCW) 80.28, which sets utility rate standards. According to those standards, rates must be just, fair, reasonable, and sufficient. Defendant argued that the city water rates are instead governed by RCW 39.92.010 and the Washington State Constitution. RCW 39.92.010 requires that rates must be uniform and sufficient to operate the water system but does not include a just and

reasonable requirement. Both parties moved for declaratory relief. I ruled RCW 39.92.010 and the Constitution control water rates, not RCW 80.28. Moreover, a separate statutory provision, RCW 80.04.500, exempts municipal water systems from the utility rate standards. The matter is currently pending in the court of appeals.

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Counsel for Respondents:

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8. *State of Washington v. Andersen*, No. 19-1-10610-32 (Wash. Sup. Ct. Spokane Cnty, Nov. 12, 2021). Copy supplied.

Defendant was charged with five counts of drive-by shooting from an incident that occurred on July 5, 2019. Defendant was also charged with one count of murder in the first degree and two counts of attempted murder in the first degree from an incident that occurred on July 7, 2019. Defendant moved to sever the charges in the July 5, 2019, incident from the July 7, 2019, incident. I applied the following factors identified in *State v. Bythrow*, 114 Wn.2d 713, 718, (1990): the strength of the evidence on each count; (2) the clarity of the defenses on each count; and (3) the admissibility of evidence of other crimes if they are tried separately. I ruled that the evidence in the July 7, 2019, incident was much stronger than July 5, 2019. Also, there was limited cross admissibility of evidence. Specifically, there would be admissible evidence relating to the murder charge that would not relate to the drive-by shooting. Therefore, I granted the motion to sever the charges.

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Counsel for Defendant:

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9. *State of Washington v. Herkimer*, No. 19-1-00323-6 (Wash. Sup. Ct. Spokane Cnty. Oct. 31, 2019), No. 37222-7-III (Wash. Ct. App. Mar. 11, 2021). Copy supplied.

Defendant was accused of breaking and entering into the home of an elderly woman and charged with residential burglary, second degree burglary and third-degree malicious mischief. A responding officer observed shoeprints in the snow and a vehicle traveling from the house, coming from the direction in which the shoeprints led. The officer apprehended Defendant's vehicle parked in a nearby driveway. Initially, Defendant did not respond to the officer's commands to exit the vehicle but eventually complied. After Defendant was arrested, he explained he thought the reason he was stopped was because he was driving around late at night and pulled into a stranger's driveway. The officer looked at the soles of Defendant's shoes and matched them to the shoeprints in the snow that led to the house that was burglarized. I ruled on pretrial motions, including a motion to admit Defendant's statements about pulling into a stranger's driveway. Defendant did not seek to suppress the footprints. A jury found Defendant guilty of all charges. Defendant appealed the convictions on the basis of ineffective assistance of counsel, arguing that his counsel should have made a motion to suppress based on an unconstitutional stop and arrest. Because Defendant did not raise these issues at the trial court level, and probable cause had not been at issue, the state had not developed a record with regard to the stop and arrest. The court of appeals declined review because the record was insufficient to establish actual prejudice. All convictions were upheld by the court of appeals.

Counsel for the State:

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Counsel for Defendant:

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10. *State of Washington v. Bost*, No. 18-1-004510 (Wash. Sup. Ct. Spokane Cnty. Dec. 19, 2019). Copy supplied.

Defendant was arrested on charges of second-degree murder and unlawful possession of a firearm. He moved to dismiss the charges based upon an alleged violation of Washington State Criminal Rule 3.3, which provides that a defendant detained in jail shall be brought to trial within 60 days of arraignment. The time period for any competency proceeding is excluded from the 60 days. After Defendant was placed in custody, multiple continuances were granted by different judges on our court due to his ongoing competency proceedings. Defendant argued that he was not brought to trial within the required time frame because any proceedings that occurred between June 2018 and May 2019, were not related to his competency. I ruled that all proceedings, including his attorney seeking a second and independent evaluation, were related to Defendant's competency to stand trial. The excludable period for competency proceedings does not end until the court enters an order finding Defendant competent. I therefore found no Rule 3.3 violation and denied the motion to dismiss. The record indicates that Defendant was acquitted by reason of insanity, and his case remains pending before a different judge.

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Defendant proceeded pro se

Stand by Counsel for Defendant:

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys

who played a significant role in the case.

As is standard practice in superior court, after I issue an oral ruling, the parties draft order(s), and I sign the order that best reflects my oral ruling. Accordingly, the decisions provided in response to Question 13c are drafted by the parties. The below list reflects letter rulings I have drafted.

1. *Adrian v. Adrian*, No. 20-3-00472-32 (Wash. Sup. Ct. Spokane Cnty., Sept. 14, 2021). Copy supplied.

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2. *McCormick v. Prosecuting Attorney of Spokane County*, No. 20-2-00308-32 (Wash. Sup. Ct. Spokane Cnty., May 6, 2020). Copy supplied.

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e. Provide a list of all cases in which certiorari was requested or granted.

Certiorari has not been requested or granted in any of my cases.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

In the Matter of the Marriage of Mulholland & Leuser, No. 18-3-00842-32 (Wash. Sup. Ct Spokane Cnty. Oct. 27, 2020), *remanded*, No. 37864-1-III (Wash. Ct. App. Jan. 25, 2022). Copies supplied. Petitioner was awarded spousal support in a stipulated order. The agreement was unconventional – allowing for spousal support until Petitioner obtained employment or began receiving social security disability (SSD) benefits. The judge made a notation in the order explaining that the arrangement was discussed with Petitioner, that it was vague, and may not be enforceable. Nearly two years later, after Petitioner had not obtained employment or SSD benefits, Respondent brought a motion for post-judgment relief seeking declaratory judgment that the precondition of Petitioner seeking employment or SSD benefits had been met, allowing an end to spousal support. The court commissioner denied post-judgment relief and I was assigned to hear Respondent's motion for revision, which is an appeal from the court commissioner's decision. On revision, Respondent characterized his motion as a motion for clarification. I ruled that he had not made this motion to the court commissioner. Further, I did not have sufficient evidence to determine whether Petitioner had been given a "reasonable time" to obtain employment or SSD benefits. I denied the revision motion reasoning Respondent should have brought a motion to terminate spousal support or a motion to clarify the order awarding spousal support. Respondent appealed to the court of appeals. The court of appeals ruled that both the commissioner and superior court should have addressed the merits of Respondent's motion. The court of appeals agreed that Respondent did not present sufficient evidence for the superior court to render a decision as to whether Petitioner had been given a reasonable amount of time to obtain employment or SSD benefits. The court remanded to the superior court to determine the reasonable time in which Petitioner should have obtained employment or benefits. Ultimately, on remand, the parties settled the matter.

State of Washington v. Populus, No. 16-1-02652-5 (Wash. Sup. Ct. Spokane Cnty March 11, 2020), *vacated in part and remanded*, 18 Wash. App. 2d 1022 (Wash. Ct. App. July 15, 2021). Copy supplied. Defendant was accused of responding to law enforcement's Craigslist ads through a "Net Nanny" sting. He corresponded with an undercover police officer and planned to have sexual intercourse with her child. When Defendant arrived at the agreed upon location, he was arrested. A jury found Defendant guilty of Attempted Rape of a Child in the First Degree. Defendant appealed the assessment of legal financial obligations. The Court of Appeals ruled that the judgment and sentence miscalculated the legal financial obligations and held that Defendant should not be assessed court costs for the criminal filing fee because he was found indigent. The matter was remanded to superior court to strike the $200 in court costs.

State of Washington v. Hiatt, No. 18-1-05601-32 (Wash. Sup. Ct. Spokane Cnty. Sept. 10, 2019), *rev'd*, 17 Wash. App. 2d 1050 (Wash. Ct. App. May 13, 2021). Copy supplied.

Defendant was charged with possession of a stolen motor vehicle and making or possessing a motor vehicle theft tool. Defendant was sleeping in his Ford Expedition which was inoperable. A stolen Honda Accord was chained and padlocked to the Expedition. Defendant told officers that the Accord belonged to a friend of a friend, the names of whom he did not wish to disclose, and claimed that he permitted his friend to chain the Accord to his vehicle so it would not get stolen. No key to the padlock was found in Defendant's possession. The officer found three key rings with shaved keys in Defendant's pockets. When the owner of the Accord came to retrieve his vehicle, he observed multiple items missing from the Accord. Also, there was a punch out key in the ignition which started the Accord. At trial, the owner of the Accord testified that he had previously given Defendant permission to drive the Accord but not on the date in question. In the bench trial, after the state rested, Defendant made a motion to dismiss the possession of a stolen motor vehicle charge for lack of evidence of actual or constructive possession. I denied the motion. After a one-day trial, I concluded Defendant had constructive possession of the Accord because he had dominion and control over the Accord. Further, he had the ability to saw off the padlock or make the Expedition operable, at which point the Accord would have been in his actual possession. In my oral ruling, I relied upon *State v. Lakotiy*, 151 Wn. App. 699 (2009), in support of a finding of constructive possession. The court of appeals reversed and dismissed the charge of a stolen motor vehicle, finding that there was not substantial evidence that the defendant had constructive or actual possession of the Accord.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

As a state trial judge, I do not author any published opinions. All decisions I issue are entered as orders or judgments. They are placed in individual case files maintained by the Spokane County Superior Court Clerk. Copies of all orders and judgments can be requested through Spokane County Clerk's office.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

State of Washington v. Gilmore, No. 22-1-00322-32 (Wash Sup. Ct Spokane Cnty. June 9, 2022). Copy supplied in response to Question 13c.

Thurman v. Cowles Company, No. 21-2-01609-32 (Wash. Sup. Ct Spokane Cnty. June 1, 2022). Copy supplied in response to Question 13c.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. **Recusal**: If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I am subject to the state of Washington's Code of Judicial Conduct. Rule 2.11 addresses when a judge must disqualify (recuse) from a matter. When deciding whether or not to recuse myself from a case, I consider Rule 2.11, confer with colleagues, and consider the situation from the position of an objective person to determine whether there could be an appearance of partiality. If I currently have or had a close relationship with a party, attorney, or potential witness, I recuse myself *sua sponte* from the matter. If there could be the appearance of partiality, but I am certain I can be impartial and am not obligated to recuse, I disclose the potential conflict of interest. I tell the parties that if requested, I will recuse. I do not recall ever declining a request to recuse myself from a matter.

Brickner v. Brooks, No. 21-2-02936-32 (Wash. Sup. Ct. Spokane Cnty.). I know the defendant and personal information about her as I am acquainted with her family members. Therefore, I recused sua sponte.

Tedescoe v. Eastern Washington University, No. 18-2-043721 (Wash. Sup. Ct. Spokane Cnty.). I am close personal friends with potential witnesses. Therefore, I recused sua sponte.

In re the Welfare of Kinchler, No. 20-7-01019-32 (Wash. Sup. Ct. Spokane Cnty.). The Assistant Attorney General representing the state was my team leader for a period of time when I worked as an Assistant Attorney General approximately 20 years ago. I disclosed this to the parties, explained that this would not affect my ability to be fair and impartial but if requested, I would recuse. When Respondent asked me to recuse, I granted the

request.

Hoffman v. Providence Health & Services, Washington, No. 20-2-01749-32 (Wash. Sup. Ct. Spokane Cnty.). In my former job as a Senior Administrative Law Judge, I supervised an attorney who represented Plaintiff in a case assigned to me. I disclosed this relationship, explained that it would not affect my ability to be fair and impartial, and then offered to recuse myself. I granted Defendant's request that I recuse.

15. **Public Office, Political Activities and Affiliations**:

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

       I have not held any public office other than my current judicial office.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

       Consistent with Washington's Code of Judicial Conduct, I have endorsed the following judges and court commissioners for election and re-election: Justice Helen Whitener, Justice Raquel Montoya-Lewis, Judge Tracy Staab, Court Commissioner Eric Dooyema, Court Commissioner Deanna Crull, and Matthew Antush.

16. **Legal Career:** Answer each part separately.

    a. Describe chronologically your law practice and legal experience after graduation from law school including:

       i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

          I have not served as a clerk to a judge.

       ii. whether you practiced alone, and if so, the addresses and dates;

          I have not practiced alone.

       iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature

of your affiliation with each;

2001 – 2003; 2004 – 2013
Washington State Attorney General
1116 West Riverside Avenue
Spokane, Washington 99201
Assistant Attorney General

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

From 2001 to 2002 I was an Assistant Attorney General. I was assigned to the Licensing and Employment Security Division representing Department of Licensing driver's license revocation hearings in superior and appellate courts throughout eastern Washington. I also represented the Employment Security Department in unemployment benefit cases.

In approximately 2003, I was assigned to the Department of Social and Health Services where I handled dependency, day care licensing, and civil commitment cases in administrative hearings and juvenile court.

In 2004 to 2013, I was assigned to the Administrative Law Division. I represented the Department of Licensing in driver's license revocation hearings in superior and appellate courts throughout eastern Washington. I also represented the Employment Security Department in unemployment benefits cases. I served as the judicial review coordinator, which included serving as the client contact for settlement, reviewing and editing briefs, advising, mentoring, and educating Assistant Attorneys General statewide.

In approximately 2005 to 2013, I took on an additional client in the Education Division. I represented Big Bend Community College, advising the college on all legal issues including contracts, public records, open public meetings act, real estate, and employment law.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My clients have always been state agencies and state institutions.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

i. Indicate the percentage of your practice in:
1. federal courts: 0%
2. state courts of record: 98%
3. other courts: 0%
4. administrative agencies: 2%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 100%
2. criminal proceedings: 0%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried one or two cases before an Administrative Law Judge, one case before a Department of Licensing Hearing Examiner, and multiple shelter care and dependency cases, which are not final decisions. The majority of my practice involved litigating appeals from administrative agencies in superior court. These appeals were all record reviews. I estimate I had more than 150 cases in superior court and the court of appeals.

i. What percentage of these trials were:
1. jury: 0%
2. non-jury: 100%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I personally handled numerous litigated matters during my time at the Attorney General's Office. I no longer have records of the cases I litigated, which were primarily administrative appeals in the superior courts of eastern Washington. Because these matters are not published, they are not easily accessible. I was able to obtain only the limited case details provided below as they are accessible through a Westlaw search.

1. *In re Richie*, 127 Wash. App. 935 (2005) (Judge Brown, Judge Kato, and Judge Sweeney)

Petitioner Mr. Richie was in a car accident in Washington and transported to a medical center in Idaho. A Washington State Trooper investigated and, among other observations, smelled the odor of alcohol on Mr. Richie at the medical center. The trooper arrested Mr. Richie for driving under the influence of intoxicants at the Idaho medical center. A blood test then showed a blood alcohol content of .13. The Department of Licensing subsequently suspended Mr. Richie's driver's license. Mr. Richie appealed to the superior court where his license suspension was upheld. Mr. Richie appealed to the court of appeals arguing that his arrest by a Washington officer in Idaho was unlawful. The Court of Appeals clarified its holding in *City of Clarkston v. Stone*, 63 Wash. App. 500 (1991). "Considering the law and our unique facts, we clarify Clarkson and hold that pursuing Washington officers may effectuate a lawful arrest in Idaho for DUI if reasonable suspicion exists to believe the suspect may have been driving under the influence in Washington before the officer pursues the suspect into Idaho." Mr. Richie also argued that the phlebotomist was not qualified to draw his blood, pursuant to Revised Code of Washington 46.61.506, which permits a physician, registered nurse of qualified technician to draw blood. The court reasoned that a sworn report submitted by a law enforcement is prima facie evidence of compliance with the statute. Because Mr. Richie did not present evidence in rebuttal, the hearing officer did not err in finding the phlebotomist to be a qualified technician. Accordingly, the court of appeals upheld the Department's action. I briefed and argued this matter in the court of appeals on behalf of the Department.

Counsel for Appellant:

Scott Gallina
Currently incarcerated

Dates of representation: approximately 2004 – 2005

2. *Ingram v. Department of Licensing*, 162 Wash. 2d 514 (2007) (Justice Chambers, all

Justices concurred).

In this consolidated case challenging driver's license revocations, the respondent drivers contested the admissibility in administrative hearings of the state toxicologist's declarations, which established that approved thermometers had been used in the breath testing machines used to detect alcohol. The state of Washington's implied consent statute provides that anyone operating a motor vehicle in Washington has given implied consent to a breath or blood test of their alcohol content if the arresting officer has reasonable grounds to believe the person was driving under the influence of intoxicants. A breath test over the legal limit results in driver's license suspension. A person may challenge the test results in an administrative hearing. Under the statutory provision, the officer's sworn report and any accompanying evidence is admissible at the hearing without further evidentiary foundation. Pursuant to the Department of Licensing's (Department) rules, evidence is admissible if received prior to the end of the administrative hearing. At the administrative hearing, a hearing examiner considered the declarations and ultimately, suspended the drivers' licenses. The respondent drivers appealed their license suspensions to superior court, arguing that the toxicologist's declarations were not admissible under any of the relevant statutes or regulations. The superior court suppressed the breath test results and reversed the license revocations. The Department appealed. The supreme court granted review and agreed with the Department that relevant evidence, including hearsay, is admissible for purposes of driver's license revocation hearings. I represented the Department in the Washington State Supreme Court. I had the primary responsibility for drafting the briefing. My co-counsel presented the oral argument.

Co-counsel:

Jay Geck (retired)

Counsel for Appellant:

Kenneth Beckley (resigned)

Dates of representation: approximately 2006 – 2007

3. *Kabrick v. Employment Security Department, and Spo-Cab, Inc.*, 110 Wash. App. 1010 (2002) (Judge Brown, Judge Schultheis, and Judge Kato)

I represented the Employment Security Department (Department) in both Spokane County Superior Court and the Court of Appeals. The Department denied Ms. Kabrick unemployment benefits because it determined she was an independent contractor and failed to establish sufficient wage credits for an unemployment claim. Ms. Kabrick appealed the denial of benefits to an administrative law judge and commissioner of the Department and both affirmed the denial of benefits. Ms. Kabrick appealed to Superior Court where she argued she was an employee of Spokane Cabs. The Department argued that Ms. Kabrick did not perform personal services for Spokane Cabs or for its benefit.

Further, cab drivers were not paid wages; rather, Spokane Cabs merely facilitated the collection of fares. The fares belonged to the cab drivers. The Court of Appeals agreed with the Department's denial of unemployment benefits and reversed the Superior Court and remanded to the Department for further proceedings consistent with the decision.

Co-counsel:

Scott Smith
Stocker, Smith, Luciani & Staub
312 West Sprague Avenue
Spokane, WA 99201
(509) 327-2500

Counsel for Appellant:

Thomas Doran
8817 East Mission Avenue, Suite 201
Spokane Valley, WA 99212
(509) 777-0600

Dates of representation: approximately 2001 – 2002

4. *Lavarias v. Employment Security Department*, 111 Wash. App. 1030 (2002) (per curiam)

I represented the Employment Security Department (Department) in the Court of Appeals. Ms. Lavarias collected unemployment benefits while working as an aerobics instructor and personal trainer. The Department assessed an overpayment of benefits, finding that she was ineligible for unemployment because she was not able to, available for, and actively seeking work. An administrative law judge, commissioner of the Department, and superior court all affirmed the denial of benefits. Ms. Lavarias appealed to the court of appeals. The court of appeals agreed with the Department that Ms. Lavarias was not available for work because she limited her search to jobs that did not conflict with her personal trainer work, rather than, as required, actively seeking all work she was able to perform.

Appellant proceeded pro se

Dates of representation: approximately 2001 – 2002

5. *Markam Group, Inc. v Employment Security Department*, 148 Wash. App. 555 (2009) (Judge Sweeney, Judge Kulik, and Judge Korsmo)

I represented the Employment Security Department (Department) in both Spokane County Superior Court and the Court of Appeals in upholding the award of unemployment benefits to Ms. Monroe after she was discharged from employment with

the Markam Group. Ms. Monroe worked as a legal secretary. Ms. Monroe did not perform to the employer's expectations because of her inability to do so. After the Department granted benefits, an Administrative Law Judge affirmed the Department's award of benefits, and the Department's Commissioner affirmed the Administrative Law Judge. The employer appealed, arguing that it was error to require it to prove Ms. Monroe's conduct was intentional. The superior court agreed and reversed the award of benefits. On appeal, the court of appeals agreed with the Department that the employer must show Ms. Monroe's conduct was intentional to establish she committed misconduct. Here, the evidence did not support that she acted in willful or wanton disregard of the employer's interests or that she knowingly failed to perform her job duties.

Co-counsel:

Marcus Lampson
Unemployment Law Project
1904 3rd Avenue #604
Seattle, WA 98101
(206) 441-9178

Counsel for Markam Group:

Mark Kamitomo
421 West Riverside Avenue, #1060
Spokane, WA 99201
(509) 747-0902

Dates of representation: approximately 2008 – 2009

6. *Turnbow v Employment Security Department*, 162 Wash. App. 618 (2011) (Judge Sweeney, Judge Kulik, and Judge Brown).

I represented the Employment Security Department (Department) in both the Spokane County Superior Court and the Court of Appeals. A person must demonstrate availability for employment to be eligible for unemployment benefits while they are looking for work. The Department denied Ms. Turnbow unemployment benefits because she was self-employed, focused on establishing her business as an independent contractor and therefore unavailable for full time work. I argued this case before Judge Eitzen in Spokane County Superior Court who upheld the Department's denial of unemployment benefits to Ms. Turnbow. Ms. Turnbow appealed and prevailed in the Court of Appeals. The Court of Appeals reasoned that a self-employed person is eligible for unemployment benefits while pursing self-employment so long as the new business is contingent, and the person is available for work.

Appellant proceeded pro se

Dates of representation: approximately 2010 – 2011

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

    I served as Trustee for the Superior Court Judges' Association September 2021 to April 2022. I am on the Equality and Fairness Committee and serve as the liaison for the Legislative Committee. The Legislative Committee reviews, monitors, and recommends proposed legislation that affects statewide superior court operations. I have also served on the Ethics Committee which provides support and education on ethical issues to superior court judges. I served on the Racial Justice Consortium which consists of a group of statewide stakeholders committed to addressing structural racism in the legal system.

    I have not performed any lobbying activities nor registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I do not have any family members, other persons, parties, categories of litigation or financial agreements that are likely to present potential conflicts-of-interest. I will continually monitor my cases to evaluate any potential conflicts of interest on a case-by-case basis. If a conflict were to arise, I would address it in accordance with the Code of Conduct for United States Judges. When in doubt, I would err on the side of recusal.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would resolve any potential conflict of interest in accordance with 28 U.S.C. § 455, the Code of Conduct for United States Judges, any related laws, and advisory opinions.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a government employee and now judge, state ethics laws have limited my ability to engage in the practice of law outside my government service. I have served my community in other ways. I volunteered for the YMCA mock trial tournament and served as a judge for the Gonzaga Law School trial advocacy mock trial. I have mentored multiple law students while at the Attorney General's Office, Office of Administrative Hearings, and in Superior Court.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and

the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On March 1, 2021, I submitted my application to the bipartisan Judicial Merit Selection Committee established by Senators Maria Cantwell and Patty Murray. On March 25, 2021, I interviewed with the Judicial Merit Selection Committee. I was notified that my name was forwarded by the committee to the senator's office. On April 19, 2021, I interviewed with Senator Cantwell's representatives. On April 20, 2021, I interviewed with Senator Murray's representatives. On May 13, 2021, I interviewed with Senator Murray. Senator Murray's office notified me that my name was forwarded to the White House. On May 26, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 11, 2022, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for potential nomination to the Eastern District of Washington. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 19, 2022, my nomination was submitted to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Matthew Paul Brookman

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Southern District of Indiana

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   United States District Court for the Southern District of Indiana
   Winfield K. Denton Federal Building and United States Courthouse, Room 328
   101 Northwest Martin Luther King Junior Boulevard
   Evansville, Indiana 47708

4. **Birthplace**: State year and place of birth.

   1968; St. Louis, Missouri

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1990 – 1993, Washington University School of Law; J.D., 1993

   1986 – 1990, DePauw University; B.A., 1990

   1989, University of Essex, Colchester, United Kingdom; no degree received

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2016 – present
   United States District Court for the Southern District of Indiana

Winfield K. Denton Federal Building and United States Courthouse, Room 328
101 Northwest Martin Luther King Junior Boulevard
Evansville, Indiana 47708
United States Magistrate Judge

2002 – 2016
United States Department of Justice
Office of the United States Attorney, Southern District of Indiana
Winfield K. Denton Federal Building and United States Courthouse, Room 250
101 Northwest Martin Luther King Junior Boulevard
Evansville, Indiana 47708
Assistant United States Attorney

1999 – 2002
United States Department of Justice
Office of the United States Attorney, Western District of Missouri
Hammons Tower, Suite 500
901 St. Louis
Springfield, Missouri 65806
Special Assistant United States Attorney

1997 – 1999
Herzog, Crebs & McGhee, LLP
One City Centre, 24th Floor
St. Louis, Missouri 63101
Associate Attorney

1994 – 1997
Office of the Prosecuting Attorney of Jefferson County, Missouri
Jefferson County Courthouse
300 Main Street
Hillsboro, Missouri 63050
Assistant Prosecuting Attorney

1993 – 1994
Brown & James, P.C.
705 Olive Street, Suite 2400
St. Louis, Missouri 63101
Associate Attorney

Teaching Affiliations:

2011 – 2015
University of Evansville
Adjunct Professor, Constitutional Law
1800 Lincoln Avenue

Evansville, Indiana 47722

2010 – 2015
United States Department of Justice, National Advocacy Center
Instructor, Basic Criminal Trial Advocacy (2010 – 2015)
Lecturer, Sentencing Guidelines Seminar (2014)
1620 Pendleton Street
Columbia, South Carolina 29201

2008 – 2010
University of Southern Indiana
Adjunct Professor, Business Law
8600 University Boulevard
Evansville, Indiana 47712

2005 – 2011
Southern Indiana Law Enforcement Academy
Lecturer and Legal Curriculum Developer
100 Walnut Street
Evansville, Indiana 47708

Other Affiliations (uncompensated):

2022 – present
Judicial Conference of the United States
One Columbus Circle, Northeast
Washington, DC 20544
Member, Committee on Criminal Law

2021 – present
Evansville Bar Association
915 Main Street, Suite 108
Evansville, Indiana 47708
Board of Directors

2019 – present
Aldersgate United Methodist Church
5130 Lincoln Avenue
Evansville, Indiana 47715
Board of Trustees

2018 – present
Indiana Judges and Lawyers Assistance Program
201 North Illinois Street, Suite 950
Indianapolis, Indiana 46204
Member, Board of Directors

2006 – 2007
Evansville Vanderburgh County Methamphetamine Demand Reduction Initiative
United States Department of Justice
Office of the United States Attorney, Southern District of Indiana
Winfield K. Denton Federal Building and United States Courthouse, Room 250
101 Northwest Martin Luther King Junior Boulevard
Evansville, Indiana 47708
Co-Chairman

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I timely registered for selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   United States Department of Justice, Executive Office of United States Attorneys Director's Award, for Superior Performance as an Assistant United States Attorney – Criminal (2010)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   Evansville Bar Association, Board of Directors (2021 – present)

   Federal Magistrate Judges Association, Title Committee, Committee Member (2016 – present)

   Indiana Judges and Lawyers Assistance Program, Board of Directors (2018 – present)

   Seventh Circuit Judicial Council, Magistrate Judge Representative (2019 – 2021)

   Southern District of Indiana Local Rules Committee, Member (2016 – present)

   Southern District of Indiana Space and Facilities Committee, Member (2016 – present)

10. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Illinois, 1994
Indiana, 2002
Missouri, 1993

There have been no lapses in membership. I have been an inactive member of the Illinois bar since 1994, when I accepted a Missouri prosecutor position, and an inactive member of Missouri since 2002, when I accepted an AUSA position in the Southern District of Indiana.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Seventh Circuit, 2002
United States Court of Appeals for the Eighth Circuit, 1999
United States District Court for the Southern District of Indiana, 2002
United States District Court for the Eastern District of Missouri, 1994
United States District Court for the Western District of Missouri, 1999

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Aldersgate United Methodist Church, Member, Board of Trustees (2019 – present)

Evansville Vanderburgh County Methamphetamine Demand Reduction Initiative, Co-Chairman (2006 – 2007)

Phi Delta Theta Fraternity (1986 – present)
Active Member of DePauw University Chapter (1986 – 1990)
DePauw Chapter Scholarship Chair (1987)
DePauw Chapter Rush Chair (1988)

Sertoma Club of Springfield, Missouri (1999 – 2002)

Washington University School of Law Alumni Admissions Program, Volunteer (2006 – 2011)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Phi Delta Theta is an international college fraternity for men. None of the other organizations listed discriminate nor have previously discriminated to my knowledge on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Indemnity Between Consecutive Property Insurers with Progressive or Continuous Types of Loss, Newsletter of Missouri Org. of Defense Lawyers (1994). I am unable to locate a copy.

RUSSELL F. WATTERS, ROBERT W. COCKERHAM, MICHAEL B. MAGUIRE, & DAVID P. BUB, ARSON, FRAUD AND FIRST PARTY INSURANCE LAW, A GUIDE TO PROPERTY INSURANCE LAW AND PROCEDURES IN MISSOURI AND ILLINOIS (1994). I was a contributing author for portions of the guide. Copy of the portions which I contributed supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have searched my files and electronic databases in an effort to identify all events responsive to this question. I have located the events listed below, but it is possible that there are events that I have no record of and therefore was unable to identify.

May 18, 2022: Speaker, Gene Brooks Inns of the Court – State of the District Talk, United States District Court, Southern District of Indiana, Evansville, Indiana. Outline and data sheet supplied.

April 26, 2022: Presiding Judge, Naturalization Ceremony, Hine Hall, Indiana University-Purdue University Indianapolis, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

November 18, 2021: Panelist, Defense Trial Counsel of Indiana Annual Conference, French Lick, Indiana. Notes and outline supplied.

June 9, 2021: Speaker, Virtual Question and Answer with Indiana Supreme Court Interns, Indiana Supreme Court, Indianapolis, Indiana (virtual event). I engaged in a discussion about federal court practice and procedures with legal interns with the Indiana Supreme Court. I have no notes, transcript, or recording. The address for the Indiana Supreme Court is 251 North Illinois Street, Indianapolis, Indiana 46204.

May 13, 2021: Judge, National Mock Trial Competition, Indiana Bar Association, Indianapolis, Indiana (virtual event). I was the presiding judge in a high school mock trial event and provided feedback to the participants afterwards. I have no notes, transcript, or recording. The address for the Indiana Bar Association is 201 North Illinois Street, Suite 1225, Indianapolis, Indiana 46204.

April 28, 2021: Speaker, Federal Court Settlement Conferences – What to Do and Not to Do, Indiana Trial Lawyers Association Advanced Civil Mediation

Conference, Indianapolis, Indiana (virtual event). Notes and outline supplied.

February 22, 2021: Speaker, Washington University School of Law Judicial Appreciation Program, Washington University School of Law, St. Louis, Missouri (virtual event). I spoke to law students about careers in federal government and the courts. I have no notes, transcript, or recording. The address for Washington University School of Law is 1 Brookings Drive, St. Louis, Missouri 63130.

November 13, 2020: Panelist, Midwest Intellectual Property Summit Judges Panel, Indiana Continuing Legal Education Forum, Indianapolis, Indiana. Notes supplied.

February 8, 2020: Judge, Evansville Regional Mock Trial Championships, Evansville Bar Association, Evansville, Indiana. I was the presiding judge in a high school mock trial event and provided feedback to the participants afterwards. I have no notes, transcript, or recording. The address for the Evansville Bar Association is 915 Main Street, Suite 108, Evansville, Indiana 47708.

December 20, 2019: Presenter, Southern District of Indiana Case Statistics, Federal Civil Practice Seminar, Barnes & Thornburg LLP, Indianapolis, Indiana. Notes supplied.

December 18, 2019: Speaker, United States District Court Employee Recognition Awards and Luncheon, Indiana War Memorial, Indianapolis, Indiana. I spoke about the contributions of employees from the Evansville Division of the United States District Court for the Southern District of Indiana. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

June 6, 2019: Presiding Judge, Naturalization Ceremony, Indiana War Memorial, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

May 15, 2019: Classroom Speaker, Government and Court, John H. Castle Elementary School, Newburgh, Indiana. I spoke to 5th grade students about court, law, and government. I have no notes, transcript, or recording. The address for John H. Castle Elementary School is 3077 Indiana-261, Newburgh, Indiana 47630.

December 14, 2018: Panelist, Magistrate Judge Panel, Federal Civil Practice Seminar, Barnes & Thornburg LLP, Indianapolis, Indiana. I spoke about judicial mediation and settlement conferences in the Southern District of Indiana. I have

no notes, transcript, or recording. The address for Barnes & Thornburg LLP is 11 South Meridian Street, Indianapolis, Indiana 46204

July 18, 2018: Presenter, Employment Law, Indianapolis Bar Association Judicial Speaker Series, Indianapolis, Indiana. The memorandum on which I based my presentation is supplied.

June 20, 2018: Speaker, Field Trip for Indianapolis Area High School Seniors to the United States District Court, Indianapolis, Indiana. I spoke to high school students about the legal profession and role of judges. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

June 15, 2018: Panelist, Indianapolis Bar Association Bench and Bar Conference, Indianapolis Bar Association, Louisville, Kentucky. I spoke about practices and procedures in the Southern District of Indiana. I have no notes, transcript, or recording. The address for the Indianapolis Bar Association is 140 North Illinois Street, Indianapolis, Indiana 46204.

April 13, 2018: Speaker, Investiture Ceremony for Magistrate Judge Doris Pryor, United States District Court, Indianapolis, Indiana. I provided brief remarks about Judge Pryor's qualifications to be a magistrate judge. Recording supplied.

March 8, 2018: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

January 10, 2018: Speaker, Federal Court Practices, Evansville Bar Association New Lawyer Bootcamp, Evansville, Indiana. I spoke with new lawyers about the basics of appearing in federal court in civil cases in the Southern District of Indiana. I have no notes, transcript, or recording. The address for the Evansville Bar Association is 915 Main Street, Suite 108, Evansville, Indiana 47708.

December 7, 2017: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

November 3, 2017: Panelist, Magistrate Judges Roundtable Event, Federal Bar Association, Indianapolis Division, Indianapolis, Indiana. I answered questions and engaged in a discussion of the role of magistrate judges in the Southern District of Indiana. I have no notes, transcript, or recording. The address for the Federal Bar Association is 1220 North Fillmore Street, Suite 444, Arlington,

Virginia 22201.

October 5, 2017: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

August 17, 2017: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

August 4, 2017: Speaker, Evansville Bar Association Employment Law Section Meeting, Evansville, Indiana. I spoke about mediation and judicial settlement conferences in the employment law context. I have no notes, transcript, or recording. The address for the Evansville Bar Association is 915 Main Street, Suite 108, Evansville, Indiana 47708.

July 18, 2017: Panelist, Indianapolis Bar Association Bench Trial Skills Series: Conducting a Bench Trial, Indianapolis, Indiana. I answered questions and engaged in a discussion about the role of magistrate judges in the Southern District of Indiana. Outline with additional handwritten notes supplied.

March 14, 2017: Speaker, Bench and Bar Committee Meeting, Evansville Bar Association, Evansville, Indiana. I spoke about practices and court procedures in the Evansville Division of the United States District Court for the Southern District of Indiana. I have no notes, transcript, or recording. The address for the Evansville Bar Association is 915 Main Street, Suite 108, Evansville, Indiana 47708.

December 16, 2016: Speaker, Federal Civil Practice Seminar, Barns & Thornburg LLP, Indianapolis, Indiana. I discussed particulars of civil practice and procedure in the Southern District of Indiana. I have no notes, transcript, or recording. The address for Barnes & Thornburg LLP is 11 South Meridian Street, Indianapolis, Indiana 46204.

September 30, 2016: Speaker, Employment Law Section Meeting, Evansville Bar Association, Evansville, Indiana. I introduced myself to lawyers in the Employment Section and spoke about my legal background. I have no notes, transcript, or recording. The address for the Evansville Bar Association is 915 Main Street, Suite 108, Evansville, Indiana 47708.

July 14, 2016: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and

administered the Oath of Citizenship to new citizens. I have no notes, transcript, or recording. The address for the United States District Court for the Southern District of Indiana is 46 East Ohio Street, Indianapolis, Indiana 46204.

April 20, 2016: Honoree, Investiture Ceremony for Magistrate Judge Matthew Brookman, United States District Court, Evansville, Indiana. Partial transcript supplied.

April 14, 2016: Presiding Judge, Naturalization Ceremony, United States District Court, Indianapolis, Indiana. I made brief comments on the occasion and administered the Oath of Citizenship to new citizens. Notes supplied.

May 2015: Speaker, Federal Firearms Crimes Training, Marion County Prosecutor's Office, Indianapolis, Indiana. I discussed federal statutes pertaining to firearms offenses and policies with respect to prosecuting firearms offenses in federal court. I have no notes, transcript, or recording. The address for the Marion County Prosecutor's Office is 251 East Ohio Street, Suite 160, Indianapolis, Indiana 46204.

May 2012: Speaker, Pharmaceutical Overdose Death Investigation Seminar, Drug Enforcement Agency, Greensburg, Indiana, Greensburg Community High School. I discussed federal statutes pertaining to crimes involving drug overdoses and cases prosecuted in federal court in the Southern District of Indiana. I have no notes, transcript, or recording. The address for the Greensburg Community High School is 1000 East Central Avenue, Greensburg, Indiana 47240.

June 2011: Keynote Speaker, Graduation, Southwest Indiana Law Enforcement Academy, Evansville, Indiana, Evansville Civic Center. I made congratulatory remarks to the graduates and gave advice for a successful career in law enforcement. I have no notes, transcript, or recording. The address for the Southwest Indiana Law Enforcement Academy is 100 Walnut Street, Evansville, Indiana 47708.

July 2011: Speaker, "Federal Firearms Crimes," United States Attorney's Law Enforcement Conference, Indianapolis, Indiana. I discussed federal firearms statutes and the prosecution of firearms offenses in the Southern District of Indiana. I have no notes, transcript, or recording. The address for the United States Attorney's Office is 10 West Market Street, Suite 2100, Indianapolis, Indiana 46204.

2010 to 2015 (specific dates unknown): Instructor, United States Department of Justice National Advocacy Center, Columbia, South Carolina, for the Basic Criminal Trial Advocacy course and Federal Sentencing Guidelines Seminar I have no notes, transcripts or recordings. The Address for the National Advocacy Center is 1620 Pendleton Street, Columbia, SC 29201.

2010 (specific date unknown): Guest Speaker, Evansville Downtown Optimist Club, Evansville, Indiana. I discussed the history of the United States Attorney's Office for the Southern District of Indiana branch office in Evansville. I have no notes, transcript, or recording. The address for the Evansville Downtown Optimist Club is 6 Walnut Street, Evansville, Indiana 47713.

2006 (specific date unknown): Guest Speaker, "Methamphetamine and Child Endangerment," Youth Resources of Southwestern Indiana, Evansville, Indiana. I discussed the effects on children of methamphetamine trafficking and illicit use. I have no notes, transcript, or recording. The address for Youth Resources of Southwestern Indiana is 4451 North First Avenue, Evansville, Indiana 47710.

2005 (specific date unknown): Lecturer, "Methamphetamine Investigation Management Workshop," Evansville Police Department, Evansville, Indiana. I discussed basic concepts of investigating federal methamphetamine cases. I have no notes, transcript, or recording. The address for the Evansville Police Department is 401 East Columbia Street, Evansville, Indiana 47711.

2005 (specific date unknown): Lecturer, "Evidence," Southwest Indiana Law Enforcement Academy, Evansville, Indiana. I have no notes, transcript or recording. The address for the Southwest Indiana Law Enforcement Academy is 100 Walnut Street, Evansville, IN 47708.

1997 (specific date unknown): Lecturer, "Criminal and Civil Legal Aspects of Arson Investigation," Department of Fire Sciences, Jefferson College, Hillsboro, Missouri. I lectured on legal concepts related to arson investigation. I have no notes, transcript, or recording. The address for Jefferson College is 1000 Viking Drive, Hillsboro, Missouri 63050.

1997 (specific date unknown): Lecturer, "Effective Testimony in Driving While Intoxicated Cases," Jefferson County Police Academy, Hillsboro, Missouri. I discussed ways for law enforcement officers to be an effective witness during a motor vehicle intoxicated driving case. I have no notes, transcript, or recording. The address for the Jefferson County Police Academy is 4400 Jeffco Boulevard, Arnold, Missouri 63010.

1997 (specific date unknown): Lecturer, "Coordination Between Insurers and Law Enforcement in Arson and Fraud Investigations," St. Louis Chapter of the Association of Special Investigation Units, St. Louis, Missouri. I discussed legal aspects related to overlap between civil and criminal investigations of structure fires. I have no notes, transcript, or recording. The address for the St. Louis Chapter of the Association of Special Investigation Units is 13 Executive Drive, Suite 4, Fairview Heights, Illinois 62208.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these

interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Marisa Patwa, *Local man sentenced for role & die in retail theft ring*, The Standard (Apr. 20, 2017). Copy supplied.

On January 5, 2017, I was interviewed telephonically by Mark Wilson of the Evansville Courier & Press regarding sentencing statistics. I do not have a transcript or recording and to my knowledge there was no resulting article.

Rozlyn Fulgoni-Britton, *Magistrate Judge Matthew P. Brookman*, The Circuit Rider (Apr. 2016). Copy supplied.

Mark Wilson, *Evansville man sentenced on federal firearms charge*, Courier & Press (Jan. 25, 2016). Copy supplied.

Prosecutor: 50-plus warrants issued in Evansville meth ring, Associated Press State Wire: Indiana (Feb. 6, 2015). Copy supplied.

Press Release, United States Attorney's Office, United States Attorney's Office announces sentencing of former redevelopment commission member (Jan. 29, 2015). Copy supplied.

2 inmates get extended sentences after murder, Tribune-Star (Oct. 27, 2014). Copy supplied.

Press Release, United States Attorney's Office, Inmate Convicted of Murder at Terre Haute Federal Correctional Facility (June 18, 2014). Copy supplied.

More Than 2 Dozen Arrested in Crackdown on Evansville-Area Criminal Organization, US Fed News (Jan. 31, 2014). Copy supplied.

Hogsett Announces Federal Indictment of Methamphetamine Scheme Involving 'Smurfing', Targeted News Service (Sept. 7, 2013). Copy supplied.

Hogsett Announces Federal Firearms Charges Against Bartholomew County Resident, US Fed News (June 20, 2013). Copy supplied.

Hogsett Announces Additional Charges Against Redevelopment Commission Member, Targeted News Service (June 1, 2013). Copy supplied.

Hogsett Announces Indictment of Four on Federal Drug, Firearm Charges, US Fed News (July 28, 2012). Copy supplied.

Press Release, Federal Bureau of Investigation, Indianapolis Division, Hogsett Announces Conviction of Terre Haute Federal Inmate for First-Degree Murder

(Apr. 11, 2012). Copy supplied.

Hogsett Announces Southern Indiana Man Receives Ten Year Sentence for Trafficking More than One Ton of Marijuana, Targeted News Service (Dec. 21, 2011). Copy supplied.

Defendant Given 20 Years for Evansville Drug Conspiracy and Illegal Use of Gun, Targeted News Service (Aug. 2, 2011). Copy supplied.

Evansville Man Sentenced to Ten Years for Drug Conspiracy, Targeted News Service (Aug. 2, 2011). Copy supplied.

Matt Thacker, *Marijuana trafficking ring busted in Southern Indiana*, News and Tribune (May 26, 2011). Copy supplied.

Matt Thacker, *Local police to get help from federal prosecutor*, News and Tribune (Apr. 5, 2011). Copy supplied.

Fugitive Sentenced For Possession of Methamphetamine and for Failure to Appear for Trial, US Fed News (Nov. 20, 2010). Copy supplied.

Will Taylor, *Second Richmond Crack Cocaine Dealer Sentenced To Life Without Parole*, US Fed News (Apr. 6, 2010). Copy supplied.

Federal charges leveled, The Herald (Feb. 5, 2010). Copy supplied.

Jennifer Rigg, *Eight Clarksville residents arrested in drug ring*, News and Tribune (Nov. 22, 2006). Copy supplied.

Drug Crime Spree, Associated Press Archive (June 14, 2006). Copy supplied.

Larry Pynn and Lori Culbert, *B.C. Hells Angels Indicted In $20-Million U.S. Pot Case*, The Vancouver Sun (Mar. 4, 2004). Copy supplied.

Phil Sutin, *Committee Opposes 499-Foot Tower Proposed For Spanish Lake*, St. Louis Post-Dispatch (July 8, 1999). Copy supplied.

Robert Kelly, *Man Convicted of Murder in Drunken-Driving Crash*, St. Louis Post-Dispatch (Oct. 23, 1997). Copy supplied.

Robert Kelly, *Affton Man Gets 4 Life Terms in Fatal Fight Alongside Road*, St. Louis Post-Dispatch (Sept. 23, 1997). Copy supplied.

Monte Reel, *Woman Guilty of Theft – Ex-Secretary Claimed Boss Made Her Take $16,800 From Ambulance District*, St. Louis Post-Dispatch (Apr. 14, 1997). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Since 2016 I have served as a United States Magistrate Judge on the United States District Court for the Southern District of Indiana. I was appointed to this position by the judges of the District.

The United States District Court for the Southern District of Indiana has jurisdiction over civil matters raising federal questions, civil matters with diversity of citizenship, and federal criminal matters. As a magistrate judge, I serve as a judicial officer of the district court conducting a range of judicial proceedings to expedite the disposition of civil cases, including procedural hearings, discovery and non-dispositive motions, and settlement conferences. In this district, settlement conferences are the standard form of alternative dispute resolution. Where the parties consent to magistrate judge jurisdiction, I am authorized to preside over the entire civil case. In criminal matters, I oversee initial proceedings including the issuance of search warrants, arrest warrants and summonses, appointing attorneys for indigent individuals, conducting initial appearance and probable cause hearings, determining conditions of release or detention under the Bail Reform Act, conducting supervised release violation hearings, and conducting international extradition proceedings. In addition, I handle criminal cases that involve petty offenses and misdemeanor charges.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over ten trials: six jury trials and four bench trials, all of which were in civil matters.

i. Of these cases, approximately what percent were:

jury trials:	60%
bench trials:	40%

ii. Of these cases, approximately what percent were:

civil proceedings:	100%
criminal proceedings:	0%

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list of opinions.

c. For each of the 10 most significant cases over which you presided, provide: (1) a

capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Bell et al. v. Pension Comm. of ATH Holding Co., LLC, et al.*, 1:15-cv-2062-TWP-MPB (S.D. Ind.)

Plaintiff participants in the Anthem 401(k) Plan sued alleged fiduciaries to the Plan under the Employee Retirement Income Security Act. Plaintiffs alleged that Defendants allowed unreasonable expenses to be charged to participants for administration of the Plan. I resolved numerous discovery disputes, including (1) disputes over redactions for relevancy (S.D. Ind. Nov. 9, 2016) (Docket No. 73); (2) issues involving work-product doctrine, 330 F.R.D. 517 (S.D. Ind. 2018); and (3) taking out-of-time depositions (S.D. Ind. Aug. 16, 2018) (Docket No. 197). The opinions not reported are supplied. The case resolved via settlement in a conference I conducted and a class action settlement was approved by the district judge.

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2. *Heston v. Intern'l Med. Grp., Inc., et al.*, No. 1:20-cv-00479-JRS-MPB

Plaintiff brought this action against his health insurance carrier for denied coverage under a "pre-existing conditions exclusion clause." I granted the insurer's motion to strike Plaintiff's jury trial demand on the basis of waiver. 477 F. Supp. 3d 829 (S.D. Ind. Aug. 6, 2020). The case was then reassigned to Magistrate Judge Mario Garcia as part of a random assignment of cases to the new magistrate judge. The case was ultimately dismissed on Plaintiff's motion by the presiding district judge.

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3. *In Re: Estate of Simmons, Deceased*, 1:15-cv-01097-TWP-MPB

The United States removed this state court probate action to federal court because it involved a residence encumbered by a federal tax lien. I issued a report and recommendation on competing motions related to the parties' claim priorities. Specifically, I found that the federal tax liens had priority over the other claims under 26 U.S.C. § 6321. 2017 WL 2800194 (S.D. Ind. May 22, 2017). The district judge adopted my recommendation and concluded that the Federal Tax Lien Act, rather than the Federal Priority Statute, governs whether the Government tax liens have preference to the proceeds from the encumbered property. 2017 WL 3261781 (S.D. Ind. July 31, 2017). The case was then closed by the district judge on an order to distribute funds.

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Current contact information unknown

4. *HNA Sweden Hospitality Management AB et al. v. Equities First Holdings, LLC, et al.*, 1:19-cv-2452-JRS-MPB

This was an international commercial dispute involving loan and stock pledge and transfer agreements. Plaintiff entered into a pledge agreement under which Defendant would loan funds to Plaintiff and Plaintiff, in turn would pledge stock as security. In total, there were twelve stock transfers totaling over $31 million as collateral for an aggregate loan principal amount of $67 million. The pledged stock was subsequently delisted, and the lawsuit ensued. I resolved a number of discovery disputes, both by telephonic conference and on motion practice (S.D.

Ind. Nov. 1, 2021) (Docket No. 257). Opinion supplied. I also engaged in numerous mediation attempts and was ultimately successful in resolving all claims at a settlement conference.

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5. *Agrolipetsk, LLC v. Mycogen Seeds et al.*, 1:16-cv-3414-SEB-MPB

This case involved a breach of contract claim stemming from an international grain dispute. A foreign limited liability company sued a Delaware limited liability company for an allegedly defective variety of hybrid sunflower seed. Following dismissal without prejudice of its first amended complaint on Defendants' motion for judgment on the pleadings, Agrolipetsk moved for leave to file a second amended complaint. I found that Plaintiff's proposed amended complaint would not survive a motion to dismiss for failure to state a claim on which relief could be granted, and denied the motion as futile. In relevant part, I

ruled that the case's nexus with Indiana was too thin to overcome the presumption against extraterritoriality and to satisfy the requirements of due process, barring the application of Indiana law to the conduct complained of. (S.D. Ind. Nov. 1, 2017) (Docket No. 46). Opinion supplied. Plaintiff appealed my ruling to the district judge, which sustained in part and overruled in part the Plaintiff's appeal. The district judge sustained the Plaintiff's objections as to the Defendants' extraterritoriality defenses, finding that the Plaintiff had adequately pleaded its contractual and tortious claims in such a way that extraterritorial issues did not apply. 2018 WL 4574335 (S.D. Ind. Sept. 25, 2018). I then mediated the case to a full settlement.

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6. *Carmel Indy Holdings, LLC v. St. Vincent Health*, 1:18-cv-2567-SEB-MPB

Plaintiff filed this suit based on a commercial lease agreement, alleging that it was a successor in interest to all Landlord rights and interests contained in the lease, and was the owner of the real property and office building occupied by Defendant. Plaintiff alleged that Defendant continued to occupy the premises after the lease's expiration without the appropriate consent and, thus, was a holdover tenant. Defendant argued it remained in a month to month agreement. I denied Defendant's request to strike portions of the amended complaint. 2019 WL 1358836 (S.D. Ind. Mar. 1, 2019). I then mediated the case to a full settlement.

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7. *American Seeds, LLC v. Daily Feed & Grain, LLC*, 1:16-cv-00371-MPB-JMS

Plaintiff, a seed supplier, sued Defendant, its seed dealer, over a dispute as to whether a document released the dealer from past account liability. The supplier alleged that the dealer owed monetary damages for action on the account, breach of contract, unjust enrichment, and theft. Defendant filed a counterclaim for fraud and conversion. Each side moved for summary judgment. I granted Plaintiff supplier's motion as to the Defendant dealer's counterclaims and notified the parties of my intent to enter summary judgment in favor of the Defendant as to Plaintiff's action on the account and unjust enrichment claims. After no objection was filed, I granted summary judgment as to these two claims. 2018 WL 397238 (S.D. Ind. Jan. 12, 2018). I held a bench trial in April 2018 and ultimately found in favor of the dealer on all remaining claims. 2018 WL 10246996 (S.D. Ind. Nov. 29, 2018)

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8. *Sturm v. Hedges*, 1:14-cv-00848-MPB-RLY

This was a 42 U.S.C. § 1983 action brought by the Plaintiff against two officers involved in the Plaintiff's arrest, in which he argued that Defendants violated his Fourth Amendment rights, and alleged battery, malicious prosecution, and negligence claims against the various Defendants. After the district judge granted in part and denied in part the Defendants' motions for summary judgment, only Plaintiff's § 1983 Fourth Amendment claims for false arrest/false imprisonment and excessive force against one of the officers remained. The parties consented to my jurisdiction for the remainder of the case, which concluded by way of a three-day jury trial. The jury found in favor of the remaining Defendant for all claims.

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9. *Eppert v. Collins et al.*, 1:18-cv-02105-MPB-JMS

Plaintiff alleged that the Defendant insured party negligently collided with her motor vehicle while the insured was operating a commercial motor vehicle in the course of his employment with TMC Transportation. Plaintiff alleged the collision resulted in damages, including damages for medical expenses. She also claimed large future medical costs and procedures. The insurer argued that it was undisputed that Plaintiff suffered from a number of pre-existing conditions and, thus, sought an order for a Rule 35 examination. I granted the request and set several parameters on the examination based on counsels' argument. Copy supplied. In discovery Defendants received Plaintiff's medical records, which included a medical provider's note indicating that Plaintiff had taken a pre-settlement loan. Defendants sought the loan document(s) be produced. I analyzed the relevant case law and ordered an *in camera* review of the loan documents. 2020 WL 12708676 (S.D. Ind. Dec. 22, 2020). The case ultimately settled prior to my ruling on the *in camera* review.

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10. *Figgs et al. v. GEO Group, Inc.*, 1:18-cv-00089-MPB-TWP

Mr. Figgs and Mr. Corbin, proposed class representatives who were incarcerated on state court convictions, filed this putative class action complaint asserting that GEO Group, which contracts with the Indiana Department of Correction to operate the New Castle Correctional Facility, committed labor trafficking, discrimination, cruel and unusual punishment, false imprisonment, confinement, unjust enrichment, and negligence. In its answer GEO included the affirmative defense that Plaintiffs failed to exhaust their remedies before filing the suit, as required by the Prison Litigation Reform Act. On expedited briefing on this threshold defense, I found that the Plaintiffs had not exhausted their remedies. I also denied the Plaintiffs' motion to amend their complaint as futile. 2019 WL 7584297 (S.D. Ind. Dec. 12, 2019).

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Metro Fibernet, LLC v. Johnson Controls, Inc.*, 3:21-cv-00059-RLY-MPB, 2022 WL 1492514 (S.D. Ind. Apr. 22, 2022).

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2. *Rexing Quality Eggs v. Rembrandt Enters.*, 3:17-cv-00141-JMS-MPB, 2021 U.S. Dist. LEXIS 240544 (S.D. Ind. Dec. 16, 2021).

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3. *HNA Sweden Hospitality Mgmt. AB v. Equities First Holdings, LLC.*, 1:19-cv-02452-JRS-MPB (S.D. Ind. Nov. 1, 2021) (Docket No. 257). Copy supplied.

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4. *In Re: Midwestern Pet Foods Marketing, Sales Practices and Product Liability Litigation*, 3:21-cv-00007-RLY-MPB (S.D. Ind. Aug. 10, 2021). Copy supplied.

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5. *Heston v. Intern'l Med. Grp., Inc.*, 477 F. Supp. 3d 829 (S.D. Ind. Aug. 6, 2020).

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6. *Eppert v. Collins*, 1:18-cv-2105-MPB-JMS (S.D. Ind. June 15, 2020) (Docket No. 57). Copy supplied.

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7. *Figgs v. Geo Grp.*, 1:18-cv-00089-MPB-TWP, 2019 WL 7584297 (S.D. Ind. Dec. 12, 2019).

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8. *Am. Seeds, LLC v. Daily Feed & Grain, Inc.*, 1:16-cv-00371-MPB-JMS, 2018 WL 10246996 (S.D. Ind. Nov. 29, 2018).

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9. *Bell v. Pension Comm. Of ATH Holding Co., LLC*, 1:15-cv-02062-TWP-MPB, 330 F.R.D. 517 (S.D. Ind. 2018).

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10. *In re: Simmons Estate*, 1:15-cv-01097-TWP-MPB, 2017 WL 2800194 (S.D. Ind. May 22, 2017), *adopted by*, 2017 WL 3261781 (S.D. Ind. July 31, 2017).

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e. Provide a list of all cases in which certiorari was requested or granted.

Unless it is a direct appeal to the Supreme Court, I am not officially notified when certiorari is sought in one of my cases. I have searched electronic databases to determine whether certiorari was requested or granted in any of my cases.

My research has revealed that a party requested certiorari in the following cases to which I was assigned.

White v. St. Lawrence Catholic Schools, No. 1:20-cv-01129-RLY-MPB, 2020 WL 8258531 (S.D. Ind. July 9, 2020), *appeal dismissed*, 2020 WL 8260313 (7th Cir. Oct. 29, 2020), *cert. denied*, 141 S. Ct. 1273 (Jan. 25, 2021)

Daza v. State of Indiana, No. 1:18-cv-02951-JMS-MPB, 432 F. Supp. 3d 860 (S.D. Ind. Jan. 10, 2020), *aff'd*, 2 F.4th 681 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 763 (Jan. 10, 2022)

Addison v. State of Indiana, No. 1:18-cv-01104-TWP-MPB (S.D. Ind. May 16, 2018) (Docket No. 7), *appeal dismissed*, 2018 WL 11297910 (7th Cir. Oct. 17, 2018), *cert. denied*, 140 S. Ct. 69 (Oct. 7, 2019), *rehearing denied*, 140 S. Ct. 929 (Jan. 13, 2020)

United States v. McLain, No. 1:18-cv-00354-SEB-MPB-1 (S.D. Ind. Sept. 29, 2020) (Docket No. 75), *aff'd*, 849 F. App'x 590 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 784 (Jan. 10, 2022)

Walton v. First Merchants Bank, No. 1:17-cv-1888-SEB-MPB, 2019 WL 11664412 (S.D. Ind. Nov. 25, 2019), *subsequent determination*, 2020 WL 208806 (S.D. Ind. Jan. 14, 2020), *motion for relief from judgment denied*, 2021 WL 2168917 (S.D. Ind. May 27, 2021), *appeal dismissed*, No. 21-865, 2021 WL 5871908 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 863 (Jan. 18, 2022)

Walton v. First Merchants Bank, No. 1:17-cv-018888-JMS-MPB, 2018 WL 8460234 (S.D. Ind. Nov. 28, 2018), *vacated and remanded*, 820 F. App'x 450 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 626 (Oct. 19, 2020), *rehearing denied*, 141 S. Ct. 949 (Dec. 7, 2020)

Richards v. Par, Inc., No. 1:17-cv-00409-TWP-MPB, 2018 WL 3426260 (S.D. Ind. July 16, 2019), *reconsideration denied*, 2018 WL 6804008 (S.D. Ind. Dec. 27, 2018), *rev'd and remanded*, 954 F.3d 965 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 670 (Nov. 2, 2020)

Straw v. Ind. Supreme Ct., No. 1:15-cv-01015-RLY-MPB (S.D. Ind. Feb. 20, 2018) (Docket No. 64), *appeal dismissed by*, 2018 WL 11339376 (7th Cir. Mar. 27, 2018), *cert. denied*, 138 S. Ct. 2009 (May 14, 2018)

Hurt v. Vantlin, No. 3:14-cv-00092-JMS-MPB, 2017 WL 1021396 (S.D. Ind. Mar. 16, 2017), *aff'd in part, rev'd in part sub nom. Hurt v. Wise*, 880 F.3d 831 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 412 (Oct. 29, 2018)

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

The Seventh Circuit reversed, or vacated, and remanded my rulings in the following five cases.

Watters v. Homeowners' Assoc. at Preserve at Bridgewater, 2019 WL 6213165 (S.D. Ind. Nov. 21, 2019), *vacated in part*, 48 F.4th 779, 2022 WL 4128529 (7th Cir. 2022). Husband and wife, African American property owners, one of whom was diagnosed with post-traumatic stress disorder, brought action against homeowners association and several of their neighbors, including two spouses who were president and former president of the association, alleging race discrimination and failure to accommodate in violation of the Fair Housing Act (FHA) and Civil Rights Act provisions protecting equal property rights. I granted summary judgment in favor of Defendants and the property owners appealed. The Seventh Circuit's majority opinion held that fact issues precluded summary judgment in FHA race discrimination claim against the two spouses, thus vacating in part the judgment as to the FHA claim and the § 1982 claim against those Defendants, but affirmed in all other respects.

Ray v. Berryhill, 1:17-cv-01322-MPB-JMS, Dkt. 34 (S.D. Ind. Apr. 9, 2018), *vacated and remanded*, 915 F.3d 486 (7th Cir. 2019). The Seventh Circuit vacated my affirmance of the ALJ's disability decision. The judgment was vacated and remanded to the district court with instructions to remand the case to the agency for further proceedings. Findings, originally given orally, supplied.

McHenry v. Berryhill, 1:16-cv-03425-MPB-WTL, Dkt. 37 (S.D. Ind. Feb. 9, 2018), *vacated*, 911 F.3d 866 (7th Cir. 2018). The Seventh Circuit vacated my affirmance of the ALJ's disability decision. Findings, originally given orally, supplied.

Brinley v. Colvin, 1:16-cv-00360-MPB-TWP, Dkt. 23 (S.D. Ind. Feb. 9, 2017), *remanded*, 732 F. App'x 461 (7th Cir. 2018). The Seventh Circuit remanded the case for further proceedings after I affirmed the ALJ's denial of disability benefits. Findings, originally given orally, supplied.

Huber v. Saul, 1:16-cv-01947-MPB-TWP, Dkt. 23 (S.D. Ind. May 3, 2017), *rev'd and remanded*, 732 F. App'x 451 (7th Cir. 2018). The Seventh Circuit reversed and remanded my affirmance of the ALJ's denial of disability benefits. Findings, originally given orally, supplied.

The presiding district judge within the Southern District of Indiana sustained objections to reports and recommendations and/or orders I issued in the following six cases.

Deborah H. v. Kijakazi, No. 1:20-cv-03201-SEB-MPB, 2022 WL 6257746 (S.D. Ind. May 24, 2022), *rejected in part*, 2022 WL 4591449 (S.D. Ind. Sept. 30, 2022). In a report and recommendation, I recommended that the Social Security

Commission's denial of disability benefits be affirmed. The district judge overruled a number of objections, but sustained an objection with regards to the ALJ's mental subjective symptom evaluation.

Wells v. The Freeman Company and Vaughn, No. 3:21-cv-00047-JRS-MPB, Dkt. 95 (S.D. Ind. Jan. 20, 2022). Copies supplied. I granted in part and denied in part the Plaintiff's motion to compel discovery. Plaintiff appealed and the district judge sustained in part, requiring an updated privilege and work-product privilege log.

Hurt v. Vantlin, No. 3:14-cv-00092-JMS-MPB, 2019 WL 8266867 (S.D. Ind. July 30, 2019), *rejected in part*, 2019 WL 3980759 (S.D. Ind. Aug. 23, 2019). The presiding district judge referred the parties' competing Statements of Remaining Claims following an interlocutory appeal to the Seventh Circuit Court of Appeals. I reviewed the parties' filings and recommended five counts remain for trial by various Plaintiffs and against various Defendants. Each party objected to the Report and Recommendations. While the district judge overruled the majority of the objections, it sustained an objection where Plaintiff inadvertently left a Fourth Amendment claim off of her Statement of Claims.

Walton v. First Merchs. Bank, 1:18-cv-01888-JMS-MPB, Docket No. 125 (Aug. 6, 2018). On August 3, 2018, I held a hearing on a number of outstanding discovery disputes in this lawsuit involving a pro se litigant's lawsuit related to several accounts she held at Defendant. Plaintiff objected. While the District Judge overruled the majority of the objections, it sustained an objection regarding attorneys' fees under Rule 37(a)(5)(A) and (B) to the extent that it directed that I make a finding if any other circumstance made the award of expenses unjust when considering the Defendants' motions for attorneys' fees. *See Walton v. First Merchs. Bank*, 2018 U.S. Dist. LEXIS 193092, at *14 (S.D. Ind. Nov. 13, 2018). On February 5, 2019, I found that no other circumstances made the award of expenses unjust and awarded $13,108.00 in fees to Defendant under Rule 37. (Docket No. 199). The District Judge affirmed the award. (Docket No. 209). Order on Discovery Conference, Order on Attorneys' Fees, and Order Affirming Attorneys' Fees supplied.

Leason v. Berryhill, 1:17-cv-00091-TWP-MPB, 2018 WL 3195162 (S.D. Ind. Feb. 12, 2018). In a report and recommendation, I recommended that the Social Security Commission's denial of disability benefits be remanded on a number of grounds. The District Court found no reversible error on the basis of any of the Commissioner's objections and adopted the report and recommendation. However, in doing so, the District Court criticized my reasoning regarding the consultative examiner, finding that a reasonable mind could find that the ALJ relied on substantial evidence in assessing the examiner's opinion.

Agrolipetsk, LLC v. Seeds, 1:16-cv-03414-SEB-MPB, Dkt. 46 (S.D. Ind. Nov. 1, 2017), *rejected*, 2018 WL 4574335 (S.D. Ind. Sept. 25, 2018). Copy supplied. I

denied Plaintiff's motion for leave to file amended complaint. In part, I ruled that the case's nexus with Indiana was too thin to overcome the presumption against extraterritoriality and to satisfy the requirements of due process, barring the application of Indiana law to the conduct complained of. Plaintiff appealed my ruling to the district judge, which sustained in part and overruled in part the Plaintiff's appeal. The district judge sustained the Plaintiff's objections as to the Defendants' extraterritoriality defenses, finding that the Plaintiff had adequately pleaded its contractual and tortious claims in such a way that extraterritorial issues did not apply. 2018 WL 4574335 (S.D. Ind. Sept. 25, 2018).

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

To the best of my knowledge, when I issue a Memorandum Opinion or Order via the court's electronic filing system (CM/ECF), the publishing services decide regarding whether to report any such decision in the Federal Supplement or merely make it available electronically, as an unpublished decision. To the extent that I have issued decisions that have not been posted and picked up by the publishing services, these decisions are maintained in the Court's CM/ECF system. I estimate that 98 percent of the decisions I have issued have not been published in the Federal Supplement.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

I have not authored any significant opinions on federal or state constitutional issues.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you

recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The United States District Court for the Southern District of Indiana has a system that flags newly assigned cases based on recusal criteria that each judge identifies. This system permits a judge to identify potential conflicts ex ante, and then decide whether to recuse sua sponte in a newly assigned case. A litigant has never requested my recusal.

After reviewing the Code of Conduct for United States Judges, I determined to recuse myself sua sponte in cases involving entities in which I have a financial interest as a stockholder.

In addition, I have hired the accounting firm of Riney Hancock CPAs for tax return preparation and judicial financial disclosure report preparation. Due to this relationship, I determined that my impartiality might reasonably be questioned and I returned the matter of *Michael v. Riney Hancock*, 3:19-cv-157-RLY-MJD, to the Clerk's Office for reassignment.

In addition, as a United States magistrate judge, I have and continue to recuse myself from cases with which I was involved as a federal prosecutor, either as the assigned Assistant United States Attorney or as a supervisor. I determined that from my prior involvement with the case, my impartiality might reasonably be questioned and that this issue was incurable.

I returned the following cases to the Clerk's Office for reassignment:

United States v. Bybee, 3:05-cr-15-RLY-CMM
United States v. Boyd, 3:06-cr-37-RLY-CMM
United States v. *Nelson*, 3:16-CR-21-RLY-CMM
United States v. *Clay et al.*, 3:16-cr-39-RLY-CMM
United States v. Robinson et al., 3:16-cr-40-RLY-CMM
United States v. Walker et al., 3:16-cr-41-RLY-CMM
United States v. Clark, 3:16-cr-44-RLY-CMM
United States v. Clark, 3:16-cr-45-RLY-CMM
United States v. Clay, 3:16-cr-46-RLY-CMM
United States v. Jones, 3:17-cr-2-RLY-CMM
United States v. Lamont, 3:17-cr-5-RLY-CMM
United States v. Somers, 3:18-cr-36-RLY-CMM
United States v. Mobley et al., 3:18-cr-39-RLY-CMM

United States v. Pam, 3:18-cr-43-RLY-CMM
United States v. Lane, 3:01-cr-3-RLY-CMM
United States v. Davis et al., 3:02-cr-2-RLY-CMM
United States v. Colbert, 3:02-cr-18-RLY-CMM
United States v. Hertzberger, 3:03-cr-20-RLY-CMM
United States v. Ramirez et al., 3:04-cr-7-RLY-CMM
United States v. Correa et al., 3:04-cr-14-RLY-CMM
United States v. Bender et al., 3:04-cr-17-RLY-CMM
United States v. McCarthan, 3:04-cr-18-RLY-CMM
United States v. Goodwin et al., 3:04-cr-19-RLY-CMM
United States v. Lovell, 3:06-cr-29-RLY-CMM
United States v. Drumm et al., 3:06-cr-36-RLY-CMM
United States v. Williams, 3:06-cr-37-RLY-CMM
United States v. Payne, 3:06-cr-38-RLY-CMM
United States v. Kemp, 3:06-cr-46-RLY-CMM
United States v. Toribio et al., 3:07-cr-4-RLY-CMM
United States v. Highman, 3:07-cr-23-RLY-CMM
United States v. Simmons et al., 3:07-cr-24-RLY-CMM
United States v. Perkins et al., 3:07-cr-25-RLY-CMM
United States v. Ogburn, 3:07-cr-27-RLY-CMM
United States v. Gonzalez et al., 3:07-cr-33-RLY-CMM
United States v. Munoz-Aniles et al., 3:07-cr-40-RLY-CMM
United States v. Cruz-Rea et al., 3:07-cr-41-RLY-CMM
United States v. Martinez-Palmero et al., 3:07-cr-42-RLY-CMM
United States v. Marzullo, 3:08-cr-7-RLY-CMM
United States v. Perkins et al., 3:08-cr-13-RLY-CMM
United States v. Griffin et al., 3:08-cr-14-RLY-CMM
United States v. Mobley, 3:08-cr-22-RLY-CMM
United States v. Young et al., 3:08-cr-29-RLY-CMM
United States v. Currie et al., 3:08-cr-30-RLY-CMM
United States v. Braden et al., 3:08-cr-33-RLY-CMM
United States v. Patterson, 3:09-cr-5-RLY-CMM
United States v. Reed, 3:09-cr-8-RLY-CMM
United States v. Jordan, 3:09-cr-27-RLY-CMM
United States v. Andrade et al., 3:10-cr-3-RLY-CMM
United States v. Davis et al., 3:10-cr-4-RLY-CMM
United States v. Sterling et al., 3:10-cr-5-RLY-CMM
United States v. Buckley, 3:10-cr-20-RLY-CMM
United States v. Collier, 3:10-cr-27-RLY-CMM
United States v. Feldman et al., 3:10-cr-38-RLY-CMM
United States v. Barron, 3:10-cr-39-RLY-CMM
United States v. Johnson et al., 3:11-cr-4-RLY-CMM
United States v. Segovia et al., 3:11-cr-12-RLY-CMM
United States v. Taylor et al., 3:11-cr-28-RLY-CMM
United States v. Pate, 3:11-cr-31-RLY-CMM
United States v. Wills, 3:11-cr-39-RLY-CMM

United States v. Dillard, 3:11-cr-42-RLY-CMM
United States v. Wind, 3:11-cr-47-RLY-CMM
United States v. Schmitt, 3:11-cr-48-RLY-CMM
United States v. Vasquez et al., 3:11-cr-53-RLY-CMM
United States v. Burge et al., 3:12-cr-2-RLY-CMM
United States v. Meriwether et al., 3:12-cr-4-RLY-CMM
United States v. Denton, 3:12-cr-5-RLY-CMM
United States v. Jenkins et al., 3:12-cr-15-RLY-CMM
United States v. Ramos et al., 3:12-cr-25-RLY-CMM
United States v. Elliott, 3:12-cr-26-RLY-CMM
United States v. Currie, 3:12-cr-31-RLY-CMM
United States v. White, 3:12-cr-34-RLY-CMM
United States v. Whittley, Jr., 3:12-cr-36-RLY-CMM
United States v. Baird, 3:12-cr-37-RLY-CMM
United States v. Perkins, 3:13-cr-1-RLY-CMM
United States v. Jones, 3:13-cr-4-RLY-CMM
United States v. Kirsch, Jr., 3:13-cr-6-RLY-CMM
United States v. Kamali, 3:13-cr-7-RLY-CMM
United States v. White et al., 3:13-cr-10-RLY-CMM
United States v. Evans, 3:13-cr-11-RLY-CMM
United States v. Prideaux, 3:13-cr-12-RLY-CMM
United States v. Pride, 3:13-cr-15-RLY-CMM
United States v. Elder et al., 3:13-cr-17-RLY-CMM
United States v. Bastain et al., 3:13-cr-20-RLY-CMM
United States v. Baldwin, 3:13-cr-26-RLY-CMM
United States v. Chaffin et al., 3:13-cr-32-RLY-CMM
United States v. Garwood, 3:13-cr-42-RLY-CMM
United States v. Davis, 3:13-cr-45-RLY-CMM
United States v. Merritt et al., 3:13-cr-46-RLY-CMM
United States v. Perry, 3:13-cr-57-RLY-CMM
United States v. Claridge, Jr, 3:13-cr-60-RLY-CMM
United States v. Hogan, 3:13-cr-61-RLY-CMM
United States v. Yauger, 3:13-cr-64-RLY-CMM
United States v. Davis et al., 3:14-cr-3-RLY-CMM
United States v. Baldwin, 3:14-cr-12-RLY-CMM
United States v. Black, 3:14-cr-15-RLY-CMM
United States v. McNary, 3:14-cr-18-RLY-CMM
United States v. Wallace, 3:14-cr-19-RLY-CMM
United States v. Fentress, 3:14-cr-30-RLY-CMM
United States v. Adams et al., 3:14-cr-34-RLY-CMM
United States v. Tomlinson, 3:14-cr-35-RLY-CMM
United States v. Bautista-De Los Santos, 3:14-cr-37-RLY-CMM
United States v. Rupert et al., 3:14-cr-38-RLY-CMM
United States v. Booker, 3:14-cr-45-RLY-CMM
United States v. Walker, 3:14-cr-47-RLY-CMM
United States v. Hicks, 3:14-cr-48-RLY-CMM

United States v. Tanksley et al., 3:14-cr-49-RLY-CMM
United States v. Allen, 3:14-cr-50-RLY-CMM
United States v. Tucker et al., 3:14-cr-52-RLY-CMM
United States v. Hite, 3:14-cr-55-RLY-CMM
United States v. Rice, 3:14-cr-56-RLY-CMM
United States v. Ramirez-Ayala et al., 3:15-cr-3-RLY-CMM
United States v. Hayes et al., 3:15-cr-4-RLY-CMM
United States v. McClain et al., 3:15-cr-5-RLY-CMM
United States v. Hezel et al., 3:15-cr-6-RLY-CMM
United States v. McKee, 3:15-cr-8-RLY-CMM
United States v. Sanchez, 3:15-cr-9-RLY-CMM
United States v. Burris, 3:15-cr-13-RLY-CMM
United States v. Elpers et al., 3:15-cr-16-RLY-CMM
United States v. Wiman, 3:15-cr-17-RLY-CMM
United States v. Pam et al., 3:15-cr-18-RLY-CMM
United States v. Statzell, 3:15-cr-19-RLY-CMM
United States v. Smith, II, 3:15-cr-21-RLY-CMM
United States v. Lopez-Luria, 3:15-cr-24-RLY-CMM
United States v. AI, 3:15-cr-26-RLY-CMM
United States v. Clark, 3:15-cr-28-RLY-CMM
United States v. Adams, 3:15-cr-31-RLY-CMM
United States v. Roach, 3:15-cr-32-RLY-CMM
United States v. Bippus-Allen et al., 3:15-cr-33-RLY-CMM
United States v. Walker et al., 3:15-cr-34-RLY-CMM
United States v. Gomez et al., 3:15-cr-35-RLY-CMM
United States v. Jackson, 3:15-cr-36-RLY-CMM
United States v. Moffitt et al., 3:15-cr-37-RLY-CMM
United States v. Salgado et al., 3:15-cr-38-RLY-CMM
United States v. Kern, 3:15-cr-39-RLY-CMM
United States v. Fluty, Jr., 3:15-cr-40-RLY-CMM
United States v. Burris, Sr. et al., 3:15-cr-43-RLY-CMM
United States v. Martin, 3:15-cr-44-RLY-CMM
United States v. Smitson, 3:15-cr-46-RLY-CMM
United States v. Smith, 3:15-cr-47-RLY-CMM

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

b. List all memberships and offices held in and services rendered, whether

compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not served as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

1993 – 1994
Brown & James, P.C.
705 Olive Street, Suite 2400
St. Louis, Missouri 63101
Associate

1994 – 1997
Office of the Prosecuting Attorney of Jefferson County, Missouri
Jefferson County Courthouse
300 Main Street
Hillsboro, Missouri 63050
Assistant Prosecuting Attorney

1997 – 1999
Herzog, Crebs & McGhee, LLP
One City Centre, 24th Floor
St. Louis, Missouri 63101
Associate

1999 – 2002
United States Department of Justice

Office of the United States Attorney, Western District of Missouri
Hammons Tower, Suite 500
901 St. Louis
Springfield, Missouri 65806
Special Assistant United States Attorney

2002 – 2016
United States Department of Justice
Office of the United States Attorney, Southern District of Indiana
Winfield K. Denton Federal Building and United States Courthouse,
Room 250
101 Northwest Martin Luther King Junior Boulevard
Evansville, Indiana 47708
Assistant United States Attorney

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

Except in my current role as a magistrate judge in the United States District Court for the Southern District of Indiana, I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I practiced law in private practice during two separate time periods. From 1993 to 1994, as an associate attorney with Brown & James, PC in St. Louis, Missouri my practice involved primarily civil insurance defense in the areas of premises liability and automobile accident cases. I also practiced in the area of first party insurance coverage disputes during this time period. The majority of the practice was in state court in Missouri and Illinois.

From 1994 to 1997, I served as a state court assistant prosecuting attorney, practicing exclusively Missouri criminal law in state court in Jefferson County, Missouri.

From 1997 to 1999, as an associate with Herzog, Crebs & McGhee, LLP in St. Louis, Missouri, my practice civil insurance defense, commercial litigation, and land use and zoning issues. I also engaged in some appellate practice in the Missouri Court of Appeals. The practice was in state and federal court in Missouri and Illinois.

From 1999 to 2016, I served as a federal prosecutor with the United States Attorney's Offices for the Western District of Missouri and for the Southern District of Indiana, practicing exclusively federal criminal law in district court, and appellate matters in the Eighth and Seventh Circuit Courts of Appeals.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My typical clients during the periods of private practice were insurance companies, large and medium commercial entities, and individuals. My sole client as state and federal prosecutor was the State of Missouri and the United States of America. In all practices I developed a specialty in trial advocacy.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Approximately 99 percent of my practice has been in litigation. During my two periods in private civil practice, from 1993 to 1994 and from 1997-1999, I engaged in a small amount of land use and zoning legal work. The rest of my practice involved work as a civil litigator and state or federal prosecutor.

i. Indicate the percentage of your practice in:
   1. federal courts: 80%
   2. state courts of record: 20%
   3. other courts: 0%
   4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
   1. civil proceedings:. 10%
   2. criminal proceedings: 90%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried approximately 100 cases to verdict, judgment or final decision, with approximately 90 as first chair or sole counsel, and approximately ten as second chair.

i. What percentage of these trials were:
   1. jury: 70%
   2. non-jury: 30%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have never practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Brown et al.*, 3:06-cr-00014-RLY-WGH (S.D. Ind.) (Young, J.)

From 2005 to 2009 I was the lead prosecutor in a multiple Defendant drug distribution conspiracy, Hobbs Act robbery, and related death penalty eligible firearms offenses case. The violent crime spree that formed the basis of the prosecution stretched from Indianapolis to Evansville, Indiana. All Defendants ultimately pleaded guilty to the charges and were convicted. Lead Defendant Brown received a sentence of life in prison without parole. I represented the government in the prosecution of the case, and handled all facets of pretrial preparation, discovery, motion practice, hearings and guilty plea, and sentencing.

Dates of Representation: 2005 to 2009

Co-Counsel
John Dowd (retired)

Counsel for Defendants
Timothy R. Dodd (deceased)

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Michael C. Keating (deceased)

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(812) 424-3520

2. *United States v. Carter*, 3:13-cr-00018-RLY-WGH (S.D. Ind.) (Young, J.)

From 2013 to 2015, I was the lead prosecutor for multi-defendant drug distribution conspiracy, money laundering and public corruption offenses, involving an appointee to the Evansville Economic Redevelopment Commission and a group of multi-national drug distributors engaged in laundering drug proceeds through several Evansville area businesses. Lead Defendant Carter was tried and convicted on all charges and sentenced to 48 months imprisonment. Several co-defendants pleaded guilty and were also convicted and sentences ranging from 60 to 180 months on related drug trafficking charges.

Dates of Representation: 2013 to 2015

Co-Counsel
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Counsel for Interested Party
Donald J. Fuchs
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One Main Street; Suite 600
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3. *United States v. Bell et al.*, 2:13-cr-00021-JMS-CMM (S.D. Ind.) (Magnus-Stinson, J.)

From 2013 to 2016 I was lead counsel for this first degree murder case arising from a gang dispute between prisoners at the United States Penitentiary in Terre Haute, Indiana. Two defendants, Bell and Dixon, went to trial, and were convicted. Defendant Dixon was sentenced to 156 months imprisonment and Defendant Bell to life imprisonment.

Dates of Representation: 2013 to 2016.

Co-Counsel
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Counsel for Defendants
Michael Donahoe
Indiana Federal Community Defenders
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Indianapolis, IN 46204
(317) 383-3520

Jessie A. Cook
400 Wabash Avenue, Suite 212
Terre Haute, IN 47807
(812) 232-4634

4. *United States v. Delaney*, 2:11-cr-00005-JMS-CMM-1 (S.D. Ind.) (Magnus-Stinson, J.)

From 2011 to 2013 I was co-counsel for a first-degree murder case arising from an argument between two cellmates in the United States Penitentiary in Terre Haute, Indiana. Defendant Delaney was found guilty following a jury trial and was sentenced to life without parole.

Dates of Representation: 2011 to 2013

Co-Counsel
James M. Warden
United States Attorney's Office
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(317) 226-6333

Counsel for Defendant
William Dazey
Indiana Federal Community Defenders
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Indianapolis, IN 46204
(317) 383-3520

5. *United States v. Mitchell*, 1:08-cr-00016-SEB-TAB-01 (S.D. Ind.) (Barker, J.)

From 2008 to 2011 I led a prosecution for crack cocaine trafficking and murder of an informant, which arose from an investigation in Richmond, Indiana. Defendant Mitchell was found guilty after a jury trial and sentenced to life imprisonment. The conviction was affirmed on appeal.

Dates of Representation: 2008 to 2011

Counsel for Defendant
Richard Kammen
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Jeffrey M. Brandt
Robinson & Brandt PSC
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(859) 581-7777

Sarah L. Nagy
Current contact information unknown

6. *United States v. Schmitt*, 3:11-cr-00048-RLY-CMM-1 (S.D. Ind.) (Young, J.)

From 2011 to 2014 I was co-counsel on a felon in possession of a firearm case. Defendant Schmitt had a jury trial and was convicted and sentenced to 110 months of imprisonment.

Dates of Representation: 2011 to 2014

Co-Counsel
Levi J. Burkett
Special Assistant United States Attorney
Current contact information unknown

Counsel for Defendant
Chad Groves
Groves Law, LLP
312 First Street
Henderson, KY 42420
(812) 402-1740

7. *United States v. Miller*, 3:09-cr-00011-RLY-WGH-1 (S.D. Ind.)(Young, J.)

From 2009 to 2012 I was co-counsel for an armed bank robbery case involving the robbery of several banks across the Midwest, including one in Evansville, Indiana. The Defendant had a jury trial and was convicted and sentenced to 747 months of imprisonment.

Dates of Representation: 2009 to 2012

Co-Counsel
Todd Stanton Shellenbarger
United States Attorney's Office
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Counsel for Defendant
John A. Goodridge
1924 West Franklin Street
Evansville, IN 47712
(812) 423-5535

8. *United States v. Goodwin et al.*, 3:04-cr-00019-RLY-CMM (S.D. Ind.) (Young, J.)

From 2004 to 2015 I was lead counsel for a 27-defendant conspiracy to distribute controlled substances and related offenses matter involving armed drug dealers in Southwest Indiana. Many defendants pleaded guilty and several went to jury trial and

were found guilty. I was lead counsel for plea negotiations and for trial. Multiple defendants were sentenced to imprisonment ranging from 60 to 420 months.

Dates of Representation: 2004 to 2015

Co-Counsel
Matthias D. Onderak
Administrative Law Judge (formerly of the United States Attorney's Office)
Social Security Administration
6511 Brotherhood Way
Fort Wayne, IN 46825
(866) 770-1735

Counsel for Defendant
Glenn Grampp
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Evansville, IN 47733
(812) 464-3401

Juval O. Scott
Office of the Public Defender (formerly of Indiana Federal Community Defenders)
Western District of Virginia
401 East Market Street, Suite 106
Charlottesville, VA 22902
(540) 777-0880

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Indiana Federal Community Defenders
111 Monument Circle, Suite 3200
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Blackard & Brinkmeyer, LLC
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(812) 573-7439

Chad E. Groves
Groves Law, LLP
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Henderson, KY 42420
(812) 402-1740

9. *United States v. Hertzberger*, 3:03-cr-00020-RLY-CMM (S.D. Ind.) (Young, J.)

From 2003 to 2005 I was sole counsel in a distribution of oxycodone resulting in death case in Evansville, Indiana. Defendant Hertzberger pleaded guilty and was sentenced to 30 years of imprisonment.

Dates of Representation: 2003 to 2005

Counsel for Defendant
David W. Lamont
413 Main Street
Evansville, IN 47728
(812) 423-6555

10. *United States v. Smith et al.*, 3:02-cr-05025-GAF (W.D. Mo.) (Fenner, J.)

In 2001 and 2002 I was the lead counsel on a seven-defendant cocaine trafficking conspiracy case, including death-penalty eligible murder charges arising from the activities of a violent drug trafficking organization in Joplin, Missouri and Tulsa, Oklahoma. I handled all pre-indictment investigation and charging of the matter, but left the Office of the United States Attorney for the Western District of Missouri before the jury trial. The jury trial occurred in January 2007, and resulted in guilty verdicts.

Dates of Representation: 2001 and 2002

Co-Counsel:
Hon. David P. Rush
Chief United States Magistrate Judge
United States District Court, Western District of Missouri
United States Courthouse
222 North John Q. Hammons Parkway, Suite 2000
Springfield, MO 65806
(417) 865-3761

Counsel for Defendants
Laine T Cardarella
Federal Public Defender's Office
KCMO Walnut Street
1000 Walnut Street, Suite 600
Kansas City, MO 64106
(816) 471-8282

Hon. Michael P. Joyce
Johnson County District Court
100 North Kansas
Olathe, KS 66061
(913) 715-3890

Susan M. Hunt
Livestock Exchange Building
1600 Genessee Street, Suite 806
Kansas City, MO 64106

(816) 221-4588

Darryl Brent Johnson, Jr.
Darryl Johnson Attorney at Law LLC
1885 North Highway CC, Suite A
Nixa, MO 65714

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a federal prosecutor in the United States Attorney's Office for the Southern District of Indiana, in addition to handling a variety of criminal cases, I also served in leadership positions within the office, including as the Chief of the Drug and Violent Crime Unit, the Lead Attorney for the District's Organized Crime and Drug Enforcement Task Force, and the Branch Chief of the Evansville U.S. Attorney's Office. These leadership positions allowed me to supervise and mentor trial lawyers and set policies and priorities for the Office. In these leadership roles I also took part in attorney and support staff hiring decisions, and provided advice to U.S. Attorneys as a member of their Executive Committees. I also served as a liaison between the U.S. Attorney's Office and the District Court on issues related to federal prosecution, and was a liaison between the U.S. Attorney's Office and federal, state and local law enforcement organizations.

As a United States magistrate judge in the Southern District of Indiana, I have served on court committees, including the Local Rules Committee and the District Court Security Committee. I have previously served as the magistrate judge representative to the Seventh Circuit Judicial Council, and currently serve as a member of the Criminal Law Committee of the Judicial Conference of the United States. The Criminal Law Committee meets regularly and provides guidance and updates to the courts on a variety of criminal law related matters. The Criminal Law Committee reports to the Judicial Conference on important matters of criminal law, and proposes and initiates various programs related to the effective administration of criminal justice within the courts.

I have not performed lobbying activity on behalf of any client or organization, and I am not and have never been a registered lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I was a part-time adjunct professor teaching an introduction to constitutional law to

undergraduate students at the University of Evansville from 2011 to 2015. I did not retain any course materials, notes, or syllabi. The course was taught, in part, with the aid of a textbook, LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA, A SHORT COURSE (Charisse Kiino, Laura Stewart & Carolyn Goldinger, eds., 5th ed. 2012).

I was a part-time adjunct professor teaching an introduction to law course to undergraduate students at the University of Southern Indiana from 2008 to 2010. I did not retain any course materials, notes, or syllabi from the course. The course was taught, in part, with the aid of a textbook, JEFFREY F. BEATTY & SUSAN S. SAMUELSON, LEGAL ENVIRONMENT (Steve Silverstein, Bob Sandman & John Barans, eds., 3rd ed. 2008).

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain

how you would address any such conflict if it were to arise.

No family members or other persons, parties, categories of litigation or financial arrangements are likely to present potential conflicts of interest for me. I will continue my current practice of recusing myself from cases involving entities in which I hold stock or matters that were active within the United States Attorney's Office at the time I left employment.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I do not anticipate any conflicts of interest. If confirmed, I would handle any matters involving actual or potential conflicts of interest by applying the Code of Conduct for United States Judges, 28 U.S.C. § 455, and any other relevant ethical canons or rules.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my career as a United States magistrate judge and prior as a federal prosecutor, from 1999 to the present, I have been a public servant. In 1993 and 1994, I participated in the St. Louis County Volunteer Lawyers Assistance Program, which provided free legal advice to disadvantaged persons in the St. Louis community, and the Volunteer Income Tax Assistance Program, which provided free income tax return preparation assistance to disadvantaged persons, in connection with the St. Louis Bar Association and Washington University School of Law.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On October 22, 2021, I spoke with staffers from the Office of Congressman Andre Carson concerning possible judicial selection. I met with staff from the Offices of Senators Todd Young and Mike Braun on February 11, 2022, and I met with Senator Braun and members of his staff on May 20, 2022. I was interviewed

by attorneys from the White House Counsel's Office on June 29, 2022. Since then, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Michael Etan Farbiarz

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the District of New Jersey

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Port Authority of New York and New Jersey
   4 World Trade Center
   New York, New York 10007

   Residence:

   Glen Ridge, New Jersey

4. **Birthplace**: State year and place of birth.

   1973; New York, New York

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1996 – 1999, Yale Law School; J.D., 1999

   1995 – 1996, Cambridge University, Trinity College; no degree received (Fiske Scholar)

   1991 – 1995, Harvard University; A.B., 1995

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2016 – present
Port Authority of New York and New Jersey
4 World Trade Center
New York, New York 10007
General Counsel (2016 – present)
Counsel, Port Authority of New York and New Jersey subsidiaries (Port Authority Trans-Hudson Corporation, Newark Legal and Communications Center Urban Renewal Corporation, New York and New Jersey Railroad) (2016 – present)
Director, Port Authority Insurance Captive Entity (2016 – present)
Acting Inspector General (2020 – 2021)

2014 – 2016
New York University Law School
40 Washington Square
New York, New York 10012
Senior Fellow

Spring 2014
Columbia Law School
435 West 116th Street
New York, New York 10027
Adjunct Instructor

2004 – 2014
United States Attorney's Office, Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Co-Chief, Terrorism and International Narcotics Unit (2010 – 2014)
Deputy Chief, Terrorism and National Security Unit (2009 – 2010)
Assistant United States Attorney (2004 – 2014)

2001 – 2004
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
Associate

2000 – 2001
Judge José A. Cabranes
United States Court of Appeals for the Second Circuit
141 Church Street
New Haven, Connecticut 06511
Law Clerk

1999 – 2000

Chief Judge Michael B. Mukasey
United States District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007
Law Clerk

Summer 1999
Howard Smith & Levin
1330 Avenue of the Americas
New York, New York 10019
Summer Associate

Summer 1998
Morrison & Foerster
425 Market Street
San Francisco, California 94105
Summer Associate

Summer 1998
Jenner & Block
1099 New York Avenue, Northwest
Washington, DC 20001
Summer Associate

Summer 1997
United States Attorney's Office, Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314
Intern

1995
Harvard Student Agencies
One Story Street
Cambridge, Massachusetts 02138
Researcher/Editor

Other affiliation (uncompensated):

2015 – 2017
Congregation Shomrei Emunah
67 Park Street
Montclair, New Jersey 07042
Board of Trustees

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social

security number) and type of discharge received, and whether you have registered for selective service.

I did not serve in the military. I timely registered for the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Senior Fellow, New York University Law School (2014 – 2016)

Attorney General's Exceptional Service Award (2011)

Federal Bureau of Investigation Director's Award, Outstanding Counterintelligence Investigation (2011)

National Association of Former United States Attorneys, Exceptional Service Award (2011)

Intelligence Community Legal Award, Team of the Year (2011)

Federal Law Enforcement Foundation, Federal Prosecutor Award (2010)

Attorney General's Distinguished Service Award (2008)

Organized Crime Drug Enforcement Task Force Award (2007)

New York County Lawyers Association Award (2004)

Articles Editor, *Yale Law Journal* (1998 – 1999)

Fiske Scholar, Cambridge University (1995 – 1996)

Harvard University
David Donald Prize for Excellence in American History (1995)
Phi Beta Kappa (1993)
Michael Christian Memorial Fellowship (1993)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Association of the Federal Bar of New Jersey

New Jersey State Bar Association

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York, 2000
New Jersey, 2018

There have been no lapses in membership. Additionally, I took and passed the Connecticut bar examination in 1999, but never became a member of the Connecticut bar.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Second Circuit, 2005
United States District Court for the District of New Jersey, 2018
United States District Court for the Southern District of New York, 2001

I no longer regularly practice in the Court of Appeals and accordingly let my membership lapse in 2017. There have been no other lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Congregation Shomrei Emunah, Member, Board of Trustees (2015 – 2017)

Deer Lake Club (2010 – present)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

In 2010, my family applied for membership in Deer Lake Club, a hiking, fishing, and swimming club in Boonton, New Jersey. After being accepted, we learned that the club's by-laws/rules could be construed as allowing only families headed by a man and a woman. We wrote to the club indicating that the rules seemed to discriminate, and that we would accordingly not join the club unless the rules were changed. The rules were changed and we joined the club. To the best of my knowledge none of the other organizations with which I am affiliated currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership practices.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

I have worked to locate all responsive materials by searching my files and conducting extensive on-line searches, but there may be materials that I have inadvertently not identified or located.

Accuracy and Adjudication: The Promise of Extraterritorial Due Process, 116 COLUM. L. REV. 625 (2016). Copy supplied.

Extraterritorial Criminal Jurisdiction, 114 MICH. L. REV. 507 (2016). Copy supplied.

Researcher/Editor, LET'S GO: INDIA AND NEPAL (1997 edition). Copy supplied.

Editor, LET'S GO: MEXICO AND CENTRAL AMERICA (1994 edition). Copy supplied.

Pleased to Punch, Harvard Crimson (Dec. 9, 1993). Copy supplied.

Dining, Haute-Style, Harvard Crimson (Dec. 9, 1993). Copy supplied.

What's On Your Powerbook, Harvard Crimson (Dec. 2, 1993). Copy supplied.

No Escape, Harvard Crimson (Nov. 4, 1993). Copy supplied.

Close, but Crummy Cigar, Harvard Crimson (Oct. 28, 1993). Copy supplied.

She's Sassy, Not Seventeen, Harvard Crimson (Oct. 14, 1993). Copy supplied.

Turn and Run: Causes of the Deterioration of the African-American/Jewish

Relationship During the 1970s, Mosaic (1992). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Contributor, *The United States District Court for the Southern District of New York: A Retrospective 1990 – 2000*, New York County Lawyers Association Committee on the Federal Courts (2002). Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

On September 9, 2007, along with other former law clerks to Chief Judge Michael Mukasey, I signed a letter in support of Judge Mukasey's nomination to be United States Attorney General. Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have tried to locate all responsive materials by searching my files and conducting extensive on-line searches, but there may be materials that I have inadvertently not identified or located.

April 13, 2022: Panelist, "A Discussion on Government Lawyering in New York," New York University Law and Government Society, New York University Law School, New York, New York. I spoke with law students about pursuing a career in public service by serving in state or local government. I have no notes, transcript, or recording. The address for the New York University Law School is 40 Washington Square, New York, New York 10012.

December 14, 2021: Speaker, "Upcoming Construction at the Port Authority of New York and New Jersey," Alliance for Action, Forsgate, New Jersey. I spoke about the Port Authority of New York and New Jersey's $37 billion capital plan.

I have no notes, transcript, or recording. The address for Alliance for Action is 91 Fieldcrest Avenue A24, Edison, New Jersey 08837.

August 24, 2020: Panelist, "A Special Look Inside the Port Authority of New York and New Jersey During the Pandemic – What Lawyers Can Learn From How this Billion Dollar Organization is Handling the Crisis," New Jersey State Bar Association, virtual presentation. I gave a presentation on public agency leadership during the pandemic crisis. I have no notes, transcript, or recording. The address for the New Jersey State Bar Association is One Constitution Square, New Brunswick, New Jersey 08901.

January 8, 2020: Speaker, Denis F. McLaughlin Advanced Trial Advocacy Workshop Seton Hall Law School, Newark, New Jersey. I spoke to selected law students about trial advocacy technique and professional development. I have no notes, transcript, or recording. The address for Seton Hall Law School is 1109 Raymond Boulevard, Newark, New Jersey 07102.

December 13, 2019: Speaker, Port Authority Police Academy, Jersey City, New Jersey. I spoke to cadets of the Port Authority Police Academy about the role of police officers in society. I have no notes, transcript, or recording. The address for the Port Authority Police Department is 241 Erie Street, Jersey City, New Jersey 07310.

October 30, 2019: Guest Lecturer, "National Security Law," Columbia University Law School, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for Columbia University Law School is 435 West 116th Street, New York, New York 10027.

August 15, 2019: Speaker, Port Authority Police Academy, Jersey City, New Jersey. I spoke to cadets of the Port Authority Police Academy about the role of police officers in society. I have no notes, transcript, or recording. The address for the Port Authority Police Department is 241 Erie Street, Jersey City, New Jersey 07310.

October 12, 2018: Speaker, Port Authority Police Academy, Jersey City, New Jersey. I spoke to cadets of the Port Authority Police Academy about the role of police officers in society. I have no notes, transcript, or recording. The address for the Port Authority Police Department is 241 Erie Street, Jersey City, New Jersey 07310.

April 5, 2018: Guest Lecturer, in course entitled "National Security Law," Fordham University School of Law, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

April 5, 2016: Panelist, "Counter-terrorist measures in the E.U. and the U.S.," Jean Monnet Center for International and Regional Economic Law and Justice and the New York University Law School Center on Law and Security, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for the Monnet Center is 22 Washington Square North, New York, New York 10011.

Fall 2016 or Winter 2017 (specific date unknown): Speaker, Port Authority Police Academy, Jersey City, New Jersey. I spoke to cadets of the Port Authority Police Academy about the role of police officers in society. I have no notes, transcript, or recording. The address for the Port Authority Police Department is 241 Erie Street, Jersey City, New Jersey 07310.

October 8, 2015: Panelist, "Terrorism and Criminal Law," Center for Jewish History, New York, New York. Video available at https://www.c-span.org/video/?328562-1/discussion-combatting-terrorism#.

Fall 2015 (specific date unknown): Guest Lecturer, in course entitled "Criminal Law," New York University Law School, New York, New York. I spoke about substantive criminal law for a course taught by Professor James Jacobs. I have no notes, transcript, or recording. The address for New York University Law School is 40 Washington Square, New York, New York 10012.

May 29, 2015: Panelist, "Extraterritorial Application of U.S. Law to the Cloud," New York University Law School Information Law Institute and the New York University Law School Center on Law and Security, New York, New York. Video available at https://www.youtube.com/watch?v=0U5WOYNQCaQ.

March 9, 2015, Moot Court Judge, Fordham University School of Law, New York, New York. I served as part of a three-judge moot panel, for a class taught by United States Circuit Judge Denny Chin. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

February 20, 2015: Panelist, "Terror Suspects: Pretrial Considerations in Civilian Terrorism Trials," *The Journal of National Security Law & Policy* and The Georgetown Center on National Security and the Law, Washington, DC. Video available at https://securitypolicylaw.syr.edu/2015-jnslp-symposium-webcast-now-online/#s:georgetown-law-feb-11-2015.

March 10, 2014, Moot Court Judge, Fordham University School of Law, New York, New York. I served as part of a three-judge moot panel, for a class taught by United States Circuit Judge Denny Chin. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

February 5, 2014: Guest Lecturer, in course entitled "Advanced Seminar on National Security and Foreign Relations Law," Fordham University School of Law, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

March 2013 (specific date unknown): Moot Court Judge, Fordham University School of Law, New York, New York. I served as part of a three-judge moot panel, for a class taught by United States Circuit Judge Denny Chin. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

March 28, 2012: Guest Lecturer, course entitled "Federal Criminal Prosecution," Yale Law School, New Haven, Connecticut. I spoke about national security investigations and trials for a course taught by Professor Kate Stith. I have no notes, transcript, or recording. The address for Yale Law School is 120 Wall Street, New Haven, Connecticut 06510.

March 2, 2012: Moot Court Judge, Fordham University School of Law, New York, New York. I served as part of a three-judge moot panel, for a class taught by United States Circuit Judge Denny Chin. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

October 31, 2011: Guest Lecturer, in course entitled "Federal Criminal Law," Columbia University Law School, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for Columbia University Law School is 435 West 116th Street, New York, New York 10027.

October 25, 2007: Guest Lecturer, in course entitled "National Security Law," Fordham University School of Law, New York, New York. I spoke about national security investigations and trials. I have no notes, transcript, or recording. The address for Fordham University School of Law is 150 West 62nd Street, New York, New York 10023.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Press Release, Office of the Hudson County Prosecutor, *Roselle Man Arrested on Forgery Charges for Possessing and Selling Fraudulent NJ Temporary License Plates* (July 23, 2021). Copy supplied.

Press Release, United States Attorney's Office, District of Massachusetts, *Government Contractor Agrees to Plead Guilty to Fraudulently Billing Federal and State Construction Contracts* (Oct. 29, 2020). Copy supplied.

Press Release, United States Attorney's Office, Eastern District of New York, *President of Navillus Contracting Charged with Defrauding Union Benefits Funds* (July 30, 2020). Copy supplied.

Robert Levine, *Measuring Law's Long Arm*, New York University Law School Magazine (Sept. 9, 2014). Copy supplied.

Edmund Lee, *Upswing*, Village Voice (May 5, 1998). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these cases, approximately what percent were:

jury trials: ___%
bench trials: ___% [total 100%]

ii. Of these cases, approximately what percent were:

civil proceedings: ___%
criminal proceedings: ___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not held judicial office.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed

you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

During the spring and/or summer of 2016, I was briefly part of a group of academic and other experts convened to provide advice on national security matters to the presidential campaign of Hillary Clinton.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 2000 to 2001, I served as a law clerk to the Honorable José A. Cabranes of the United States Court of Appeals for the Second Circuit.

From 1999 to 2000, I served as a law clerk to the Honorable Michael B. Mukasey of the United States District Court for the Southern District of New York.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

2001 – 2004
Davis Polk and Wardwell
450 Lexington Avenue
New York, New York 10017
Associate

2004 – 2014
United States Attorney's Office, Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007
Co-Chief, Terrorism and International Narcotics Unit (2010 – 2014)
Deputy Chief, Terrorism and National Security Unit (2009 – 2010)
Assistant United States Attorney (2004 – 2014)

2016 – present
Port Authority of New York and New Jersey
4 World Trade Center
New York, New York 10007
General Counsel (2016 – present)
Counsel, Port Authority of New York and New Jersey subsidiaries (Port Authority Trans- Hudson Corporation, Newark Legal and Communications Center Urban Renewal Corporation, New York and New Jersey Railroad) (2016 – present)
Director, Port Authority Insurance Captive Entity (2016 – present)
Acting Inspector General (2020 – 2021)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Since 2016, I have served as the General Counsel of the Port Authority of New York and New Jersey, a public transportation agency established by New York and New Jersey, with the approval of the United States Congress under the Compact Clause of the Constitution.

As General Counsel, I report directly to both the agency's Board of Commissioners and the agency's chief executive officer; I manage a law department of approximately 120 people, plus outside counsel; I supervise the agency's Office of Ethics and Compliance; and I am responsible for a broad range of legal matters, principally related to litigation, transactional matters, and regulatory matters.

As to litigation, hundreds of matters are typically pending at any moment, in New Jersey and New York courts; in federal and state courts; in trial and appellate courts; and in arbitral settings and before administrative agencies. These matters generally concern a mix of administrative law, antidiscrimination law, bankruptcy, class actions, commercial disputes,

employment law, environmental law, tort law, and constitutional claims under the First, Fourth, and Fourteenth Amendments.

Transactional matters include work on major projects associated with the agency's $37 billion capital plan, such as addressing land use, environmental, and procurement issues, and overseeing negotiation and drafting of complex contracts related to large-scale construction projects and public-private partnerships. Important transactional matters that I have worked on include the Port Authority's largest-ever investment in New Jersey, the rebuilding of Terminal A at Newark Liberty International Airport; major capital construction in New Jersey, including at the Harrison Port Authority Trans-Hudson ("PATH") train station and at the agency's seaports in Newark and Elizabeth; and early-stages support for the replacement of the Newark AirTrain, for the trans-Hudson Gateway program, and for the rebuilding of the Port Authority Bus Terminal.

Regulatory matters typically focus on compliance with federal safety, operational, and financial standards related to the agency's three major airports; the nation's busiest seaport; the PATH commuter rail network; and numerous bridges and tunnels.

Finally, and in addition to the above, I served from 2020 to 2021 as the agency's Acting Inspector General. In that capacity, from Office of Inspector General headquarters in Hoboken, New Jersey, I supervised approximately 100 additional staff, charged with: conducting audits; conducting "fraud, waste, and abuse" investigations; and serving as the investigative arm for the Port Authority's Civilian Complaint Review Board, which receives and assesses civilian complaints against Port Authority police officers.

From 2004 to 2014, I was an Assistant United States Attorney in the Southern District of New York, and from 2010 to 2014 I served as Co-Chief of the Terrorism and International Narcotics Unit.

As Co-Chief, I directed the work of more than 20 federal prosecutors in the investigation and prosecution of highly complex and urgent matters of, among other things, international and domestic terrorism, espionage, and global arms-trafficking.

As an Assistant United States Attorney, I represented the United States in all phases of the federal criminal process. I started in the General Crimes unit (2004 to 2005), and then served in in the Narcotics unit (2005 to 2006) and the Terrorism and National Security unit (2006 to 2009); the Terrorism and National Security unit was merged with the International Narcotics unit in 2010 and I then served in the merged Terrorism and International Narcotic unit (2010 to 2014). I led more than 100

investigations, preparing search warrant and wiretap applications, and engaging in Grand Jury practice. I appeared in federal court very frequently, during many years on a near daily basis. I conducted large numbers of contested factual hearings and handled all pre-trial litigation on my cases. I tried seven cases, including a number of highly complex trials that each extended for approximately one month. Finally, I virtually always handled my own appeals; I served as both principal draftsperson on relevant appellate briefs and as oral advocate on approximately 13 appeals before the United States Court of Appeals for the Second Circuit.

From 2001 to 2004, I was a litigation associate at Davis Polk and Wardwell. I participated in two trials, engaged in commercial litigation, and assisted with legal and factual analysis in confidential internal investigations.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

At the Port Authority of New York and New Jersey, my principal client is the agency. I am also sometimes called upon to advise the agency's Board of Commissioners. I do not specialize; my focus is on a broad mix of matters.

As an Assistant United States Attorney, my client was the United States. With rare exceptions, such as handling an occasional federal habeas corpus action, I focused exclusively on criminal matters.

At Davis Polk and Wardwell, my clients were a bar association, which I helped represent at a *pro bono* trial; various companies, such as an insured pressing a post-9/11 business interruption claim; and certain entities in internal investigations. I did not specialize, and virtually all of my work was civil.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As General Counsel of the Port Authority, approximately 25 percent of my work has been focused on litigation-related matters. I have not appeared in court. As an Assistant United States Attorney, 100 percent of my work was focused on litigation, and I appeared in court very frequently. As a litigation associate, 100 percent of my work was focused on litigation, and I appeared in court occasionally.

i. Indicate the percentage of your practice in:
   1. federal courts: 85%

2. state courts of record: 15%
3. other courts: <5%
4. administrative agencies: <5%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 25%
2. criminal proceedings: 75%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried nine cases to verdict, and in each of those cases I worked with at least one other attorney. I have presented oral argument in approximately 13 federal appeals.

i. What percentage of these trials were:
1. jury: 78%
2. non-jury: 22%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Ghailani*, 98 Cr. 1023 (S.D.N.Y) (Kaplan, J.); 733 F.3d 29 (2d Cir. 2013) (Cabranes, Leval, Parker, JJ.)

From 2009 to 2013, I represented the United States in this federal terrorism prosecution. The core allegation against the defendant, Ghailani, was that he, along with other al Qaeda operatives, orchestrated the simultaneous 1998 truck bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, which resulted in 224 deaths and thousands of injuries. I was the lead prosecutor. My role was to personally handle all significant pre-trial litigation, including a range of difficult and novel constitutional issues under the Fifth and Sixth Amendments; to try the case along with my colleagues; to advocate in writing and orally at sentencing; and to argue the appeal. The large majority of the evidence against Ghailani was obtained from outside of the United States and the case involved extensive litigation under the Classified Information Procedures Act. At trial, I delivered the rebuttal summation and put on the majority of key witnesses, including: numerous civilian Tanzanian witnesses who interacted with Ghailani in the run-up to the bombings; victims of the bombings; and various law-enforcement agents, who testified, among other things, about the explosives used in the truck bombs and how and where the bombs were built. The trial lasted approximately five weeks. Ghailani was convicted on one count, of conspiring to destroy buildings and property of the United States, resulting in death, and acquitted on many others; he was sentenced principally to a term of life imprisonment. His conviction and sentence were affirmed on appeal. I argued the appeal before the United States Court of Appeals for the Second Circuit, and I was the principal drafter on the appellate brief.

Reported decisions include: 761 F. Supp. 2d 167 (S.D.N.Y. 2011); 761 F. Supp. 2d 114 (S.D.N.Y. 2011); 751 F. Supp. 2d 515 (S.D.N.Y. 2010); 751 F. Supp. 2d 502 (S.D.N.Y. 2010); 751 F. Supp. 2d 498 (S.D.N.Y. 2010); 743 F. Supp. 2d 261 (S.D.N.Y. 2010); 743 F. Supp. 2d 242 (S.D.N.Y. 2010); 687 F. Supp. 2d 365 (S.D.N.Y. 2010); 686 F. Supp. 2d 279 (S.D.N.Y. 2009); 98 Cr. 1023 (LAK), 2010 WL 4006381 (S.D.N.Y. Oct. 6, 2010).

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2. *United States v. Metsos et al.*, 10 Cr. 598 (S.D.N.Y.) (Wood, J.)

From before it became public until it concluded in 2010, I represented the United States in this federal counterintelligence prosecution, which principally focused on a large ring of deep-cover Russian secret agents who operated covertly in the United States for many years, undertaking various tasks at the behest of Russian intelligence, and hiding both their true identities and their connection to Russia from their work colleagues, neighbors, and others. (Most of the Russian deep-cover agents lived as married couples in, among other states, New Jersey, Washington, Massachusetts, and New York.) In total, 11 defendants were charged and arrested. One of these defendants was captured and

detained abroad, released, and became a fugitive. The remaining 10 defendants were arrested in the United States; detained; pled guilty pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C); and deported immediately to Vienna, where they were traded for four people who had been held in Russian custody for alleged contact with Western intelligence agencies. I was the lead prosecutor. For several years, before the matter became public, I was the Assistant United States Attorney overseeing the investigation, which involved, among other things, extensive judicially-authorized electronic surveillance, and numerous judicially-authorized physical searches, executed in districts around the United States. In addition, before the case was charged, I was responsible for securing appropriate declassification determinations and, along with my colleagues, preparing numerous Federal Rule of Criminal Procedure 41 search warrants. I drafted the two criminal complaints, which totaled 55 pages; oversaw post-arrest interrogations of defendants who waived their *Miranda* rights; and argued the critical detention hearings. I prepared the relevant informations and agreements pursuant to which the defendants pled guilty, and I handled the guilty plea proceedings.

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3. *United States v. Muse*, 09 Cr. 512 (S.D.N.Y.) (Preska, C.J.)

From 2009 to 2010, I represented the United States in this federal piracy prosecution, the first major piracy prosecution in more than 150 years. The core allegation against the defendant, Muse, was that he led an armed group of pirates that attacked various large container ships in the Indian Ocean, including the Maersk Alabama, which was captured in 2009 after being sprayed by AK-47 fire, and whose captain was held hostage at sea and mistreated over the course of several days. In the prosecution, my principal role was to: investigate the matter; draft the Complaint; charge the case before the Grand Jury; handle pre-trial matters; and supervise the investigation that led to the superseding indictment, as more evidence was developed after Muse had been transferred to the United States for prosecution. Muse pled guilty to six counts, including hijacking a ship, kidnapping, and hostage-taking, and was sentenced principally to a term of imprisonment of 405 months.

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4. *United States v. Kassir*, 04 Cr. 356 (S.D.N.Y.) (Keenan, J.)

From 2007 to 2009, I represented the United States in this federal terrorism prosecution. The core allegation against the defendant, Kassir, was that, in support of al Qaeda, he: came to the United States from Europe to establish a terror training camp in rural Oregon; recruited locals to the camp; and taught them to kill, including with knives, explosives, and poisons. Kassir was arrested on a flight passing through the Czech Republic and extradited to the United States. Some of the evidence against Kassir was obtained from outside of the United States and the case involved extensive litigation under the Classified Information Procedures Act. Along with my colleague, my role was to: handle pre-trial litigation; try the case; and assist with sentencing. The trial lasted approximately four weeks. At trial, I delivered the opening jury address and also the rebuttal summation, and put on multiple critical witnesses, including numerous civilian witnesses who directly interacted with Kassir at the training camp and a law-enforcement witness who recovered evidence (including large volumes of shell casings) from the training camp. Kassir was convicted of 11 counts, including conspiracy to kill and provision of material support to a foreign terrorist organization, and was sentenced principally to a term of life imprisonment; his conviction and sentence were affirmed on appeal, although due to the press of business I did not handle the appeal. (Kassir had been dispatched to the United States by a senior terror leader, who was extradited, tried, and convicted in 2014; as Co-Chief of the Terrorism and International Narcotics Unit, I directly supervised that prosecution.)

Decisions reported only in electronic databases: No. 09–3974–cr., 406 Fed. Appx. 526 (2d Cir. Jan. 19, 2011); 04 Cr. 356 (JFK), 2009 WL 2913651 (Sept. 11, 2009); 04 Cr. 356 (JFK), 2008 WL 2653952 (S.D.N.Y. July 3, 2008); 04 Cr. 356 (JFK), 2009 WL 995139 (Apr. 9, 2009); 04 Cr. 356 (JFK), 2009 WL 976821 (Apr. 9, 2009); 04 Cr. 356 (JFK),

2009 WL 910767 (Apr. 2, 2009); 04 Cr. 356 (JFK), 2008 WL 2695307 (July 8, 2008). In addition to the above, a number of decisions were reported after I left the Department of Justice.

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5. *United States v. Wyatt*, 05 Cr. 59 (S.D.N.Y.) (Chin, J.)

From 2005 to 2008, I represented the United States in this federal fraud prosecution. The core allegation against the defendant, Wyatt, was that he paid bribes to the Government of Iraq to procure Iraqi oil shipments for a very large oil company he had founded. Along with my colleagues, my role was to: investigate the matter; charge the case in the Grand Jury; handle pre-trial litigation, including a range of novel and difficult issues as to the scope of both the federal wire-fraud statute and the Confrontation Clause; try the case; and assist with sentencing. The trial was scheduled to last approximately five weeks, but Wyatt pled guilty after approximately three weeks of trial. At trial, I put on multiple witnesses, including a critical Iraqi witness who was relocated to the United States, who had served for years as a senior financial official in Saddam Hussein's Government, and who testified, among other things, as to financial records he had secreted out of Baghdad. Wyatt was convicted of conspiring to violate the federal wire fraud statute and sentenced principally to 12 months and one day imprisonment and more than $11 million dollars in restitution payments. Wyatt's co-defendants, including Mr. Chalmers and the two oil companies he operated, pled guilty shortly before trial, and I helped to prosecute those matters as well, from 2005 to 2008.

Reported decisions: 474 F. Supp. 2d 555 (S.D.N.Y. 2007); 410 F. Supp. 2d 278 (S.D.N.Y. 2006); 05 Cr. 59 (DC), 2007 WL 591948 (S.D.N.Y. Feb. 27, 2007); 05 Cr. 59 (DC), 2007 WL 624063 (S.D.N.Y. Feb. 26, 2007); 05 Cr. 59 (DC), 2006 WL 1062917 (S.D.N.Y. Apr. 18, 2006).

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6. *United States v. Park*, 619 F. Supp. 2d 89 (S.D.N.Y. 2009); 533 F. Supp. 2d 474 (S.D.N.Y. 2008) (Chin, J.)

From 2005 to 2008, I represented the United States in this federal counterintelligence prosecution. The core allegation against the defendant, Park, was that he acted as an agent of the Government of Iraq; received funds in Baghdad from then-Iraqi Foreign Minister Tariq Aziz; secreted those funds into the United States; and used those funds to bribe at least one senior United Nations official. The principal goal of Park's efforts was to ensure the establishment of the so-called United Nations Oil-for-Food Program on terms favorable to Saddam Hussein's Government. Along with my colleagues, my role was to: investigate the matter; prepare the Complaint; charge the case in the Grand Jury; handle pre-trial litigation; try the case; and participate in sentencing. The trial lasted approximately four weeks. I delivered the opening jury address and put on multiple witnesses, including a critical Jordanian witness who directly interacted with Park soon after he crossed the border with bagfuls of cash from Central Bank of Iraq. Park was convicted of conspiring to serve as an unregistered foreign agent, and was initially

sentenced principally to a term of imprisonment of 60 months; his sentence was subsequently reduced to 37 months.

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7. *United States v. Marcelino et al.*, 06 Cr. 36 (S.D.N.Y.) (Cote, J.)

From 2005 to 2008, I represented the United States in this federal narcotics prosecution. Eight defendants were charged in connection with their participation in a conspiracy to bring cocaine into the northeastern United States. During the investigation, approximately 143 kilograms of cocaine were seized, based on a series of Title III wiretap applications and Rule 41 search warrant applications that I drafted. Large portions of the cocaine recovered had been secreted inside religious statues, and held in a local warehouse. Each of the 8 defendants pled guilty in the Southern District of New York to a federal controlled substances offense, with the exception of one defendant whose case was transferred under Federal Rule of Criminal Procedure 20 to another district. The Southern District of New York defendants were sentenced principally to terms of imprisonment of: 120 months, 97 months, 70 months, 36 months, 30 months, 30 months, and time served. I was the sole prosecutor handling the investigation and prosecution, and my role was to: lead the investigation; charge the case in the Grand Jury; handle all pre-trial matters, including discovery; and conduct each of the sentencings.

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8. *United States v. Mastellone*, 06 Cr. 787 (S.D.N.Y.) (Marrero, J.)

From 2005 to 2008, I represented the United States in this federal fraud prosecution. The defendant, Mastellone was charged with the largest fraud ever perpetrated against the September 11 Victims' Compensation Fund. Mastellone received more than $1.075 million from the Fund, based on claims that he had been "totally and permanently disabled" in the attacks on the World Trade Center. But videos obtained from a covert pole camera as well as from other sources showed him dancing, shoveling snow, carrying a person on his back, and going about his normal activities without hindrance. The defendant pled guilty to fraudulently stealing money from the United States, and was sentenced principally to a term of imprisonment of 30 months. My role was to: lead the investigation; charge the case in the Grand Jury; handle all pre-trial matters, including discovery; and to oversee the sentencing. In the context of a subsequent and separate civil False Claims Act proceeding, handled by another Department of Justice attorney, Mastellone was ordered to pay treble damages of more than $3 million.

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9. *New York County Lawyers' Association v. State*, Index No. 102987/00 (N.Y. S. Sup. Ct., N.Y. Cnty.) (Suarez, J.).

From 2001 to 2003, I represented the plaintiff, a local bar association, in this civil action brought against New York State and New York City. The plaintiff alleged that the rates

paid to attorneys for indigent children and adults in New York City criminal and family courts, which rates had been set during the mid-1980s, were so low that a systematic violation was occurring with respect to defendants' right to effective assistance of counsel. At the close of a multi-week trial, the trial court ruled in the plaintiff-bar association's favor, and entered a permanent injunction directing that attorneys' fees be raised across the board. The State and City appealed, and the parties settled while the appeal was pending. As a result of the lawsuit, compensation rates paid to thousands of attorneys for the indigent, which had been set at $25/hour for out-of-court work and $40/hour for in-court work, were increased: to $75/hour for *all* work, in court or out, in felony criminal cases and in family court cases. Along with my colleagues, my role was to: conduct factual and legal analysis with respect to questions of organizational standing; assist with both the preparation of expert materials and pre-trial legal filings; and to assist with the drafting of post-trial and appellate briefs. In addition, during the trial, I put on multiple witnesses.

Reported decisions: *New York County Lawyers' Ass'n*, 294 A.D.2d 69 (1st Dep't 2002); *New York County Lawyers' Ass'n*, 196 Misc.2d 761 (2002); *New York County Lawyers' Ass'n*, 192 Misc.2d 424 (2002); *New York County Lawyers' Ass'n*, 188 Misc.2d 776 (2001).

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10. *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 02 Civ. 7676 (S.D.N.Y.) (Rakoff, J.).

From 2002 to 2004, I represented an insured, Duane Reade, a drug store chain, in this civil action. On September 11, 2001, Duane Reade's most heavily-trafficked store was destroyed, and the company sued its insurer under a business interruption policy, seeking a declaration as to the meaning of critical policy terms, and alleging breach of contract claims for nonpayment of the insured's full losses. The case raised difficult and novel questions of substantive insurance law, as well as Article III ripeness questions. Along with my colleagues, my role was to: respond to the insurer's motion to dismiss; take and defend depositions; prepare the plaintiff's summary judgment motion; respond to the insurer's summary judgment motion; assist at trial, including by putting on multiple witnesses; and to draft the insured's federal appellate brief. My involvement with the matter ended when I left the firm in 2004, before oral argument in the federal Court of Appeals; after I left, the case went on for a number of years.

Reported decisions: 411 F.3d 384 (2d Cir. 2005); 261 F. Supp. 2d 293 (S.D.N.Y. 2003); 279 F. Supp. 2d 235 (S.D.N.Y. 2003).

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

During my time as General Counsel of the Port Authority, I designed and executed the legal process that culminated in 2018 in raising minimum wages for approximately 40,000 workers at the agency's three major airports. I worked to: craft a rigorous public hearing and comment process to gather relevant facts, analogous to the federal notice-and-comment process; prepare critical Board resolutions; and develop a 110+ page analysis of the legal theory and factual basis for the new minimum wage, that publicly explained the Port Authority's legal authority to require higher wages and why doing so was not preempted by certain federal laws.

In addition, as General Counsel I drafted the first-ever Code of Ethics for the Port Authority's Board of Commissioners; helped to establish, and now supervise, the agency's first-ever Office of Ethics and Compliance; and oversaw the drafting of the agency's first-ever Code of Ethics for Employees, first-ever Code of Ethics for Vendors, and first-ever Code of Ethics for Lessees.

Furthermore, as General Counsel I led negotiations with the agency's 23 unions that moved employees-in-contract from 0 percent to 100 percent. In addition, I have overseen the negotiation and drafting of complex legal documentation for numerous billion-dollar-plus transactions, including two of the largest public-private partnerships in United States history, and certain large and complex long-term construction and operations and maintenance contracts.

From 2004 to 2014, I was an Assistant United States Attorney in the Southern District of New York; during that period, from 2010 to 2014, I served as Co-Chief of the Terrorism and International Narcotics Unit. Many of the investigations and prosecutions I directly and closely supervised were of national and international significance. These included: the investigation and prosecution of an Islamic Revolutionary Guard Corps plot to kill the Saudi Ambassador to the United States in Washington, DC; military/intelligence/law-enforcement operations that captured terror operatives in Libya and in the Indian Ocean, and brought them to the United States for trial; convictions after trial of the most prominent terror leader in Europe, a globally notorious arms-trafficker, and a senior al Qaeda leader; and the capture and conviction of the Taliban operative who in 2010 sought to detonate a car bomb in New York City's Times Square.

In addition to serving as a supervisor, as an Assistant United States Attorney I directly handled cases on my own, including significant matters involving terrorism,

counterintelligence, and piracy. For my work on cases that I personally handled, I received numerous awards, including the Department of Justice's single-highest annual award (in 2011) and the Department of Justice's second-highest annual award (in 2008).

From 2001 to 2004, I was a litigation associate at Davis Polk and Wardwell. Among other matters, I participated in a lengthy *pro bono* state court trial and a federal court trial on an insurance claim; I prepared and put on multiple witnesses at each of these two trials.

I have not registered as a lobbyist, but in my role at the Port Authority I often interact with public officials on behalf of the agency's interests.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    In the spring semester of 2016, I taught *Criminal Procedure: The Adjudicatory Part, From First Appearance to Post Conviction* at New York University School of Law. Syllabus supplied.

    In the spring semester of 2015, I taught *National Security Law: Transnational Exercises of American Power* at New York University School of Law. Syllabus supplied.

    In the fall semesters of 2015 and 2014, I taught *National Security Law* at New York University School of Law. Syllabi supplied.

    In the spring semester of 2014, I co-taught *Intelligence, Surveillance, and Privacy* at Columbia University School of Law. Course outline supplied.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar

year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

As a general matter, I would handle any matters involving actual or potential conflicts of interest in accord with the Code of Conduct for United States Judges, and any applicable statutes, ethical canons and opinions, and rules.

At a minimum, I would recuse myself from all matters I have worked on. In addition, for a fixed period of time I would recuse myself from any cases in which the parties include the Port Authority of New York and New Jersey or Port Authority Commissioners, officers, employees, or agents alleged to have been acting in the scope of their Port Authority duties. Such matters are readily identifiable from the pleadings. As to determining the appropriate period of time during which I would plan to recuse, and certain additional questions (such as how to proceed when the Port Authority is the real party in interest in a litigation) I would consult the Code of Conduct for United States Judges, and any applicable statutes, ethical canons and opinions, and rules.

I do not believe that my family members, as parties or counsel, are likely to have matters that arise in federal court in the District of New Jersey. I have no financial arrangements that are likely to generate actual or potential conflicts, and the organizations that I am a member of are not likely to have matters that arise in federal court. Aside from Port Authority matters, there are no categories of cases that are likely to present actual or potential conflicts of interest issues.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would handle any matters involving actual or potential conflicts of interest in

accord with the Code of Conduct for United States Judges, and any applicable statutes, ethical canons and opinions, and rules. Upon becoming aware of information that might raise actual or potential conflicts of interest issues, I would promptly notify the parties of all relevant information, and provide them with an ample opportunity to be heard and to express their views, including by affording them the opportunity to brief any recusal or conflict issues.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I believe strongly in the ethical imperative reflected in Canon 2 of the American Bar Association's Code of Professional Responsibility, and I have devoted virtually my entire professional career to public service. During the period of my career in which I worked at a private law firm, I spent large amounts of time on pro bono work, including a multi-week trial focused on improving the legal representation provided to indigent defendants. During my career in public service, I have not done pro bono work per se, but I have engaged in volunteer and community service, principally through my synagogue in New Jersey, where I have served on the Board of Trustees and undertaken various hands-on community service activities.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I received a questionnaire from a member of Senator Booker's Judicial Selection Advisory Group during April 2021. I submitted it in May 2021 and was interviewed by the Group in August 2021. I was interviewed by Senator Booker in August 2022. Shortly thereafter, I was interviewed by Senator Menendez and then by attorneys at the Office of the White House Counsel. Since August 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question

in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Robert Andrew Kirsch

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the District of New Jersey

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: New Jersey Superior Court
   Union County Courthouse
   2 Broad Street
   Elizabeth, New Jersey 07207

   Residence: Westfield, New Jersey

4. **Birthplace**: State year and place of birth.

   1966; Livingston, New Jersey

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1988 – 1991, Fordham University School of Law; J.D., 1991

   1984 – 1988, Emory University; B.A. (*magna cum laude)*, 1988

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2010 – present
   New Jersey Superior Court

Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207
Superior Court Judge
Criminal Division Judge (2016 – present)
Civil Division Judge (2015 – 2016)
Family Division Judge (2010 – 2015)

2008 – 2010
Trial Attorneys of New Jersey ("TANJ")
Trustee

1997 – 2010
United States Attorney's Office
District of New Jersey
970 Broad Street, Suite 700
Newark, New Jersey 07102
Assistant United States Attorney

1993 – 1997
United States Department of Justice, Civil Division
950 Pennsylvania Avenue, Northwest
Washington, DC 20530
Trial Attorney, Attorney General's Honors Program

1991 – 1993
United States District Court for the Southern District of Florida
299 East Broward Boulevard
Fort Lauderdale, Florida 33301
Law Clerk to the Honorable William J. Zloch

Summer 1990
Hahn & Hessen LLP
488 Madison Avenue,
New York, New York 10022
Summer Associate

Other Affiliations (uncompensated)

Summer 1989
United States District Court for the District of New Jersey
Frank Lautenberg U.S. Post Office & Courthouse
2 Federal Square
Newark, New Jersey 07102
Judicial Intern to the Honorable Harold A. Ackerman

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I registered for the selective service upon turning 18.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Columbia High School, inductee into the Athletics Hall of Fame as member of 1983-84 championship varsity basketball team (2015)

   Family & Children's Services of Union County, "Champion for Children" (2013)

   Federal Bureau of Investigation, letter of commendation from Director Robert S. Mueller, III, for outstanding service on behalf of the Department of Justice (2010)

   Securities and Exchange Commission, commendation for successful prosecution of Medi-Hut Co., Inc., corporate officers engaging in complex securities fraud scheme (2010)

   Federal Drug Administration, award for successful prosecutions involving Able Laboratories for falsification of drug testing data and securities fraud (2010)

   Federal Bureau of Investigation, commendation for successful prosecutions related to mortgage fraud and Ponzi scheme involving New Jersey Affordable Homes Corp. (2010)

   Immigration and Customs Enforcement, award for successful prosecution of international drug trafficking and escape case (2009)

   Department of Education – Office of Inspector General, commendation for successful prosecution of federal grant embezzlement scheme (2008)

   Department of Justice, nominee for the Attorney General's Director's Award for Superb Performance (2007)

   Postal Inspection Service, Chief Postal Inspector's Award for successful prosecution of major international telemarketing fraud scheme (2006)

   Commodity Futures Trade Commission, letter of commendation for successful prosecution of major international telemarketing fraud scheme (2006)

   Federal Bureau of Investigation, letter of commendation from FBI Special Agent in Charge for successful prosecution of a lawyer who embezzled funds from several sources

(2003)

United States Customs Service, Outstanding Service Award for legal advocacy in civil personal search litigation (2002)

Acting Governor of New Jersey Donald DiFrancesco, commendation for actions related to New Jersey's rescue, relief, and recovery efforts post-September 11 (2001)

United States Department of Justice
Attorney General's Honors Program

Fordham University School of Law
Dean's List, majority of semesters (specific semesters unknown)

Emory University
Magna Cum Laude
High Honors, Political Science

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

New Jersey Council on Juvenile Justice System Improvement (2013 – 2015)

New Jersey Supreme Court Committee on Rules of Evidence and Subcommittee on Restyling the Hearsay Rules (2011 – 2018)

Presiding Judges Committee on Juvenile Justice (2014 – 2015)

Union County Bar Association
Member and Co-Chair of Criminal Practice Group (2008)

Union County Juvenile Detention Alternatives Initiative ("JDAI")
Co-Chair (2013 – 2015)
Co-Chair, Subcommittee of Disparate Minority Contacts (2013 – 2015)

Trial Attorneys of New Jersey ("TANJ")
Trustee (2008 – 2010)

Youth Services Commission for Juvenile Justice
Chair (2011 – 2015)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Florida, 1993
New Jersey, 1992
New York, 1992

There have been no lapses in membership. I assumed "retirement" status in New York when I began service as a full-time judge in 2010.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the District of New Jersey, 1992

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

None.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

In Memoriam, *Don Robertson, Jr.: a Celebration of Life*, NEWS REC., Sept. 20, 2001. Copy supplied.

Letter to the Editor, N.Y. TIMES, Oct. 10, 1999. Copy supplied.

Letter to the Editor, *The Gotcha Game*, WASH. POST, Feb. 25, 1995. Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

August 2, 2022: Panelist, White Collar Crime Conference, New Jersey State Bar Association, Virtual. I principally spoke about sentencing white-collar cases in state court, with an emphasis on post-COVID issues. I have no notes, transcript, or recording. The address of the New Jersey Bar Association is 1 Constitution Square, New Brunswick, New Jersey 08901.

May 8, 2019: Moderator and Panelist, Effects of Mandatory Minimum Sentencing, New Jersey Judiciary, Newark, New Jersey. I moderated a panel with the filmmaker and subject of the film, "The Sentence," an award-winning documentary. I have no notes, transcript, or recording. The address for the New Jersey Judiciary is Richard J. Hughes Justice Complex, 25 Market Street, Trenton, New Jersey 08611.

May 6, 2019: Judge, Seton Hall Law School, Newark, New Jersey. I served as a judge for presentations relating to the opioid crisis by students enrolled in a Law, Ethics, and Public Policy class. I have no notes, transcript, or recording. The address for Seton Hall Law School is One Newark Center, Newark, New Jersey 07102.

April 18, 2019: Panelist, Prisoner Reentry Conference, New Jersey Reentry Corporation, Jersey City, New Jersey. I served on a panel titled "Criminal Justice Remover, from Jail to Jobs," coordinated by former Governor James McGreevey, and provided remarks on Drug Court and mental health initiatives in the state judiciary. I have no notes, transcript, or recording. The address for the New Jersey Reentry Corporation is 591 Summit Avenue, 6th Floor, Jersey City, New Jersey 07306.

October 18, 2018: Presenter, "Professionalism, Courtesy and Decorum: No Case is Worth Your Reputation," Union County Bar Association, Elizabeth, New Jersey. Notes supplied.

May 16, 2018: Panelist, "How to Handle High-Profile White-Collar Criminal Matters," New Jersey State Bar Association, Atlantic City, New Jersey. I served as a panelist and spoke about my experience in white-collar criminal cases. I have no notes, transcript, or recording. The address for the New Jersey Bar Association is 1 Constitution Square, New Brunswick, New Jersey 08901.

May 11, 2017: Moderator, Prisoner Re-Entry, New Jersey Bar Association, Atlantic City, New Jersey. I moderated a panel on prisoner re-entry at the annual Criminal Division Conference. I have no notes, transcript, or recording. The address for the New Jersey Bar Association is 1 Constitution Square, New Brunswick, New Jersey 08901.

April 13, 2017: Panelist, "A Family Conversation," New Jersey Reentry Corporation, Jersey City, New Jersey. Notes supplied.

April 28, 2016: Panelist, Technological Demonstrative Aids at Trial, Trial Attorneys of New Jersey ("TANJ"), West Orange, New Jersey. I discussed evidentiary considerations regarding the use of technological demonstrative aids at trial. I have no notes, transcript, or recording. The address for TANJ is P.O. Box 184, West Allenhurst, New Jersey 07711.

April 26, 2016: Speaker, "A View from the Bench," Georgetown University Law Center, Washington, DC. Notes supplied.

March 22, 2016: Speaker, Trial Preparation, Seton Hall Law School, Newark, New Jersey. I addressed students involved in the moot court program at Seton Hall Law School on trial preparation. I have no notes, transcript, or recording.

The address for Seton Hall Law School is One Newark Center, Newark, New Jersey 07102.

April 2, 2015: Panelist, "Post-Prison: Reentry at Work," New Jersey Reentry Corporation, Jersey City, New Jersey. I spoke at the Prisoner Reentry Conference to discuss the Juvenile Reentry Initiative, which I founded. I have no notes, transcript, or recording. The address for the New Jersey Reentry Corporation is 591 Summit Avenue, 6th Floor, Jersey City, New Jersey 07306.

February 13, 2015: Keynote Speaker, Awards and Recognition Ceremony, Integrity House, Secaucus, New Jersey. I addressed graduates of the Integrity House adult rehabilitation facility. I have no notes, transcript, or recording. The address for Integrity House is 103 Lincoln Park, Newark, New Jersey 07102.

March 6, 2014: Lecturer, "General Principles for Trial Lawyers (& for Life)," Fordham University School of Law, New York, New York. PowerPoint supplied.

November 5, 2013: Panelist, "The Rules of Evidence: New Developments Involving Privilege and More," Institute of Continuing Legal Education, New Brunswick, New Jersey. Although I did not retain my notes or outline, I located my law clerk's memorandum that I reviewed and incorporated into my own remarks. Copy supplied.

October 29, 2013: Presenter, Opening Remarks, Community Access Unlimited, Union, New Jersey. I presented opening remarks for the Annual Union County Youth Services Networking Conference held at Kean University. I have no notes, transcript, or recording. The address for Community Access Unlimited is 80 West Grand Street, Elizabeth, New Jersey 07202.

April 25, 2013: Lecturer, "A View from the Bench," Columbia Law School, New York, New York. I addressed students at Columbia Law School on my experiences as a Superior Court judge. I have no notes, transcript, or recording. The address for Columbia Law School is 435 West 116th Street, New York, New York 10027.

December 10, 2012: Speaker, "General Principles for Trial Lawyers (& for Life)," Attorney General's Advocacy Institute, Newark, New Jersey. I used the same PowerPoint as that provided for the March 6, 2014, presentation.

November 15, 2012: Panelist, Cross-Examination of Child Witnesses, New Jersey Association for Justice ("NJAJ"), Trenton, New Jersey. Although I did not retain my notes or outline, I located my law clerk's memorandum that I reviewed and incorporated into my own remarks. Copy supplied.

October 1, 2012: Speaker, "General Principles for Trial Lawyers (& for Life)," Attorney General's Advocacy Institute, Trenton, New Jersey. I used the same

PowerPoint as that provided for the March 6, 2014, presentation.

September 20, 2012: Presenter, Clerking for the New Jersey Judiciary, Fordham University School of Law, New York, New York. I spoke about clerking for the New Jersey Judiciary. I have no notes, transcript, or recording. The address for the School of Law is 150 West 62nd Street, New York, New York 10023.

September 10, 2012: Lecturer, Judicial Orientation Program, New Jersey Judiciary, Princeton, New Jersey. Outline supplied.

September 26, 2011: Speaker, Clerking for the New Jersey Judiciary, New York University School of Law, New York, New York. I spoke to students about clerking for the New Jersey judiciary. I have no notes, transcript, or recording. The address for New York University School of Law is 40 Washington Square South, New York, New York 10012.

September 12, 2011: Lecturer, Judicial Orientation Program, New Jersey Judiciary, Princeton, New Jersey. I lectured to newly confirmed judges to the New Jersey Judiciary as part of their orientation program. I have no notes, transcript, or recording. The address for the main office of the New Jersey Judiciary is the Richard J. Hughes Justice Complex, 25 Market Street, Trenton, New Jersey 08611.

Additionally, before I became a Superior Court Judge, I frequently served as a guest speaker or instructor on various topics involving trial and investigative strategies in complex civil and criminal cases, including at the Justice Department's National Advocacy Center, to various New Jersey bar associations, state and federal criminal prosecutors and investigators, private practitioners, forensic accountants, and government regulators. There exist no copies, transcripts, or recordings regarding same, and in light of the elapsed time, it is impossible for me to provide the specific dates, as well as a listing of the formal groups that I addressed. While, in all likelihood, I used notes or an outline, a search of my files has proven unsuccessful in retrieving any copies.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Ted Sherman, *Former Bane of Con Men is Now a Judge of Heartbreaking Family Tales*, STAR LEDGER (Apr. 18, 2010). Copy supplied.

Joe Ryan, *N.J. Con Artist gets 18 Years for $100M Real Estate Scam*, STAR LEDGER (Jan. 15, 2010). Copy supplied.

Joe Ryan, *Accountant Admits to Embezzling $1M*, STAR LEDGER (Nov. 20, 2009).

Copy supplied.

Michaelangelo Conte, *CPA at Jersey City Firm Pleads Guilty to Embezzling $1 Million*, JERSEY J. (Nov. 19, 2009). Copy supplied.

Joe Ryan, *Caught in Fla., Fugitive Admits Guilt in Newark*, STAR LEDGER (Sept. 18, 2009). Copy supplied.

David Porter, *Jersey Man Pleads Guilty in $80M Mortgage Fraud*, ASSOC. PRESS (Apr. 10, 2009). Copy supplied.

Joe Ryan, *Two Admit Guilty in $20M Real Estate Scam*, STAR LEDGER (Feb. 5, 2009). Copy supplied.

Michael O'Keefe, *N.J. 'Roid Maker Gets 33 Months*, N.Y. DAILY NEWS (Jan. 23, 2009). Copy supplied.

Joe Ryan, *N.Y. Man Admits Smuggling Drugs, Jumping Bail*, STAR LEDGER (Dec. 19, 2008). Copy supplied.

Michael O'Keefe, *Steroid 'Factory' Found in Jersey*, N.Y. DAILY NEWS (Sept. 10, 2008). Copy supplied.

Greg Saitz, *Real Estate Firm Owner Arrested in Fraud Case – He's Accused of Bilking People via NJ Affordable*, SUN SENTINEL (June 11, 2008). Copy supplied.

Gabriel H. Gluck, *Con Man Sentenced to 9 Years in Prison*, STAR LEDGER (May 14, 2008). Copy supplied.

Jeff Whelan, *Ex-College Official Admits Embezzling $264,000*, STAR LEDGER (May 8, 2008). Copy supplied.

Jeffrey Gold, *Federal Agents Uncover Suspected Steroid Factory in New Jersey Home and Arrest Resident*, ASSOC. PRESS (Sept. 21, 2007). Copy supplied.

James A. Quirk, *Real Estate Con Man Gets Five Years*, ASBURY PARK PRESS (Apr. 3, 2007). Copy supplied.

Greg Farrell, *Four Chemists at Former Drugmaker Admit Falsifying Data*, USA TODAY (Mar. 9, 2007). Copy supplied.

John P. Martin, *Former Executives in Cranford Admit to Defrauding Investors*, SUN SENTINEL (Nov. 17, 2006). Copy supplied.

Rachel Hatzipanagos, *Man Guilty in Fraud Hearing – Investors Lost $2.5 Million in Currency Case*, SUN SENTINEL (July 13, 2006). Copy supplied.

John P. Martin, *Prison Term Dethrones Scam King*, STAR LEDGER (June 20, 2006). Copy supplied.

Rachel Hatzipanagos, *Pompano Man Draws 17 Years in Prison – Boiler Room Operator given Harsh Sentence*, SUN SENTINEL (June 20, 2006). Copy supplied.

Ken Serrano, *Two Carjackers Sentenced*, HOME NEWS TRIB. (June 16, 2006). Copy supplied.

Katie Wang, *R-Tec's Founder Admits Fraud*, STAR LEDGER (Dec. 23, 2004). Copy supplied.

Michael L. Diamond, *3 Ex-Executives Going to Prison*, ASBURY PARK PRESS (Nov. 17, 2004). Copy supplied.

Joseph R. Perone, *Former Medi-Hut Execs get Prison*, STAR LEDGER (Nov. 17, 2004). Copy supplied.

Kate Coscarelli, *Mastermind of Credit Scheme Admits Guilt*, STAR LEDGER (Oct. 16, 2004). Copy supplied.

Jeff Theodore, *Guilty Plea in Credit Card Fraud Operation*, JERSEY J. (Oct. 24, 2003). Copy supplied.

John Martin, *Pair Held in Plot to Steal Thousands of Identities*, STAR LEDGER (May 2, 2003). Copy supplied.

2 Charged with Stealing Credit Reports, ASSOC. PRESS (May 1, 2003). Copy supplied.

Jeffrey Gold, *Lawmen Arrest Broker in Commodities Scam – U.S. used Jersey Sting Operation Case*, ASSOC. PRESS (Feb. 20, 2003). Copy supplied.

James A. Duffy, *Lawyer Guilty in $120K Theft*, DAILY REC. (Jan. 14, 2003). Copy supplied.

Man Sentenced in Bogus Bond Case, ASSOC. PRESS (Oct. 4, 2002). Copy supplied.

Robert Rudolph, *Feds Probe Links in Ecstasy Cases*, STAR LEDGER (July 16, 2002). Copy supplied.

Second Load of Ecstasy is Seized in Newark, THE TIMES (July 14, 2002). Copy supplied.

John Martin and Russell Ben-Ali, *Five Jerseyans are Accused of $1.5 Million Credit Scam*, STAR LEDGER (June 13, 2002). Copy supplied.

Mitchel Maddux, *Five Men Arrested in Credit Card Scams*, THE RECORD (June 13, 2002). Copy supplied.

Guy Sterling, *Story of this Ph.D. from Harvard is a Fraud – Teaneck Man gets 2 Years in Jail for Scheme to Bilk up $11.8 Million from Companies*, STAR LEDGER (Dec. 12, 2001). Copy supplied.

Robert Rudolph, *Next Field Trip for Touring Stickup Trio: Prison*, STAR LEDGER (June 16, 1999). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In December 2009, I was nominated by Governor Jon Corzine of New Jersey to serve as a Superior Court judge, and thereafter I was unanimously confirmed by the state senate. I have served as a trial court judge since January 2010. In December 2017, I was re-nominated by Governor Christopher J. Christie for lifetime tenure and was unanimously re-confirmed by the state senate.

From January 2010 through August 2011, in the Family Division, I principally presided over matters involving allegations of child abuse and neglect, and termination of parental rights. From September 2011 through August 2015, I served as the sole judge in Union County handling allegations of juvenile delinquency. In this capacity, I presided over 75 trials involving charges ranging from minor offenses through and including murder. While in the Family Division, I also presided over dozens of trials involving allegations of domestic violence and handled hundreds of post-divorce motions.

From September 2015 through October 2016, I served in the Civil Division. In this capacity, I presided over 30 civil jury trials involving allegations of personal injury, malpractice, and business disputes. I also ruled on hundreds of civil pretrial motions.

Since November 2016, I have served in the Criminal Division. In this capacity, I have handled hundreds of criminal cases and presided over approximately 35 criminal jury trials related to charges of homicide, armed robbery, carjacking, sexual assault, fraud, official misconduct, and drugs.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over more than 200 cases that have gone to verdict or judgment.

1. Of these cases, approximately what percent were:

jury trials: 35%
bench trials: 65%

2. Of these cases, approximately what percent were:

civil proceedings: 50%
criminal proceedings: 50%

b. Provide citations for all opinions you have written, including concurrences and dissents.

None of my written opinions have been published.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. State v. Morente-Dubon, Ind. No. 17-06-450 (N.J. Super. Ct. Law Div. Jan. 24, 2019). Copy supplied.

In March 2007, a 21-year-old-man was reported missing, prompting a massive search for him. The victim was found deceased, bloodied and bludgeoned, in his vehicle. The defendant, on the evening of the incident, fled the United States for Guatemala, where he remained for more than 10 years until he was extradited to face charges of murder and weapons-related offenses. In January 2020, he was tried before a jury which acquitted him of murder but convicted him of passion/provocation manslaughter and weapons-related offenses. He was sentenced to nine and one-half years in state prison of a statutory maximum sentence of ten years. I issued an opinion on the defense's motion to suppress physical evidence. Copy supplied.

On December 19, 2022, the Appellate Division reversed and remanded for resentencing. The principal ground for reversal was that the sentence, which correctly applied the case law at the time, had been rendered improper by a subsequent New Jersey Supreme Court decision whose "new rule" had retroactive effect. The defendant's resentencing is pending.

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2. State v. McGillvary, Ind. No. 16-05-344 (N.J. Super. Ct. Law Div. Apr. 24, 2019), aff'd, No. A-4519-18 (App. Div. Aug. 4, 2021), certif. denied, 249 N.J. 341 (Dec. 7, 2021), cert. denied, 142 S. Ct. 1685 (Apr. 18, 2022). Opinions supplied.

The defendant, a self-described "internet celebrity" whose fame included viral internet postings and appearances on Jimmy Kimmel Live! and the Colbert Report, was charged with the murder of a 74-year-old man. The victim was a lawyer who had been found deceased in his home after police performed a welfare check. At trial, the medical examiner testified to extensive bruising to the victim's lips, nose, and eyes; multiple broken ribs; multiple crushed cervical vertebrae; and that his ear had almost been completely severed from his head. The defendant was arrested at an out-of-state bus depot, preparing to travel to Georgia. At trial, the jury rejected the defenses of self-defense and involuntary intoxication, and convicted him of murder in the first degree. The defendant was sentenced to 57 years in state prison. I issued opinions on media access and a motion to proceed pro se on appeal.

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3. State v. Clay, Ind. No. 18-02-118 (N.J. Super. Ct. Law Div. July 31, 2019), aff'd, No. A-2210-19 (App. Div. Aug. 10, 2022). Opinions supplied.

The defendant, a police officer, was charged with committing a series of thefts from retail stores. He was alleged to have been on duty and in uniform during several incidents. The defendant, an avid action figure toy collector, was charged with intentionally affixing fraudulent barcodes on items which were then scanned at self-checkout counters in order to purchase items at reduced pricings. The defendant was tried before a jury which convicted him of official misconduct and multiple thefts. He was sentenced to the statutory mandatory minimum sentence of two years in state prison.

I issued opinions on multiple pretrial motions, including a motion to dismiss the indictment, a motion to suppress evidence, and cross-motions in limine on a variety of evidentiary issues.

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4. State v. Grillo, Ind. No. 16-05-354 (N.J. Super. Ct. Law Div. July 31, 2018), aff'd, No. A-1995-18 (App. Div. May 7, 2021) certif. denied, 2022 N.J. LEXIS 641 (July 12, 2022). Opinions supplied.

Two teenaged boys returned home from dinner with their father to find a suspicious note supposedly written by their mother indicating that she had gone out. As hours passed, family members became concerned. The older boy, looking for his mother, opened her closet door to find a figure holding a weapon and wearing a hockey-style mask with holes cut out for his eyes. The boy ran screaming from the house to seek refuge at a neighbor's, leaving his younger brother alone in his bedroom down the hall. A neighbor saw the highly distraught boy and the figure dressed in black, and chased the aggressor on foot, but the person was not apprehended.

Several hours later, at around 4 a.m., the victim was found dead in a crawl space of her basement by her sister and her sister's boyfriend. She was bloodied, with ligature marks around her neck.

The defendant was arrested that night, wandering in a neighboring town, dressed in a black cape and black mask. The victim had been a witness to a prior pending criminal case alleging that the defendant had sexually molested the victim's niece. The defendant was tried before a jury which convicted him of all 10 counts, including murder. The defendant was sentenced to 55 years in state prison.

I issued opinions on the defense's motion to suppress the defendant's statement to law enforcement and on the state's evidentiary motions.

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5. State v. Cady, Ind. No. 13-06-597 (N.J. Super. Ct. Law Div. Feb. 24, 2017), aff'd, No. A-0358-17T4 (App. Div. Feb. 12, 2020), certif. denied, 2021 N.J. LEXIS 492 (June 1, 2021). Opinions supplied.

The defendant was charged with murder and related weapons offenses stemming from a killing in retribution for a series of ongoing shootings and murders between local rival crips and bloods criminal street gangs. The trial involved allegations of death threats to a cooperating witness and jury tampering. After the six-week jury trial, which consisted of more than 20 witnesses and 70 exhibits, the jury convicted the defendant on all counts: murder, possession of a weapon for an unlawful purpose, and unlawful possession of a weapon. I sentenced the defendant to 42 years in state prison.

I issued written opinions on the state's motions to admit the defendant's statement to law enforcement, the defendant's status as a member of a criminal street gang, and expert testimony relating to criminal gangs.

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6. State v. Randleman, Ind. No. 14-09-787 (N.J. Super. Ct. Law Div. Apr. 26, 2017), aff'd, No. A-5378-16 (App. Div. Dec. 30, 2021), certif. denied, 2022 N.J. LEXIS 731 (Sept. 7, 2022). Opinions supplied.

The defendant was charged with carjacking and a related theft. A middle-aged woman was unloading groceries in her driveway in the early afternoon when she was assaulted by a passerby. After a physical struggle, the defendant stole her keys and drove off in her vehicle. An observant neighbor followed the fleeing vehicle and contacted the police. The defendant abandoned the stolen vehicle and jumped into an awaiting getaway vehicle which became disabled from an attempt to elude law enforcement in a high-speed chase.

The trial resulted in a jury verdict of guilty on both counts, and I sentenced the defendant to 25 years in prison, due, in part, to his extensive prior criminal history including a conviction for aggravated manslaughter.

I issued opinions on the defense's motion to compel discovery of police internal affairs records, the state's motion to exclude certain evidence, and the defendant's motion for a new trial.

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7. State v. Belo, Ind. No. 15-12-792 (N.J. Super. Ct. Law Div. June 22, 2017).

Opinion supplied.

The defendant was charged with vehicular homicide for running over and killing a co-worker by driving a top loader after having a number of alcoholic drinks during lunch. I conducted an extensive, multi-day evidentiary hearing on the defense's motion to suppress statements made by the defendant; to suppress any evidence relating to the testing of the defendant's blood on the date of the incident; and to suppress video of the defendant eating lunch prior to the incident. I issued a written decision denying the defendant's motions.

After I issued the written decision, the defendant pled guilty to vehicular homicide. Consistent with the plea agreement, I sentenced the defendant to three years in state prison.

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8. State v. Powell, Ind. Nos. 12-10-796 and 12-10-797 (N.J. Super. Ct. Law Div. May 30, 2017), aff'd, No. A-1343-18 (App. Div. July 13, 2021), certif. denied, 2021 N.J. LEXIS 1028 (Oct. 5, 2021). Opinion supplied.

The defendant was charged with committing a series of aggravated sexual assaults and armed robberies of couples staying in several motels in Elizabeth and Linden, New Jersey. He followed couples as they entered their motel rooms, broke into those motel rooms, and, at gunpoint, forced the individuals to engage in sexual acts with each other and him, robbed them, and then fled the scene. The defendant was tried before a jury in a two-month bifurcated trial spanning from January to March 2018. He was found guilty on all 60 counts for which he was charged, and sentenced to an aggregate term of 133 years' imprisonment.

I issued a written decision on the defense's motions to suppress and sever the counts of the indictments. On appeal, I was affirmed on all material grounds and remanded on a single ground to amend the judgment of conviction merging four charges.

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9. State v. A.B., No. FJ-20-184-14 (N.J. Super. Ct. Ch. Div. May 19, 2014). Opinions supplied.

The juvenile, a 15-year-old male, was charged with armed robbery, aggravated assault, and bias intimidation in the first degree for his role in the alleged bludgeoning to near-death of a random victim. The brutal assault was referred to in testimony as "papi hunting," which involved the deliberate pursuit of Latinos to rob and beat. The victim in this case was in such a precarious state that the Homicide Unit was summoned to the scene, anticipating his demise. The victim survived, albeit having sustained multiple brain hemorrhages and skull fractures, which required multiple hospitalizations.

The state filed an application to transfer the juvenile to adult criminal court. I conducted an evidentiary hearing and determined that the state met the threshold of probable cause, entitling the juvenile to a subsequent hearing regarding amenability to rehabilitation. At the conclusion of that evidentiary hearing, I issued a second written decision holding that the juvenile failed to demonstrate that the probability of his rehabilitation by the age of 19 substantially outweighed the bases for waiver resulting in the court's transferring jurisdiction to the adult criminal court for further proceedings.

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10. State v. C.F., No. FJ-20-1450-12 (N.J. Super. Ct. Ch. Div. Jan. 31, 2013), aff'd, State in the Interest of C.F., 444 N.J. Super. 179 (App. Div. 2016).

Opinions supplied.

In mid-2012, the defendant was arrested and charged with a murder that had occurred in early 1976. The defendant was a 52-year-old man at the time of trial; he was 15 at the time of the offense. The victim was a 57-year-old female neighbor.

At the time of the offense, New Jersey law did not authorize transfer of 15-year-old juveniles to adult court, including for murder (the statute has since been amended). As a result, the defendant was tried as a juvenile in a bench action before me. The trial consisted of 15 witnesses, including several police officers who were at the scene of the crime and who had retired decades ago, and more than 75 exhibits.

The murder scene was particularly grisly. The victim, who lived alone, was found by the police prone, face down in bed, in a state of partial undress, hog-tied, bloodied and battered. Swabs were taken from her person, her clothing and bedding, indicating the presence of spermatozoa. However, technological advances regarding DNA analysis were decades away. Thus, the scientific evidence contained on slides, as well as on her clothing and bedding, along with other physical evidence, was stored at various locations and remained untouched for almost 35 years.

In 2010, an investigator from the Union County Prosecutor's Office forwarded various pieces of retained evidence to the forensic lab. A partial DNA profile was obtained. The DNA profile was inputted into the national database that stores DNA profiles for certain individuals, including those convicted of prior felonies. The computer-generated data indicated a possible match for the defendant, a man now in his fifties who had lived on an adjoining property in the mid-1970s.

After obtaining the defendant's DNA through a buccal swab, the scientist testified that the probability of an erroneous match of the DNA obtained through the preserved sperm fraction taken from the victim and Mr. Franklin was approximately one in 40 quadrillion. In a 51-page opinion, I adjudicated the defendant guilty of felony murder.

The case presented novel and complex legal issues at sentencing. I sentenced the defendant to 10 years in prison, which was the maximum penalty authorized by law, and issued an opinion setting forth the basis for the sentence.

Both parties appealed: the defense appealed the verdict and the state appealed the sentence. The Appellate Division affirmed both the verdict and sentence.

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. State v. Knight, Ind. No. 15-08-569 (N.J. Super. Ct. Law Div. Oct. 8, 2021). Copy supplied.

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2. State v. McGillvary, Ind. No. 16-05-344 (N.J. Super Ct. Law Div. Oct. 30, 2020), aff'd, No. A-4519-18 (App. Div. Aug. 4, 2021), certif. denied, 249 N.J. 341 (Dec. 7, 2021), cert. denied, McGillvary v. New Jersey, 142 S. Ct. 1685, 2022 U.S. LEXIS 1920 (Apr. 18, 2022). Copy previously supplied in response to Q13c.

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3. State v. McGillvary, Ind. No. 16-05-344 (N.J. Super. Ct. Law Div. Apr. 24, 2019), aff'd, No. A-4519-18 (App. Div. Aug. 4, 2021), certif. denied, 249 N.J. 341 (Dec. 7, 2021), cert. denied, McGillvary v. New Jersey, 142 S. Ct. 1685, 2022 U.S. LEXIS 1920 (Apr. 18, 2022). Copy previously supplied in response to Q13c.

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4. State v. Clay, Ind. No. 18-02-118 (N.J. Super. Ct. Law Div. July 3, 2019), aff'd, No. A-2210-19 (Aug. 10, 2022). Copy previously supplied in response to Q13c.

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5. State v. Morente-Dubon, Ind. No. 17-06-450 (N.J. Super. Ct. Law Div. Jan. 24, 2019). Copy previously supplied in response to Q13c.

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6. State v. Randleman, Ind. No. 14-09-787 (N.J. Super. Ct. Law Div. June 29, 2017), aff'd, No. A-5378-16 (App. Div. Dec. 30, 2021), certif. denied., 2022 N.J. LEXIS 731 (Sept. 7, 2022). Copy previously supplied in response to Q13c.

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7. State v. Belo, Ind. No. 15-12-792 (N.J. Super. Ct. Law Div. June 22, 2017). Copy previously supplied in response to Q13c.

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8. State v. Powell, Ind. Nos. 12-10-796 and 12-10-797 (N.J. Super. Ct. Law Div. May 30, 2017), aff'd, No. A-1343-18 (App. Div. July 13, 2021), certif. denied, 2021 N.J. LEXIS 1028 (Oct. 5, 2021). Copy previously supplied in response to Q13c.

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9. State v. C.F., No. FJ-20-1450-12 (N.J. Super. Ct. Ch. Div. Jan. 31, 2013), aff'd, State in the Interest of C.F., 132 A.3d 426, 444 N.J. Super. 179 (App. Div. 2016). Copy previously supplied in response to Q13c.

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10. State v. C.F., No. FJ-20-1450-12 (N.J. Super. Ct. Ch. Div. Dec. 20, 2012), aff'd, State in the Interest of C.F., 132 A.3d 426, 444 N.J. Super. 179 (App. Div. 2016). Copy previously supplied in response to Q13c.

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e. Provide a list of all cases in which certiorari was requested or granted.

I have searched electronic databases to determine whether certiorari was requested or granted, and to my knowledge, the only case in which certiorari was requested is State v. McGillvary, Ind. No. 16-05-344 (N.J. Super. Ct. Law Div. Oct. 30, 2020), aff'd, No. A-4519-18 (App. Div. Aug. 4, 2021), certif. denied, 249 N.J. 341 (Dec. 7, 2021), cert. denied, McGillvary v. New Jersey, 142 S. Ct. 1685, 2022 U.S. LEXIS 1920 (Apr. 18, 2022). I did not find any cases in which certiorari was granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

Since becoming a judge approximately 13 years ago, I have been reversed nine times. In two of the cases, I was affirmed by the Appellate Division but reversed

by the New Jersey Supreme Court. I have supplied copies of all appellate opinions cited below.

State v. Morente-Dubon, Ind. No. 17-06-450 (N.J. Super. Ct. Law Div. Jan. 24, 2019), rev'd, No. A-459-20, 2022 N.J. Super. LEXIS 143 (App. Div. Dec. 19, 2022). In this criminal case, the defendant, an employee of a used-tire shop, bludgeoned a customer to death with an aluminum baseball bat and then enlisted his 16-year-old cousin to assist him in covering up the death. The defendant then fled the country to Guatemala, his native country, where he remained for more than ten years until he was extradited to the United States. The jury found defendant guilty of second-degree passion-provocation manslaughter, third-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a weapon. At sentencing, I found that that aggravating factors one (the manner in which defendant committed the offense was particularly heinous), three (risk that defendant will commit another offense), four (defendant took advantage of a position of trust to commit the offense), and nine (need for deterring the defendant and others) applied. Because these factors outweighed the sole mitigating factor (defendant's lack of prior criminal history), I sentenced defendant to a term of nine-and-a-half years of imprisonment – under the statutory maximum sentence of ten years. The Appellate Division reversed and remanded for re-sentencing. The principal ground for reversal indicated that while my sentencing analysis was sound and followed applicable law at the time, a subsequent New Jersey Supreme Court case (decided in 2021) applied retroactively and rendered my sentence improper. The matter is now pending resentencing.

State v. Oshinaike, Ind. No. 05-04-538, rev'd, No. A-0927-20, 2022 N.J. Super. Unpub. LEXIS 1469 (App. Div. Aug. 24, 2022). The matter was before me on a Petition for Post-Conviction Relief. The petitioner pleaded guilty in 2005 to possession with intent to distribute cocaine, an offense in the third degree. Consistent with the plea, the trial judge sentenced petitioner to 180 days in the county jail, and sentenced the defendant to probation for an unrelated charge of contempt in the fourth degree. In late 2019, petitioner was arrested for allegedly failing to pay child support and was referred to Immigration and Customs Enforcement officers based on a detainer, which resulted in deportation proceedings. On March 1, 2020, the defendant moved to withdraw his guilty plea tendered almost 15 years prior and alleged that his prior counsel provided ineffective assistance of counsel. Among other things, under oath, the defendant testified at the change of plea hearing that he was a U.S. citizen, and the written plea forms clearly advised him that if he were a non-citizen, he may be subject to deportation. He now claims that he was not a U.S. citizen, and that his lawyer was aware that he was a non-citizen. I found that the petition was time-barred, and in the alternative, without basis. The Appellate Division reversed, holding that the defendant was entitled to an evidentiary hearing. The hearing is pending.

State v. Graham, Ind. No. 19-02-0007, rev'd, No. A-001676-21 (N.J. Super. Ct. App. Div. June 6, 2022). The matter was before me on the defendant's violation of probation. The defendant pled guilty before me to an indictable third-degree offense of criminal mischief. The plea agreement included a provision recommending three years in state prison. Instead, I deviated downward and imposed a non-custodial sentence to a period of probation which required her to comply with intensive outpatient mental health treatment, among other conditions. The defendant failed to comply, and the Probation Department filed a Violation of Probation. After an evidentiary hearing, I ruled that defendant violated a number of conditions of probation and sentenced her to five years in state prison. While in state prison, the defendant was charged with escape, which prompted a state-wide manhunt. The Appellate Division, in a summary order, remanded the case back to me for more specific findings. Thereafter, I issued a 28-page opinion setting forth my findings of fact and conclusions of law, and re-sentenced the defendant to five years in state prison for the violations of probation. The defendant appealed, and in a summary order the Appellate Division remanded the matter again "to correlate the specific allegations of violation of probation with specific conditions of probation." The matter was heard by a different judge, who also ruled that the defendant violated probation, and sentenced the defendant to four years in state prison. The defendant has appealed that judge's ruling, which remains pending. Copies of my opinion, dated January 24, 2022, and the Appellate Division Order, dated June 6, 2022, supplied.

State v. Rivas, Ind. No. 15-02-114, aff'd, No. A-1994-18, 2021 N.J. Super. Unpub. LEXIS 1494 (App. Div. July 20, 2021), rev'd, 251 N.J. 132 (2022). In this criminal case, the defendant was charged with murdering his wife and dumping her naked body, with her mouth duct-taped, in the basement of an abandoned home. I conducted a five-day pre-trial evidentiary hearing on the defendant's motion to suppress a series of statements given by the defendant to law enforcement after he reported his wife missing to police in late February 2014. After initially claiming that his wife had disappeared after a night-time visit to the drug store, the defendant gave conflicting statements to law enforcement over the ensuing days. Eventually, he confessed that they had a marital argument, that she bit his finger, and that he lost control and struck her repeatedly in the head with a meat tenderizer in the kitchen of his residence. He then provided the details of the crime and the location where her body was thereafter discovered. At the outset of the interrogation which led to his confession, and for the first time, defendant asked if he should have a lawyer. I found that the invocation was ambiguous, and since law enforcement's attempt to clarify were inadequate, I suppressed the inculpatory statement, including the confession. However, at the end of the interview, the defendant repeatedly requested law enforcement to return the next day to talk to him. In light of the overnight hiatus, the change in location, the defendant's repeated entreaties for the officers to return, the clear Mirandizing of the defendant at the outset of the interview conducted the next day, and the absence of bad faith, I found that the defendant initiated "further communications" with law enforcement, and thus his subsequent confession was

admissible. I issued a written decision memorializing my findings of fact and conclusions of law. The Appellate Division affirmed in all respects. The New Jersey Supreme Court reversed, holding that law enforcement did not sufficiently clarify the defendant's ambiguous invocation of his right to counsel requiring the suppression of his confession, and that the defendant's repeated requests at the end of the interview to return to talk to him tomorrow did not constitute a voluntary reinitiation of communications with law enforcement. The matter is now pending a retrial.

State v. Knight, Ind. No. 15-08-569, rev'd, No. A-0838-19 (N.J. Super. Ct. App. Div. Apr. 26, 2021). The defendant, a police officer who was indicted for second-degree official misconduct and a series of third and fourth-degree thefts, pleaded guilty to a non-criminal petty disorderly conduct. Pursuant to the plea agreement, the defendant was sentenced to fines and restitution only. Thereafter, she moved to withdraw her guilty plea, which I denied. The Appellate Division reversed, holding that while the defendant made a knowing, voluntary, and intelligent guilty plea, and that "she testified to improperly submitting multiple overtime pay 'slips' or vouchers to her public employer for off-duty security work she did not perform," nonetheless her allocution did not constitute an adequate basis for the petty disorderly persons offense of disorderly conduct. As such, the matter was remanded for further proceedings. In November and December 2021, the matter was tried before a jury. The defendant was convicted of five counts of third and fourth-degree thefts. She was sentenced to 180 days in the county jail and placed on probation. Her appeal is pending.

State v. Outland, Ind. No. 16-02-107, aff'd, No. A-2857-17 (N.J. Super. Ct. App. Div. June 17, 2019), rev'd, 245 N.J. 494 (2021). This was a criminal case where the defendant was charged with an armed robbery and had filed a pro se pre-trial motion to represent himself. At oral argument, in response to the court's questions, the defendant indicated he had no knowledge of the criminal code, rules of evidence, rules of procedure, or the jury selection process. Moreover, he did not know that he was charged with conspiracy, although the charge was plainly set forth in the indictment, or that a conviction to first-degree robbery would subject him to a mandatory extended term of up to life in prison. I denied the defendant's motion to represent himself, granted his lawyer's motion to withdraw as counsel because the defendant no longer wanted him to represent him, and then adjourned the trial to allow the defendant's third assigned lawyer adequate time to prepare. At trial, the jury acquitted the defendant of first-degree robbery, which could have subjected him to life in prison, but convicted him of second-degree conspiracy and a related weapons offense. I sentenced him to nine years in state prison. My rulings, the verdict, and my sentence were affirmed by the Appellate Division. The New Jersey Supreme Court reversed the Appellate Division, holding that the defendant should have been allowed to represent himself, remanding the matter for a new trial. Upon remand, the defendant no longer sought to represent himself and instead sought to have the same counsel who represented him at the initial trial for the retrial. Because Double Jeopardy

attached, he could not be tried on the original charge of robbery in the first degree. In June 2022, the defendant was retried and convicted of the same offenses as in the first trial and sentenced to nine years in state prison.

State ex rel. D.M., No. FJ-20-209-15, rev'd, 451 N.J. Super. 415 (App. Div. 2017), rev'd, 238 N.J. 2 (2019). In a juvenile delinquency case, D.M., a 14-year-old boy, was charged with committing an aggravated sexual assault and related charges on an 11-year-old boy identified as Z.Y. Z.Y. told his mother that D.M., an older boy whom he knew from a local playground, had engaged in sexual conduct with him, prompting her to contact law enforcement. I conducted a five-day bench trial. During trial, it was established that Z.Y. had repeatedly communicated with D.M. through instant messaging and admitted to sending D.M. profane messages asking if he could perform oral sex on D.M. In a written decision, I found that the state failed to prove, beyond a reasonable doubt, that D.M. committed the offense of aggravated sexual assault but adjudicated D.M. to a lesser-related offense of child endangerment. Copy supplied. The Appellate Division reversed, finding that the child endangerment statute was sufficiently ambiguous and thus a juvenile cannot be adjudicated for the offense when the children are less than four years apart, absent penetration or coercion. The Supreme Court reversed the Appellate Division on alternate grounds.

Mone v. Graziadei, Girls Softball League of Westfield et al., No. UNN-L-3240-13, rev'd, No. A-4578-15T2, 2017 N.J. Super. Unpub. LEXIS 2727 (App. Div. Oct. 30, 2017). This civil personal injury lawsuit alleged that a volunteer softball coach in a recreational league was negligent when a 13-year-old player, while warming up the pitcher before a game in an area adjacent to the field, missed catching a ball, resulting in injuries to her teeth and jaw. The injured player wore shin guards and a chest protector during the warm-up but did not wear a face mask. At her deposition, the player testified that the coach instructed the players that they must wear "full equipment," which included face masks, when warming up the pitcher on the field, but was uncertain if the coach gave the same instruction when warming up the pitcher off the field. I granted summary judgment in favor of the defendant coach, finding no genuine issue of material fact in dispute. The Appellate Division reversed, holding that a "rational fact finder could conclude the coach's conduct constituted gross negligence if the coach, as plaintiff's supervisor, failed to ensure plaintiff was wearing a safety mask at the time she was warming up the pitcher." Upon remand, the parties settled the case.

State of New Jersey in the Interest of D.C., Nos. FJ-20-1338-12 and FJ-20-1374-12, aff'd in part, rev'd in part, State ex rel. D.C., No. A-1637-12T3, 2014 N.J. Super. Unpub. LEXIS 1438 (App. Div. June 18, 2014). In a case involving allegations of juvenile delinquency, I was affirmed in part and reversed in part. D.C. was a juvenile tried on two separate complaints: (1) causing a false public alarm and (2) assaulting a public school employee. On the false public alarm charge, the Appellate Division found that D.C.'s dislodging of the pull-box station

of the fire alarm in school which triggered "a high-pitched buzzer" did not "initiate a school-wide alarm or evacuation," within the meaning of the statute, and thus was "constrained" to reverse. State ex rel. D.C. at *13–14. I was affirmed on the assault charge, and the sentence was unaffected.

N.J. Div. of Youth & Family Servs. v. R.R., No. FN-20-42-09K, rev'd, No. A-0436-10 (N.J. Super. Ct. App. Div. May 13, 2011). In a case of alleged child abuse and neglect, R.R. was charged with physically beating her young biological daughter. Prior to my handling of the matter, the child had been removed from R.R. twice by other judges because of allegations of physical abuse. In addition, R.R. had pleaded guilty to a fourth-degree crime of child abuse, and she admitted to a prior judge in the Family Part matter that she had beaten the child. Based on the foregoing, citing the published decision of N.J. Div. of Youth & Family Servs. v. A.P., 408 N.J. Super. 252 (App. Div. 2009), I determined that a second factfinding trial based on a new allegation of physical abuse was not required, and thus the child did not have to testify against her mother. The Appellate Division reversed, holding that a second factfinding was required. As a result, I presided over an ensuing trial and issued a written opinion, finding that R.R. physically abused her daughter. My opinion was appealed and affirmed in all respects.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I have issued approximately 300 written unpublished opinions, and I have maintained hard copies in the courthouse.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

While I have issued dozens of written unpublished decisions involving various aspects of criminal law which implicate federal or state constitutional issues, none have addressed novel constitutional questions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify

each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

There is no "automatic" recusal system in the vicinage in which I sit. I assess recusal consistent with R. 1:12, titled "Disqualification and Disability of Judges," and the Code of Judicial Conduct. R. 1:12-1 (a) and (b) require recusal of the court if a party or lawyer, or member of the firm, is a close family relative, which is defined therein. In addition, R. 1:12-1(g) is a general proscription requiring "fair and unbiased" judgment, and the appearance of same. Canons 2 and 3 of the Code of Judicial Conduct require a judge to act impartially, free from influence of personal, professional, and political relationships, and in a manner which promotes the public's confidence in the judiciary.

To the best of my recollection, pursuant to the above, I have recused myself, sua sponte, on two occasions:

N.J. Div. of Youth and Family Servs. v. D.S., No. FN-20-59-09. The case involved alleged parental abuse and neglect, and the subject children to the litigation attended the same elementary school as my children. I recused myself because while I did not know the litigants, I did not want them or myself to be uncomfortable if we saw each other at school-related events.

State v. T. H., No. FJ-20-1959-11. This was a juvenile delinquency case involving a home burglary with substantial restitution, and I recused myself because I personally knew the alleged victims.

To the best of my recollection, I have been the subject of motions to recuse myself in one matter by one lawyer and two litigants, as follows:

Hall v. Hall, No. FM- 20-1365-05. This was a post-divorce matrimonial matter in which one party sought an ex-spouse's parental contribution for a child's college tuition. The plaintiff and his counsel had requested that I recuse myself on the grounds that I was predisposed and biased against him. I declined to recuse myself as the grounds were baseless. Counsel appealed, and the Appellate Division affirmed on all grounds, finding "no merit whatsoever to plaintiff's challenge to the trial court's impartiality." Hall v. Hall, No. A-2451-11T1, 2014 N.J. Super. Unpub. LEXIS 453 (App. Div. Mar. 6, 2014).

State v. Figueroa, Ind. No. 19-02-147. The defendant was charged with luring a 13-year-old-girl, who was walking to school in her school uniform, into his vehicle. Both the defendant and the victim were unrelated and unknown to each other. The defendant verbally sought my recusal on the grounds that I was biased against him because the defendant was Catholic. The defendant failed to file a motion or certification to support his allegation. His lawyer affirmatively stated on the record that he did not support his client's position and would not argue in favor of it. I issued a written decision denying the defendant's pro se motion for recusal as utterly without merit. On appeal, the Appellate Division affirmed in all respects. State v. Figueroa, No. A-1007-20 (N.J. Super. Ct. App. Div. June 28, 2022).

State v. Outland, Ind. No. 16-02-107. As described above in response to Q13f, prior to the initial trial, the defendant requested to represent himself. After a hearing, I denied the request, finding that the facts did not support a knowing, voluntary, and intelligent waiver of his right to counsel. The defendant, with highly experienced counsel, was tried before a jury resulting in an acquittal of the robbery in the first-degree charge but convicted on conspiracy and weapons-related offenses. The defendant was sentenced accordingly. The Appellate Division unanimously affirmed in all respects. The New Jersey Supreme Court reversed and vacated the convictions, holding that the defendant had a right to represent himself. On remand, the defendant filed a pro se motion for my recusal, claiming without basis that I was biased against the defendant because of the New Jersey Supreme Court's reversal of the trial court. Both the prosecutor and defense counsel stated on-the-record that there was no basis for recusal. The defendant's counsel affirmatively disavowed the position of his client, stating on the record, "I think you were utterly fair at the trial, and I have no doubt that you will be fair going forward. I don't see any conflict or bias ... I'm not aware of any basis for your recusal." On March 26, 2022, I supplemented my oral findings denying the motion for recusal in a written decision.

15. **Public Office, Political Activities and Affiliations**:

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

       None.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

       None.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk to the Honorable William J. Zloch, U.S. District Judge, Southern District of Florida, from 1991 to 1993.

ii. whether you practiced alone, and if so, the addresses and dates;

None.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

1993 – 1997
U.S. Department of Justice
950 Pennsylvania Avenue, Northwest
Washington, DC 20004
Trial Attorney

1997 – 2001
United States Attorney's Office
970 Broad Street, Suite 700
Newark, New Jersey 07102
Assistant U.S. Attorney, Civil Division

2001 – 2010
United States Attorney's Office
970 Broad Street, Suite 700
Newark, New Jersey 07102
Assistant U.S. Attorney, Criminal Division; Frauds Division; and Securities and Healthcare Fraud Unit

2010 – present
New Jersey Superior Court
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07102
Superior Court Judge

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My entire legal career since law school graduation has been in public service. After graduating law school in 1991, I clerked for two years for the Honorable William J. Zloch, U.S. District Judge for the Southern District of Florida.

In 1993, I was selected to serve in the Attorney General's Honors Program at the Department of Justice, in the Civil Division, as a Trial Attorney. In this capacity, I served as lead counsel handling complex civil litigation matters, primarily qui tam actions brought under the False Claims Act, for alleged contracting fraud. I handled all aspects of litigation, which included drafting civil complaints, discovery, motion practice, pre-trial preparation, settlement negotiations, and trial.

Thereafter, I served for four years as an Assistant U.S. Attorney in the United States Attorney's Office in New Jersey, in the Civil Division. I served as lead trial and appellate counsel in civil actions brought against the United States involving claims of general torts, constitutional torts, employment discrimination, sexual harassment and retaliation, and medical malpractice.

In mid-2001, I joined the Frauds Division and later the Securities and Healthcare Fraud Unit of the Criminal Division. I focused on sophisticated financial frauds, including corporate fraud, securities fraud, and a variety of investment and business fraud schemes. In this capacity, I successfully prosecuted dozens of individuals, including corporate executives of publicly traded and privately held companies, as well as accountants, lawyers, doctors, and business executives for their involvement in various fraud schemes. In addition, I prosecuted general crimes involving domestic and international drug trafficking, weapons offenses, bank robbery, carjacking, embezzlement, tax offenses, identity theft, insurance fraud, and bankruptcy fraud.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

In my more than 15 years at the Department of Justice in Washington, DC, and the U.S. Attorney's Office in New Jersey, I served the people of the United States of America.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As a trial attorney at the Department of Justice in Washington, DC, I generally appeared in court a few times per month. As an Assistant U.S. Attorney, I appeared in court multiple times per week.

i. Indicate the percentage of your practice in:
   1. federal courts: 99%
   2. state courts of record: 1%
   3. other courts: 0%
   4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 50%
   2. criminal proceedings: 50%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried approximately ten civil and criminal cases to verdict, and, with one exception, all matters were tried in federal court. For most of the cases, I served as sole counsel.

i. What percentage of these trials were:
   1. jury: 70%
   2. non-jury: 30%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the United States Supreme Court.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe

in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. United States v. Puff, No. 2:09-cr-271 (01) JLL

In 2008 through early 2010, I, along with co-counsel, investigated and prosecuted more than ten individuals for their roles in a Ponzi and mortgage fraud scheme, which defrauded more than 400 investors and financial institutions of more than $100 million. The defendants included lawyers, senior management at the company, loan appraisers, and processors.

NJ Affordable Homes, Inc., marketed itself as a real estate business which bought, refurbished and resold residential properties which it financed through an investment pool from residents in 30 states, predominantly New Jersey, but also from Sweden, the Caribbean, and Israel. The company falsely touted its profitability and security, luring investors with inflated profits and promised returns. The evidence proved that, in addition to the unlawful use of investor monies for personal gain, new investor money was used to pay off prior investors.

Mr. Puff, the president and owner of NJ Affordable Homes, Inc., the fraud's ringleader and mastermind, pled guilty to conspiracy to commit wire fraud, and was sentenced to 18 years in prison. I, along with co-counsel, coordinated and supervised the broad investigation, negotiated the plea agreements, drafted the charging documents and sentencing material, and handled all court appearances.

Judge:
Honorable Jose Linares (retired)
United States District Court for the District of New Jersey

Co-counsel:
Justin Arnold, Esq. (formerly at the U.S. Attorney's Office for the District of New Jersey)
United States Attorney's Office for the Western District of Washington
700 Stewart Street
Seattle, WA 98101
(206) 553-5558

Counsel for Defendant:
Joshua Markowitz, Esq.

1834 Stuart Road West
Princeton, NJ 08540
(609) 915-9042

2. United States v. Scott, No. 2:08-cr-00789(WHW), aff'd, 463 F. App'x 85 (3d Cir. 2011)

In 2009, as an Assistant U.S. Attorney, along with co-counsel, I tried to a jury a former convicted felon for drug and weapons offenses. Defendant Scott was approached by two officers on foot as it appeared that he was drinking alcohol in public. The defendant immediately fled into an adjacent alley, and while fleeing, appeared to turn toward the officers while brandishing a firearm. Upon his apprehension, he was found to possess a 9 mm semi-automatic pistol loaded with hollow-point bullets, and 40 individually packaged doses of heroin. I, along with co-counsel, prepared and presented the matter at trial, including conducting direct and cross-examinations, and closing argument. A jury convicted defendant Scott of all counts, and he was sentenced to ten years in prison.

Judge:
Honorable William H. Walls (deceased)
United States District Court for the District of New Jersey

Co-Counsel:
Ronnell L. Wilson, Esq.
United States Attorney's Office
District of New Jersey
970 Broad Street
Newark, NJ 07102
(973) 645-2923

Counsel for Defendant:
Lisa Mack, Esq.
Federal Public Defender's Office
976 Broad Street
Newark, NJ 07102

3. United States v. Urciuoli, No. 07-cr-637-01, aff'd, No. 08-1208 (3d Cir. Feb. 20, 2013)

In 2007 and 2008, as an Assistant U.S. Attorney, I investigated and prosecuted a number of officers of InsPara Networking Technologies, Inc., a privately owned business information technologies firm, for defrauding investors by falsely inflating stated revenue and profits, among other things. In 2008, along with co-counsel, I tried Mr. Urciuoli, InSpara's Vice President of Finance and a Director, in federal court for his role in defrauding investors of more than $5 million. He was convicted of wire fraud and obstruction of justice, and was sentenced to nine years in prison.

I handled the case from its inception through its conclusion. I was involved in coordinating the investigation with federal agents, and along with co-counsel, presented the matter at trial. At trial, I handled the direct and cross-examinations of multiple witnesses, and presented the closing and rebuttal summations. Post-conviction, I also submitted the sentencing material and presented the argument on behalf of the United States at the sentencings of the defendants.

Judge:
Honorable Peter Sheridan
United States District Court for the District of New Jersey

Co-counsel:
Craig Carpenito, Esq.
King & Spalding
1185 Avenue of the Americas, 34th Floor
New York, NY 10036
(212) 556-2142

Counsel for Co-defendant Henches:
Michael Pedicini, Esq.
560 Main Street
Chatham, NY 07928
(973) 769-3723

Counsel for Co-defendant Urciuoli:
David Feingold, Esq.
Broadstreet Private Equity
211 North Main Street
Greenville, SC 29601
(561) 309-5767

4. United States v. DaCosta, No. 2:04cr-00572 (JCL)

In 2006 to 2007, as an Assistant U.S. Attorney, along with co-counsel, I tried this criminal case to a jury. Defendant DaCosta's investment company swindled approximately two dozen mostly elderly investors through false promises involving bogus real estate transactions and non-existent "high yield" banking instruments. In order to assuage the investors and promote the infusion of additional monies, defendant DaCosta sent them fraudulent account statements, indicating exorbitant but nonexistent returns. The monies were used for the defendant's personal expenses and lifestyle purchases. I, along with co-counsel, prepared and presented the matter at trial, including conducting direct and cross-examinations, and opening statement. Mid-trial, the defendant pled guilty to wire fraud, and was sentenced to five years in prison. There was no appeal.

Judge:

Honorable John Lifland (retired)
United States District Court for the District of New Jersey.

Co-Counsel:
Adam Lurie, Esq.
Linklaters
601 13th Street, Northwest
Suite 400 South
Washington, DC 20005
(202) 654-9229

Counsel for Defendant:
Abukela Adetula, Esq.
(973) 652-6539
I am unable to locate additional contact information.

5. United States v. Hoffecker and Myers, Nos. 03-cr-120(01) and (02), aff'd, 530 F.3d 137 (3d Cir. 2008)

From 2003 through mid-2006, as an Assistant U.S. Attorney, I investigated and prosecuted defendants Hoffecker and Myers, for their roles in owning and operating a major complex international telemarketing fraud which targeted U.S. investors believing they were purchasing a variety of physical commodities which the company represented they were safely storing.

The scheme involved an offshore central "office" in the Bahamas, with claimed worldwide offices, and approximately 10 U.S. boiler rooms. The investment scheme defrauded more than 1,000 U.S. citizens of more than $20 million, specifically targeting senior citizens and the unsophisticated, resulting in individual financial ruin. One trial witness, an 82-year-old great-great grandmother from Kansas who invested $125,000, of which all was lost, testified that she was solicited by one of the boiler rooms more than 20 times in a single day.

While both Messrs. Hoffecker and Myers were notorious as ringleaders in several prior substantial fraud schemes, they nonetheless avoided any meaningful sanctions from investigating regulators or law enforcement despite repeated referrals to their agencies. The investigation included thousands of documents, more than 100 secretly recorded meetings and conversations, interviews of victims located across the U.S., and interviews of their employees both in the U.S. and abroad.

I, along with co-counsel, conducted two three-month jury trials of both defendants, which resulted in convictions of both defendants to all counts of conspiracy and mail fraud. Both prosecutions spanned years and required extensive pretrial litigation on a multitude of complicated legal issues. I, along with co-counsel, briefed and argued a litany of pretrial motions, including conducting direct and cross-examination of witnesses at pretrial evidentiary hearings. At the trials, I conducted numerous direct and cross-

examinations, as well as presented the opening statement and closing arguments. I also drafted the post-trial sentencing material for both defendants, and argued the sentencing issues in court on behalf of the United States as it related to Mr. Hoffecker.

Defendant Hoffecker was sentenced to more than 17 years in prison; Defendant Myers was sentenced to nine years in prison. When both defendants appealed the sentence, I provided strategic advice to appellate counsel, edited the brief, and participated in the moot oral argument. The Third Circuit Court of Appeals affirmed.

Judge:
Honorable Katharine Hayden
United States District Court for the District of New Jersey

Co-counsel:
Bohdan Vitvitsky, Esq.
Former Assistant U.S. Attorney (retired)

Counsel for Co-defendant Hoffecker:
Benedict Kuehne, Esq.
100 Southeast 2nd Street
No. 3550
Miami, FL 33131
(786) 369-0213

Counsel for Defendant Myers:
Jon May, Esq.
11122 Landsman Street
Boca Raton, FL 33428
(954) 439-6500

6. United States. v. Kaiser, No. 04-cr-434(02)

In 2004, as an Assistant U.S. Attorney, I investigated and prosecuted Mr. Kaiser for his principal role in promoting a supposed a mobile chemical and biological detection device referred to as C-BAND, two weeks after the tragedy of September 11, through a company, R-Tec, which he founded. He falsely claimed the purported anti-terrorism device was patented and operational, readily deployable for immediate use in homes, hospitals, and schools.

The investigation proved that the device was a fraud, and that defendant Kaiser's false representations propped up the value of the company, and his own shares. On the eve of trial, the defendant pled guilty to securities fraud. He was sentenced to 12 months in prison. I coordinated and supervised the investigation, negotiated the plea agreement, drafted the charging document and sentencing material, and handled all court appearances.

Judge:
Honorable John Bissell (retired)
United States District Court for the District of New Jersey

Counsel for Defendant Kaiser:
Mark Wasserman, Esq.
329 South Oyster Bay Road
Suite 225
Plainview, NY 11803
(516) 476-6040

7. United States v. Sanpietro, No. 2:03-cr-595-001(JLL)

In 2003 and 2004, as an Assistant U.S. Attorney, I served as lead counsel in the investigation and prosecution of a series of officers in Medi-Hut, a publicly traded healthcare company, relating to a $100 million securities fraud case which resulted in the convictions of members of the entire executive suite, including the CEO, CFO, COO, and VP. Medi-Hut, a small-cap stock which traded on the Nasdaq exchange, was based in Wall Township, New Jersey, and made and distributed medical devices such as syringes, as well as brand-name and generic over-the-counter and prescription drugs. Medi-Hut's corporate officers engaged in sham transactions which inflated revenue and created false and inflated accounts receivables. These tactics were designed to artificially inflate the value of the company's stock, which had increased 15-fold during the timeframe of the fraud. The defendant executives, whose personal holdings ranged from 30,000 to 3.3 million shares, stood to gain substantial financial windfalls.

I coordinated and supervised the broad investigation, negotiated the plea agreements, drafted the charging documents and sentencing material, and handled all court appearances. The entire executive suite pled guilty: Co-defendants Sanpietro, Sr., and Simon, the CEO and CFO, respectively, pled guilty to conspiracy to commit securities fraud and making false statements to the SEC and each were sentenced to 46 months in prison. Co-defendant Marasco pled guilty to conspiracy, making false statements to the SEC, and tax fraud. He was sentenced to 42 months in prison. Mr. Sanpietro, the COO, pled guilty obstruction of justice and was sentenced to probation.

Judge:
Honorable Jose Linares (retired)
United States District Court for the District of New Jersey

Counsel for Defendant Sanpietro, Sr.:
Jonathan Goldstein, Esq.
Hellring Lindeman Goldstein & Siegel
One Gateway Center
Newark, NJ 07102
(973) 621-9020

Counsel for Defendant Simon:
Edward Dauber, Esq.
Greenberg Dauber Epstein & Tucker
One Gateway Center, No. 600
Newark, NJ 07102
(973) 643-3700

Counsel for Defendant Marasco:
Paul Nittoly, Esq.
McElroy Deutsch
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962
(973) 425-8731

Counsel for Defendant Sanpietro:
William Maderer, Esq.
Saiber
18 Columbia Turnpike
Florham Park, NJ 07932
(973) 645-4814

8. United States v. Qaraeen, No. 2:03-cr-00749 (FSH)

In 2003 and 2004, as an Assistant U.S. Attorney, I investigated and prosecuted Mr. Qaraeen for his role as a ringleader in recruiting dozens of others to commit credit card fraud schemes in New Jersey over a period of several years, which resulted in approximately $7 million in losses through fraudulent purchases and unlawful cash advances.

Defendant Qaraeen and his recruits opened more than 1,000 credit card accounts and other credit accounts through fraudulent applications, which resulted in obtaining millions of dollars in cash and merchandise, including jewelry, electronics, home furnishings, and airline tickets. In order to perpetuate the scheme, the defendant and his co-conspirators would issue checks to the credit card companies which were immediately credited to their account but which were rejected for insufficient funds days later when processed by the bank. I coordinated and supervised the investigation, negotiated the plea agreement, drafted the charging document and sentencing material, and handled all court appearances. The case also involved coordination for restitution purposes of dozens of creditors. He was sentenced to nine years in prison and was ordered to pay restitution in the amount of $6.8 million. No appeal was filed.

Judge:
The Honorable Faith Hochberg (retired)
United States District Court for the District of New Jersey

Counsel for Defendant:
Laurie Fierro, Esq.
135 Kinnelon Road
Kinnelon, NJ 07405
(973) 838-4405

9. Latella v. United States, No. 2:97-cv-5744 (DRD)

From 1997 through early 2000, I represented the United States in this personal injury civil suit brought by the plaintiff against the U.S. Postal Service stemming from an automobile accident. Initially, the matter appeared to be a rather routine and unremarkable rear-end collision case. Through discovery and extensive motion practice, it was revealed that the plaintiff had had multiple prior accidents, through automobile accidents and slip-and-falls, and had sustained previous injuries to her neck and back. Thus, the parties contested the issue of damages.

I tried the case, which included conducting the direct and cross-examinations of numerous expert witnesses, and presented the opening statement and closing argument before the Honorable Dickinson Debevoise. Plaintiff sought damages in excess of $120,000 and in a written Final Judgment, Judge Debevoise awarded less than $10,000. No appeal was filed.

Judge:
Honorable Dickinson Debevoise (deceased)
United States District Court for the District of New Jersey

Counsel for Plaintiff:
Gregory Miller, Esq.
Rivkin Radler
25 Main Street
Court Plaza North
Hackensack, NJ 07601
(201) 287-2474

10. United States v. Cheney, No. 99-cr-137 (NHP)

In 1998 and 1999, as an Assistant U.S. Attorney, I handled the investigations and prosecutions of a trio of defendants, two of whom escaped from federal prison for prior bank robberies and then went on a multi-state bank robbery spree until they were ultimately apprehended by U.S. Marshals.

The lead defendant, Mr. Cheney, met his male co-codefendant in federal prison where both were incarcerated. On a visit to the prison, Cheney and his then-girlfriend and co-conspirator planned his escape which was finalized through subsequent coded communications. With proceeds from a string of bank robberies, the trio spent their days at breweries, zoos, Broadway plays, and luxury hotels. When the defendants were

arrested at a New Jersey motel, law enforcement seized an exotic jungle pet, among other items. I coordinated and supervised the investigation, negotiated the plea agreement, drafted the charging document and sentencing material, and handled all court appearances. Mr. Cheney was sentenced to 60 months for escape and the bank robberies, to be served after the completion of his prior sentence. No appeal was filed.

Judge:
Honorable Nicholas Politan (deceased)
United States District Court for the District of New Jersey

Counsel for Defendant Cheney:
Stacy Biancamano, Esq.
312 North Avenue, East
Suite 7
Cranford, NJ 07016
(908) 325-3023

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Throughout my career both as a practicing lawyer and as a judge, I have undertaken various roles, including positions of supervision. In the U.S. Attorney's Office, when I served in the Securities and Healthcare Fraud Unit, I served as the Healthcare Fraud Coordinator. In this capacity, I led meetings and coordinated the work of various agencies whose shared mission was investigating and prosecuting healthcare fraud. Throughout my career, I gave numerous lectures and participated on various panels to federal prosecutors and investigators on a variety of fraud-related topics, including effective trial strategy and presentation in fraud cases. In addition, while at the U.S. Attorney's Office, for many years I served on the hiring committee. In this capacity, I interviewed numerous applicants, spoke with references, and issued written evaluations regarding the applicant's candidacy. In addition to my case-related responsibilities as a lawyer at the Department of Justice, I also served in leadership positions as Trustee of the Trial Association of New Jersey and Co-chair of the Criminal Section of the Union County Bar Association.

As a judge, I have served as a mentor to a number of newly confirmed judges, in order to provide guidance and assistance in acclimating to the responsibilities and challenges of serving as a Superior Court judge. I have served on a number of leadership committees, including the New Jersey Supreme Court Committee on Rules of Evidence and Subcommittee on Restyling the Hearsay Rules. I have also served on a number of statewide and local committees devoted to juvenile justice. I also created a juvenile

reentry program which was implemented statewide.

I have not performed any lobbying activities or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

No family members or other persons, parties, categories of litigation or financial arrangements are likely to present potential conflicts of interest for me. I would recuse myself from any matter coming before me on collateral review in which I was involved as a state court judge.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would resolve any potential conflict of interest by adhering to the Code of Conduct for United States Judges, 28 U.S.C. § 455, and all applicable policies and procedures of the United States Courts.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My career has been in public service and, pursuant to judicial canons, I have been unable to provide direct pro bono representation. As a judge, in 2014, I initiated a juvenile re-entry program for statewide implementation. The format of the program included a motivational guest speaker series for juveniles held at various youth detention centers throughout the state, in coordination with community-based service providers and on-site educators to assist in transitioning youth post-release. The program was presented at every youth detention facility serving at-risk youth from all 21 counties in New Jersey.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In December 2014, I was referred to Senators Booker and Menendez for consideration for a judicial position on the U.S. District Court for the District of New Jersey. In early 2015, I was interviewed by Senator Cory Booker's Judicial Advisory Committee and was subsequently contacted by Senator Menendez's staff. Senator Booker's Judicial Advisory Committee recommended that I be interviewed by the Senator's staff. As a result, I was interviewed by members of Senator Booker's staff. A few days later, I was interviewed by Senator Booker.

In early 2021, I was telephonically interviewed by both Senators Booker and Menendez. On August 4, 2022, I was interviewed by Senator Menendez. On August 9, 2022, I was interviewed telephonically by Senator Booker.

On August 12, 2022, I interviewed with attorneys from the White House Counsel's Office. Since August 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

UNITED STATES SENATE
COMMITTEE ON THE JUDCIARY

QUESTIONAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Orelia Eleta Merchant

   Orelia Merchant Camara (informally)

2. **Position**: State the position for the which you have been nominated.

   United States District Judge for the Eastern District of New York

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office:
   New York State Attorney General's Office
   28 Liberty Street, 23rd Floor
   New York, New York 10005

   Home:
   Brooklyn, New York

4. **Birthplace**: State year and place of birth.

   1971, Bronx, New York

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1995 – 1998, Tulane University Law School; J.D., 1998

   1993 – 1995, College of William and Mary; M.A., 1995

   1988 – 1992, Dillard University; B.S., 1992

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation

from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description.

2019 – present
New York State Attorney General's Office
28 Liberty Street
New York, New York 10005
Chief Deputy Attorney General for State Counsel

2002 – 2019
U.S. Attorney's Office for the Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
Executive Assistant United States Attorney (2016 – 2019)
Assistant United States Attorney - Civil Division (2002 – 2016)

1998 – 2000; 2001 – 2002
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604
Assistant Regional Counsel

2000 – 2001
U.S. Attorney's Office for the Eastern District of Louisiana
501 Magazine Street
New Orleans, Louisiana 70130
Special Assistant United States Attorney

Spring 1997; 1997 – 1998
Carter and Cates Law Firm
110 Poydras Street, Suite 1230
New Orleans, Louisiana 70163
Law Clerk

Summer 1997; Summer 1996
Phelps Dunbar LLP
365 Canal Street Suite 2000
New Orleans, Louisiana 70130
Summer Associate

Summer 1996
Atlantic Richfield Company (ARCO)
444 South Flowers Street
Los Angeles, California 90011
Law Clerk

1993 – 1995
Virginia Institute of Marine Science
Route 1208 Greate Road
Gloucester Point, Virginia 23062
Graduate Assistant

1992 – 1993
Environmental Industrial Research Associates – Chemfix
161 James Drive West, Suite 100
St. Rose, Louisiana 70087
Environmental Chemist I

7. **Military Service and Draft Service**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I was not required to register for the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Recipient of U.S. Department of Justice, Executive Office for United States Attorneys Director's Award for Superior Performance as an Assistant United States Attorney – Civil (2016)

   Commendations for Outstanding Work on Employment Law Matters, United States Probation Department, Eastern District of New York (2002, 2010, 2011, 2015)

   Community Service Award, U.S. Attorney's Office, Eastern District of New York (2013)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   American Bar Association

   EDNY Litigation Advisory Committee

   Federal Bar Council

   Metropolitan Black Bar Association

   National Black Prosecutors Association

New York State Bar Association

New York County Lawyers Association

Second Circuit Judicial Conference Program and Planning Committee

United States Magistrate Judge Merit Selection Panel for the Eastern District of New York

10. **Bar and Court Admissions**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Louisiana, 1999*
District of Columbia, 2018
New York, 2018

*From September 2001 to May 2002, I was administratively ineligible to practice in Louisiana for nonpayment of dues/assessment. During this time, I did not practice in Louisiana. I had moved to Illinois, and then to New York. As soon as I paid the dues/assessment in May 2002, I immediately became eligible, and have remained eligible to practice in Louisiana since that time.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals, Second Circuit, 2003
United States Court of Appeals, Fifth Circuit, 2000*
United States District Court, Eastern District of Louisiana, 2000*
United States District Court, Eastern District of New York, 2019
United States District Court, Southern District of New York, 2019
United States Court of International Trade, 2021

*I did not renew these admissions after I left the U.S. Attorney's Office for the Eastern District of Louisiana.

11. **Memberships:**

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or

participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Delta Sigma Theta Sorority Inc. (National Organization), Life Member (1989 – present)

Additionally, I have served as a Parent Volunteer Admissions Ambassador (2019 – present) and Middle School Parent Association, 7th Grade Parent Representative (2021 – 2022) at my children's school; Parent and Teacher Association Executive Vice-President (2018-2021) and Lower School Vice-President (2016-2018) at my children's former school; and as a Volunteer Girls Softball Assistant Coach (2019 – 2020). I can provide additional details to the Committee upon request.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, or religion or national origin either through formal membership requirements or the practical implementation or membership policies. If so, describe any action you have taken to change these policies and practices.

Delta Sigma Theta Sorority, Inc. is a national service organization that limits its membership to women. To the best of my knowledge, none of the other organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

"Shellfish Culture Area Designation Protocol Development" (1995), Dissertations, Theses, and Masters Projects, William & Mary Scholarworks, Paper 1539617684. Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give

the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

d. Supply four (4) copies of transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

The following reflects my best effort to identify the speeches, talks, and remarks that I have delivered based on a review of my records and publicly available information.

January 16, 2022: Faculty Member, Ethics for Government Lawyers, Practising Law Institute, New York, New York. Notes supplied.

January 27, 2021: Faculty Member, Ethics for Government Lawyers, Practising Law Institute, New York, New York. Notes supplied.

October 26, 2020: Panelist, Navigating Graduate School and Career Paths, William and Mary, School of Marine Science, Gloucester Point, Virginia. The panel discussed career paths after graduate school. I have no notes, transcript, or recording. The address for the William and Marry School of Marine Science is Route 1208 Greate Road, Gloucester Point, Virginia 23062.

January 31, 2020: Faculty Member, Ethics for Government Lawyers, Practising Law Institute, New York, New York. The faculty discussed the application of professional conduct rules to government lawyers. I have no notes, transcript, or recording. The address of the Practising Law Institute is 1177 6th Avenue, New York, New York 10036.

February 28, 2019: Faculty Member, Ethics for Government Lawyers, Practising Law Institute, New York, New York. The faculty discussed the application of

professional conduct rules to government lawyers. I have no notes, transcript, or recording. The address of the Practising Law Institute is 1177 6th Avenue, New York, New York 10036.

October 5, 2018: Panelist, Alumnae Panel Discussion, Castilleja School, Palo Alto, California. I spoke to junior and senior high school students about navigating non-traditional career paths and life after high school sponsored by Castilleja School. I have no notes, transcript, or recording but press coverage is supplied. The address of Castilleja School is 1310 Bryant Street, Palo Alto, California 94301.

March 1, 2018: Faculty Member, Ethics for Government Lawyers, Practising Law Institute, New York, New York. The faculty discussed the application of professional conduct rules to government lawyers. I have no notes, transcript, or recording. The address of the Practising Law Institute is 1177 6th Avenue, New York, New York 10036.

March 22, 2017: Panelist, How to Become an Assistant United States Attorney, New York City Bar Association Committee for Minorities in the Courts, New York, New York. I participated in a panel discussion about pathways to becoming an Assistant United States Attorney. I have no notes, transcript, or recording. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036.

March 4, 2017: Guest Speaker, Power Brunch Series, Association of Black Women Attorneys ("ABWA"), New York, New York. I participated in a round table discussion with ABWA members about navigating career paths. I have no notes, transcript, or recording. The address of ABWA is 1001 Avenue of the Americas, 11th Floor, New York, New York 10018.

July 19, 2016: Panelist, Pathways to—and Reward of—Becoming an Assistant United States Attorney: Perspectives from Diverse Assistant U.S. Attorneys, Federal Bar Council Public Service Committee and the United States Attorney's Office for the Eastern and Southern District of New York, New York, New York. The panel discussed paths to service as assistant U.S. attorneys. I have no notes, transcript, or recording. The address of the Federal Bar Council is 150 Broadway, New York, New York 10038.

April 26, 2016: Panelist, How to Become an Assistant United States Attorney, Panelist, How to Become an Assistant United States Attorney, New York City Bar Association Committee for Minorities in the Courts, New York, New York. I participated in a panel discussion on the structure of the office, the qualifications sought for the position of Assistant United States Attorney and the basics of applying, and I shared information regarding my professional trajectory. I have no notes, transcript, or recording. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036.

January 22, 2015: Panelist, How to Become an Assistant United States Attorney, Panelist, How to Become an Assistant United States Attorney, New York City Bar Association Committee for Minorities in the Courts, New York, New York. I participated in a panel discussion on the structure of the office, the qualifications sought for the position of Assistant United States Attorney and the basics of applying, and I shared information regarding my professional trajectory. I have no notes, transcript, or recording. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036.

April 21, 2014: Panelist, Everything You Wanted to Know About Becoming an AUSA, New York City Bar Association Committee for Minorities in the Courts, New York, New York. I participated in a panel discussion on the structure of the office, the qualifications sought for the position of Assistant United States Attorney and the basics of applying, and I shared information regarding my professional trajectory. I have no notes, transcript, or recording. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036.

Specific date unknown: Guest Speaker, Careers in Law, New York Needs You (nonprofit mentoring program for first generation college students), New York, New York. I spoke to first generation college students about careers in law. I have no notes, transcript, or recording. The address of New York Needs You is 589 8th Avenue, Floor 5, New York, New York 10018.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

CBS Evening News – Eye on America (Louisiana Lawsuit), "Law Students Take on Goliath" (Oct. 19, 1998). I am unable to locate a recording or transcript of this interview. Summary supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

i. Of these cases, approximately what percent were:

jury trials: ___%
bench trials: ___% [total 100%]

ii. Of these cases, approximately what percent were:

civil proceedings: ___%
criminal proceedings: ___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed an/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues together with the citation to appellate court rulings on such opinions. If any opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sate by designation on a federal court of appeals, including a brief summary of any opinions you authored whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal**: If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs and "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to

an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not held judicial office.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career**: Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduating from law school including:

i. whether you served as a clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have never served as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1998 – 2000; 2001 – 2002
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604
Assistant Regional Counsel

2000 – 2001
U.S. Attorney's Office for the Eastern District of Louisiana
501 Magazine Street
New Orleans, Louisiana 70130
Special Assistant United States Attorney

2002 – 2019
U.S. Attorney's Office for the Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
Assistant United States Attorney (2002 – 2016)
Executive Assistant United States Attorney (2016 – 2019)

2019 – present
New York State Attorney General's Office
28 Liberty Street
New York, New York 10005
Chief Deputy Attorney General for State Counsel

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Since 2019, I have served as Chief Deputy Attorney General for State Counsel ("State Counsel"), a member of the New York State Attorney General's executive leadership team. As State Counsel, I head the Division of State Counsel, which consists of seven bureaus statewide, including Civil Recoveries, Claims, Litigation, Real Property, and Sex Offender Management Bureaus, that handle litigation involving the state, including its agencies and officials. In this role, I oversee more than 8,000 active cases, and manage 450 employees, including 250 attorneys, in prosecution and defense of actions and complex cases in state and federal

court on behalf of executive branch officials, the legislature, and state agencies, officials and employees; defense of the state against actions in the Court of Claims involving malpractice, contract disputes and property condemnation; recovery of money owed to the state though affirmative litigation; and legal assistance provided to state agencies in connection with the acquisition and disposition of public land.

From 2002 to 2019, I served in the U.S. Attorney's Office for the Eastern District of New York, most recently serving as an Executive Assistant United States Attorney ("EAUSA"). From 2016 to 2019, in my position as EAUSA, I provided counsel to the United States Attorney and division supervisors on Office policy, procedures, personnel matters, and significant and sensitive legal, workplace, and case related issues. I represented the Office in high-level meetings in some of its most significant cases and investigations, including settlement discussion and negotiations related to complex residential mortgage-backed securities fraud investigations, involvement in national initiatives, and asset forfeiture related international repatriation ceremony programs. I also provided management direction and oversight of the Civil Division in representing the interests of the United States in nearly 1,000 active cases and matters, and the Office's Administrative Division, including management of the financial, human and information technology resources for approximately 350 permanent employees and approximately 50 contract employees.

From 2002 to 2016, during my tenure as an Assistant United States Attorney in the Civil Division, I managed a diverse, demanding, and complex caseload, handling a wide range of affirmative and defensive matters. I prosecuted asset forfeiture, environmental, health care fraud, and mortgage fraud cases, and defended employment discrimination, medical malpractice, bankruptcy, immigration, personal injury, social security, prisoner litigation, constitutional challenges, and federal program litigation cases. As lead counsel in all stages of trial practice, on these cases, I drafted pleadings and conducted pre-trial discovery, including drafting and responding to discovery requests and preparing and defending parties, Fed. R. Civ. P. 30(b)(6) witnesses, third parties and expert witnesses. In addition, I regularly argued discovery and dispositive motions before the United States District Court for the Eastern District of New York and represented the United States in the United States Court of Appeals for the Second Circuit.

From 1998 to 2000 and 2001 to 2002, I served as an Assistant Regional Counsel for the United States Environmental Protection Agency Region 5 ("USEPA"), counseling various programs, litigating environmental enforcement actions, and negotiating settlements in CERCLA, RCRA, CAA, CWA, FIFRA, and TSCA matters.

From 2000 to 2001, while employed by the USEPA, I was detailed to the United States Attorney's Office for the Eastern District of Louisiana as a Special Assistant United States Attorney ("SAUSA"), where I was assigned to both the Civil and Criminal Divisions. As a SAUSA, I was responsible for the investigation and prosecution of general crimes, violent and drug crimes, criminal environmental cases, and defending the government in tort and employment discrimination actions. I represented the United States in matters before the United States District Court for the Eastern District of Louisiana, including arraignments, pre-trial conferences, detention, revocation, and sentencing hearings, and trials. I also prepared witness and experts and presented their testimony in court. In addition to assisting with criminal trials, I was co-counsel on three employment discrimination jury trials.

ii. your typical clients and the areas, if any, in which you have specialized.

I have represented the United States, its agencies, officers, and employees, and New York state, its agencies, officers and employees in wide range of civil practice areas.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. In the frequency of your appearances in court varied, describe such variance, providing dates.

The majority of my over 23 years of practice has been in litigation.

Since 2019, as Chief Deputy Attorney General for State Counsel, I occasionally attend court proceedings in state and federal court in a supervisory capacity to observe attorneys and provide guidance.

From 2016 to 2019, as an Executive Assistant United States Attorney, I occasionally attended court proceedings in a supervisory capacity to observe attorneys.

From 2002 to 2016, as an Assistant United States Attorney, and from 2000 to 2001, as a Special Assistant United States Attorney, I appeared in federal district court frequently, often several times a week. During these time periods, I also occasionally appeared in federal appellate court.

i. Indicate the percentage of your practice in:

1. federal courts: 95%
2. state courts of record: 4%
3. other courts: 1%
4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 95%
2. criminal proceedings: 5%

d. State the number of cases in court of record you tried to verdict or judgment (rather than settled), indicated whether you were sole counsel, chief counsel, or associate counsel.

I have tried at least eight trials to verdict or judgment. Four of those trials were federal civil matters where I was chief counsel, and one was a criminal health care fraud forfeiture matter, where I was associate counsel, tried in the United States District Court for the Eastern District of New York. Three of those trials were civil employment discrimination jury trials, where I was associate counsel, tried in the United States District Court for the Eastern District of Louisiana. I have also assisted with criminal jury trials as associate counsel in the United States District Court for the Eastern District of Louisiana. Additionally, I have argued several cases before the United States Court of Appeals for the Second Circuit.

i. What percentage of these trials were:
1. Jury: 40%
2. Non-Jury: 60%

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties who you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also, state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each other parties.

1. *In Re Hurricane Sandy Cases*, Case No. 14-MC-41 (E.D.N.Y.) (Brown, M.J., Pollak, M.J., Reyes, M.J.)

From June 2014 to December 2015, I represented FEMA at numerous hearings and hundreds of court conferences in more than 1,300 cases arising out of Hurricane Sandy that were filed against FEMA's private insurance carriers that are funded by FEMA. In these cases, FEMA's handling of the Hurricane Sandy property damage flood insurance-based claims under the National Flood Insurance Program was often in the national spotlight. I coordinated with FEMA, the private insurance carriers funded by FEMA, and the court to address a host of issues that arose in the claims handling processing and that resulted in the denial of potentially meritorious claims, and was instrumental in achieving favorable results for homeowners. I also managed and counseled AUSAs in resolving approximately 125 of these cases litigated by the Office, and issues that arose in navigating discovery, mediation and settlement orders issued by the three-judge magistrate panel.

Plaintiff's Liaison Counsel:
John S. Mostyn (deceased)

Javier Delgado, Esq.
Merlin Law Group
100 Park Avenue
New York, NY 10017
(516) 515-6025

2. *United States ex rel. Bozzelli v. PHH Corporation*, Case No. CV-13-3084 (E.D.N.Y. Bianco, J.) (Brown, M.J.)

From 2013 to 2016, I worked with agency partners, a multi-district team, and related workgroup to investigate the relator's qui tam allegations that PHH Corporation violated the False Claims Act by knowingly originating and underwriting mortgage loans insured by the U.S. Department of Housing and Urban Development's Federal Housing Administration (FHA), guaranteed by the United States Department of Veteran Affairs (VA), and purchased by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) that did not meet applicable originating, underwriting, and quality control requirements. In 2017, the case settled for approximately $74 million.

Relator's Counsel:
Michael J. Lingle, Esq.
Thomas Solomon LLP
693 East Avenue
Rochester, NY 14607
(585) 272-0574

3. *Tripp v. United States*, Case No. CV-12-5777 (E.D.N.Y.) (Johnson, J.) (Pohorelsky, M.J.)

From 2012 to 2015, I represented the United States in this personal injury and wrongful death action arising out of a motor vehicle accident with a governmental vehicle operated by a Secret Service Agent. This was a significant high-exposure wrongful death and zone of danger action involving a Secret Service agent who struck a young mother of five children. The decedent's youngest daughter witnessed the accident. I handled pretrial matters, including court conferences and discovery, which included deposing decedent's minor children. I successfully dealt with challenges presented both by the video recording of the accident that captured the decedent being struck by the Agent's car as well as his signed sworn admission that he was driving above the speed limit at the time of the accident. I negotiated settlement after the close of pretrial discovery.

Plaintiff's Counsel:
Steven I. Fried, Esq.
Law Office of Steven I. Fried, P.C.
18 East 41st Street – Suite 806
New York, NY 10017
(212) 964-5777

4. *Plaza v. United States*, Case No. CV-00-735 (SLT) (E.D.N.Y. Mar. 30, 2007)

From 2004 to 2007, I represented the United States in this tort action alleging negligence of an FBI agent in a motor vehicle accident involving a pedestrian. I handled direct and cross examinations of fact and expert witnesses, summation, and prepared and filed pre-trial and post-trial submissions. The two-day bench trial resulted in a decision favorable to the United States.

Plaintiff's Counsel:
Steven Wildstein, Esq.
Steven Wildstein, P.C.
99 Cutter Mill Road
Great Neck, NY 11021
(516) 466-1790

Co-Counsel:
Kathleen Mahoney, Esq.
U.S. Attorney's Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201
(718) 254-6026

5. *Andretta v. Napolitano*, 922 F. Supp. 2d 411 (E.D.N.Y. 2013) (Kuntz, J.) (Orenstein, M.J.)

From 2009 to 2013, I represented the United States Department of Homeland Security in this employment discrimination action. Plaintiff alleged age discrimination when he was

not selected for a position as a Supervisory Customs and Border Patrol Agent. I handled pretrial matters, including court appearances and discovery, and prepared and filed defendant's motion for summary judgment. The court granted defendant's motion for summary judgment.

Plaintiff's Counsel:
Louis D. Stober, Jr., Esq.
Law Offices of Louis D. Stober, Jr., L.L.C.
350 Old Country Road
Garden City, NY 11530
(516) 742-6546

6. *Hadman v. Sebelius*, No. 09-CV-4414 (ARR) (LB), 2011 WL 4736972 (E.D.N.Y. Oct. 6, 2011)

From 2009 to 2011, I represented the United States Secretary of the Department of Health and Human Services in this employment discrimination action. Plaintiff alleged discrimination based on race and national origin. I handled pretrial matters, including court appearances and discovery. After completion of pre-trial discovery, I filed defendant's motion for summary judgment, which the court granted.

Plaintiff's Counsel:
Albert Adam Breud, II, Esq.
Jonathan Edward Kirchner, Esq.
Law Officer of Albert Adam Breud, P.L.L.C.
356 Veterans Memorial Highway, Suite 3
Commack, NY 11725
(631) 543-3030

7. *Testaverde v. United States*, No. 05-CV-2462 (ARR), 2009 WL 1456533 (E.D.N.Y. May 26, 2009)

From 2008 to 2009, I represented the United States in this complex medical malpractice and wrongful death action alleging failure to diagnose and treat a rare bone cancer. This case was assigned to me for trial after the close of discovery. I drafted a motion to reopen discovery to depose an expert, which was granted, and prepared fact and expert witnesses for trial. I handled trial presentation, including direct and cross examinations of fact and expert medical witnesses, and prepared and filed pre-trial and post-trial submissions. The three-day bench trial in April 2009 went to decision and resulted in a judgment favorable to the United States.

Plaintiff's Counsel:
Jason Marc Rubin, Esq.
Wingate, Russotti, & Shapiro LLP
420 Lexington Avenue, Suite 2750
New York, NY 10170

(212) 986-7353

Co-Counsel:
Charles Kelly, Esq.
U.S. Attorney's Office
Eastern District of New York
100 Federal Plaza
Central Islip, NY 11722
(631) 715-7866

8. *United States v. BCF Oil Refining Inc.*, Case No. 05-CV-0562 (E.D.N.Y.) (Sifton, J.) (Pollak, M.J.)

From 2003 to 2007, I represented the United States in this CERCLA cost recovery action seeking $3.5 million against the corporation, the site, and an individual. The complaint sought reimbursement for the United States' expenditure of $3.5 million in Superfund monies to remove and dispose of hazardous substances found at the site. I prepared and filed the complaint in this action, and successfully defended against defendants' motion to dismiss the complaint and for summary judgment. The court granted the United States' motion for partial final judgment against the corporation and the site. After settlement between the government and the individual defendant, the court entered a final consent judgment.

Defendants' Counsel:
Julian Friedman, Esq.
Stillman & Friedman PC (now Ballard Spahr Stillman & Friedman, LLP)
New York, NY
(646) 346-8019

9. *United States v. Frank*, 05-CR-0040 (E.D.N.Y.) (Gleeson, J.)

From 2003 to 2006, I represented the United States, with co-counsel, in the investigation and prosecution of health care fraud and forfeiture charges against defendant dentist who defrauded the Medicaid program. After defendant's conviction, the court entered a forfeiture money judgment in the amount of approximately $5.1 million against the defendant.

Co-Counsel:
Peter Katz, Esq.
Formerly of USAO-EDNY
YK Law
New York, NY
(212) 933-9323

Michael Ramos, Esq.
Formerly of USAO-EDNY

Nardello & Co.
New York, NY
(212) 537-5300

Opposing Counsel:
Steven R. Kartangener, Esq.
225 Broadway, Suite 2700
New York, NY 10007
(212) 732-9600

10. *United States v. Pineda-Giraldo et al.*, Case No. 04-CR-0039 (E.D.N.Y) (Glasser, J.) (Go, M.J.)

From 2003 to 2004, I represented the United States, with co-counsel, in the prosecution of nine alleged members of a New York-Colombia money laundering ring for conspiring to launder more than $6 million in drug money by sending it to Colombia, South America. For two years, I worked on the investigation with federal agents. I prepared grand jury presentation and post-indictment restraining motions. I worked on this matter through 2004, when the indictments were unsealed and warrants for arrest and post-indictment restraining orders were issued.

Co-Counsel:
Suzanne McDermott, Esq. (formerly USAO-EDNY)
Bardin Hill Investment Partners LP
299 Park Avenue, 24th Floor
New York, NY 10022
(212) 303-9400

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organizations(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have litigated and/or supervised or advised on hundreds of significant matters in addition to the ones detailed above.

As Chief Deputy Attorney General for State Counsel, I supervise and manage approximately 450 employees, including 250 attorneys, in prosecution and defense of actions and complex cases in state and federal court on behalf of executive branch officials, the legislature, and state agencies, officials and employees; defense of the state against actions in the Court of Claims involving malpractice, contract disputes and property condemnation; recovery of money owed to the state though affirmative litigation; and legal assistance provided to state agencies in connection with the

acquisition and disposition of public land. I routinely review papers and provide mentorship of attorneys. As an EAUSA, I provided management direction and oversight of the Civil Division, and mentorship of attorneys.

From 2014 to 2015, I also served as EDNY's FEMA Litigation Coordinator. During this time, in addition to maintaining an active caseload, as FEMA Litigation Coordinator, I managed the Office's FEMA litigation practice. I represented FEMA in hundreds of court conferences and counseled FEMA in its handling of over 1,300 cases arising out of Hurricane Sandy that were filed against private insurance carriers that were funded by FEMA. I also managed and counseled AUSAs in resolving 125 of these cases litigated by the Office and issues that arose in navigating discovery, mediation and settlement orders.

As an AUSA, I also represented the EDNY Chief of Probation and the Probation Department in several highly sensitive employment law matters before the U.S. District Court for the Eastern District of New York and before the New York State Unemployment Insurance Appeal Board.

I have not performed any lobbying activities or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/Future Benefits**: List any sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for nay financial business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sourced and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial

disclosure report required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

If confirmed I would strictly follow the Code of Conduct for United States Judges, and all other applicable rules and ethical cannons regarding recusal. Where appropriate, I would recuse myself from matters involving cases I handled, supervised, or was consulted on at the New York Attorney General's Office and U.S. Attorney's Office for the Eastern District of New York in a manner consistent with the Code of Conduct for United States Judges and any other relevant statutory provisions, ethical canons, and rules.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would evaluate and resolve any potential conflicts of interest by applying the rules and standard in 28 U.S.C. §455, the Code of Conduct for United States Judges, published advisory opinions, and relevant judicial decisions and opinions. I would also consult with other judges and seek guidance as appropriate in evaluating issues of conflict.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in servicing the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Since graduating from law school, I have devoted my legal career to public service. While I have not represented any individual client or entity on a pro bono basis, I have engaged and continue to engage in other pro bono activities.

In 2016, I established a mentoring partnership program between the USAO-EDNY and Mott Hall Bridges Academy, a public junior-high school in the Brownsville

neighborhood of Brooklyn. As a result of the partnership, the USAO-EDNY hosted approximately 40 seventh graders from Mott Hall Bridges Academy for a one-day internship during the summer.

I also developed a partnership between the USAO-EDNY and the New York City Ladders for Leaders program, which is a competitive summer internship program that provides vetting, training and matchmaking with local, high-achieving high school and college students. Through this partnership, the USAO-EDNY offered two summer internships to two minority students with interests in the legal profession.

As Chair of the USAO-EDNY's Diversity Committee, I fostered partnerships and mentoring programs with bar organizations, community groups, and local schools. For example, among the many events I facilitated, I spearheaded a successful diversity event co-sponsored by the Office of Public Service Committee of the Federal Bar Council in an effort to increase to the number of diverse candidates in the Office's applicant pool. In addition, I represented the USAO-EDNY on panels and events sponsored by the New York City Bar Council, the National Black Prosecutors Association, the Association for Black Women Attorney's and the South Asian Bar Association of New York.

I have consistently looked for opportunities to facilitate professional development and advancement of attorneys, law interns and students. For almost a decade, I served as the Chair of the USAO-EDNY's Civil Division Summer Law Internship Program Committee, providing mentorship to scores of interns from diverse backgrounds. I have served as a mentor to numerous law students and junior attorneys.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). In there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with the Federal Bureau of Investigation personnel concerning your nomination.

On approximately February 4, 2021, I submitted a judicial questionnaire to Senator Schumer's Judicial Screening Committee. On March 31, 2021, I interviewed with the Committee. On December 20, 2021, I interviewed with Senator Schumer. On June 13, 2022, I interviewed with attorneys from the White House Counsel's Office. Since June 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee

discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonable be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Charnelle Bjelkengren
Nominee to be United States District Judge for the Eastern District of Washington
February 1, 2023

1. You have served as a superior court judge since 2019. In this role, you have issued hundreds of decisions and you have presided over approximately 130 jury or bench trials that proceeded to verdict or judgement.

   Please give a general overview of your role as a superior court judge. What types of cases do you routinely handle?

2. All judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a range of legal issues they have not confronted beforehand in their professional practice.

   What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your practice?

3. During your confirmation hearing, you were asked questions about several issues that you said were not presented to you as a state assistant attorney general or as a state court judge. Please provide answers in writing to these questions.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Charnelle Marie Bjelkengren
Nominee to be United States District Judge, Eastern District of Washington

1. Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?

2. Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:
    a. How often have you cited to either of these tomes during the course of your work?
    b. How often have you had an opportunity to work within these constructs during the course of your career?

3. How many antitrust cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

4. How many social security cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

5. How many securities litigation cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

6. How many multi-district litigation matters have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

7. How many Racketeer Influenced and Corrupt Organization Act cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

8. How many False Claims Act cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

9. How many class action suits have you:
    a. Personally handled during your legal practice?
    b. Presided over in your capacity as a judge?

10. How many §1983 suits have you:
    a. Personally handled during your legal practice?
    b. Presided over in your capacity as a judge?

11. How many copyright cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

12. How many patent cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

13. How many federal Indian law cases have you:
    a. Personally handled during your legal practice?
    b. Presided over in your career as a judge?

14. How many driver's license revocation hearings have you:
    a. Personally handled during your legal practice?
    b. Presided over in your capacity as a judge?

15. Please discuss your familiarity with the Federal Rules of Evidence. Specifically:
    a. How often have you cited to these rules during your legal practice?
    b. How often have you cited to these rules during your career as a judge?
    c. With the experience you outlined above, please explain how you intend to oversee a trial within the federal judicial system.

16. Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

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

18. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

19. In what situation(s) does qualified immunity not apply to a law enforcement officer in Washington?

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

21. Under Supreme Court precedent, is 18 U.S.C. § 1507, or a state statute modeled on § 1507, constitutional on its face?

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

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

24. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

25. Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

26. Please state the governing law for self-defense in Washington and the Ninth Circuit.

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

28. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

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

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

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

31. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
    a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. 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.
    c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
    d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

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

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

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

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

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

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

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

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

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

Senator Mike Lee
Questions for the Record
Charnelle Bjelkengren, Nominee to the United States District Court for the Eastern District of Washington

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. How do you define "systemic racism?"

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

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

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

Questions for the Record for Charnelle Bjelkengren, nominated to be United States District Judge for the Eastern District of Washington

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

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

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

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

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

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

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

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

5. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

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

7. Is the criminal justice system systemically racist?

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

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

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

11. Have you ever personally owned any firearms?

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

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

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

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

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

17. Are there instances where a judge should not honor the judicial code of conduct?

    a. If so, can you please identify all instances?

    b. What justifies a departure from the judicial code of conduct?

18. What is the cause of the systemic racial injustice you referenced in the Personal and Professional Commitment to Equality on behalf of the Spokane Superior Court?

19. Are the racist actors or institutions in the criminal justice system?

    a. If so, can you please identify and list those actors or institutions.

20. Is there need for systemic reform in the criminal justice system?

    a. If so, please identify the reforms you believe are necessary.

21. Are judges "change agents" or neutral arbiters of the law?

22. Please list the matters you have litigated in federal court.

23. Please list all of the trials that you have personally tried to a jury.

24. As a litigator, what percentage of your cases were devoted to driver's license revocations?

25. Can a person be transracial in the eyes of federal law? That is, can a person, on a federal government form, legally identify themselves as belonging to an ethnic group they do not belong to, without committing perjury?

Senator Josh Hawley
Questions for the Record

Judge Charnelle Bjelkengren
Nominee, U.S. District Court for the Eastern District of Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

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

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

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

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

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

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

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

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

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

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

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

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

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

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

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

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

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

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

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

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

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

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

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

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

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

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

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

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

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

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

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

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

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

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

a. **What do you understand this statement to mean?**

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

    a. **If yes, please provide appropriate citations.**

32. **Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.**

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

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

35. **How did you handle the situation?**

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

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

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

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

40. **In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**

    a. ***Roe v. Wade*, 410 U.S. 113 (1973)?**

    b. **The Supreme Court's substantive due process precedents?**

    c. **Systemic racism?**

    d. **Critical race theory?**

41. **Do you currently hold any shares in the following companies:**

    a. **Apple?**

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

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

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

44. Have you ever confessed error to a court?

45. If so, please describe the circumstances.

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

Questions from Senator Thom Tillis
for Charnelle Bjelkengren
Nominee to be United States District Judge for
the Eastern District of Washington

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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

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

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

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

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

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

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

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Matthew P. Brookman
Nominee to be United States District Judge, Southern District of Indiana

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

2. Under Supreme Court and Seventh Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

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

4. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

5. In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?

6. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

7. Please identify a Seventh Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

8. Please state the governing law for self-defense in Indiana and the Seventh Circuit.

9. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

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

11. Please explain the differences in the introduction of evidence between federal courts and a military commission.

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

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

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

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

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

18. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
    a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. 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.
    c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
    d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

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

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

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

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

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

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

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

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

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

Senator Mike Lee
Questions for the Record
Matthew Brookman, Nominee to the United States District Court for the Southern District of Indiana

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. How do you define "systemic racism?"

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

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

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

Questions for the Record for Matthew Brookman, nominated to be United States District Judge for the Southern District of Indiana

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

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

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

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

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

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

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

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

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

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

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

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

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

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

30. Is the criminal justice system systemically racist?

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

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

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

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

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

36. Have you ever personally owned any firearms?

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

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

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

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

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

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

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

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

45. Are there instances where a judge should not honor the judicial code of conduct?

    a. If so, can you please identify all instances?

    b. What justifies a departure from the judicial code of conduct?

46. Do judges need to undergo implicit bias training?

47. Is it appropriate for a prosecutor to publicly announce that they were going to prosecute a member of the community before they even start an investigation?

Senator Josh Hawley
Questions for the Record

Judge Matthew Brookman
Nominee, U.S. District Court for the Southern District of Indiana

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

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

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

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

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

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

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

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

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

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

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

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

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

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

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

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

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

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

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

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

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

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

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

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

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

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

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

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

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

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

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

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

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

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

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

a. **What do you understand this statement to mean?**

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

    a. **If yes, please provide appropriate citations.**

32. **Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.**

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

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

35. **How did you handle the situation?**

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

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

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

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

40. **In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**

    a. ***Roe v. Wade*, 410 U.S. 113 (1973)?**

    b. **The Supreme Court's substantive due process precedents?**

    c. **Systemic racism?**

    d. **Critical race theory?**

41. **Do you currently hold any shares in the following companies:**

    a. **Apple?**

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

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

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

44. Have you ever confessed error to a court?

45. If so, please describe the circumstances.

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

Questions from Senator Thom Tillis
for Matthew P. Brookman
Nominee to be United States District Judge
for the Southern District of Indiana

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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

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

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

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

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

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

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

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Michael Etan Farbiarz
Nominee to be United States District Judge, District of New Jersey

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

2. Under Supreme Court and Third Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

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

4. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

5. In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?

6. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

7. Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

8. Please state the governing law for self-defense in New Jersey and the Third Circuit.

9. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

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

11. Please explain the differences in the introduction of evidence between federal courts and a military commission.

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

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

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

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

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

18. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
    a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. 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.
    c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
    d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

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

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

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

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

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

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

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

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

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

Senator Mike Lee
Questions for the Record
Michael Farbiarz, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. How do you define "systemic racism?"

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

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

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

Questions for the Record for Michael Farbiarz, nominated to be United States District Judge for the District of New Jersey

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

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

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

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

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

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

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

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

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

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

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

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

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

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

30. Is the criminal justice system systemically racist?

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

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

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

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

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

36. Have you ever personally owned any firearms?

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

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

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

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

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

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

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

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

45. Do judges need to undergo implicit bias training?

46. Are there instances where a judge should not honor the judicial code of conduct?

    a. If so, can you please identify all instances?

    b. What justifies a departure from the judicial code of conduct?

Senator Josh Hawley
Questions for the Record

Michael Farbiarz
Nominee, U.S. District Court for the District of New Jersey

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

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

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

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

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

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

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

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

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

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

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

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

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

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

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

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

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

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

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

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

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

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

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

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

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

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

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

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

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

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

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

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

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

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

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

a. What do you understand this statement to mean?

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

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

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

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

35. How did you handle the situation?

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

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

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

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

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

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

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

44. Have you ever confessed error to a court?

45. If so, please describe the circumstances.

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

Questions from Senator Thom Tillis
for Michael Farbiarz
Nominee to be United States District Judge
for the District of New Jersey

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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

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

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

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

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

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

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

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Robert Kirsch
Nominee to be United States District Judge, District of New Jersey

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

2. Under Supreme Court and Third Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

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

4. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

5. In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?

6. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

7. Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

8. Please state the governing law for self-defense in Indiana and the Third Circuit.

9. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

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

11. Please explain the differences in the introduction of evidence between federal courts and a military commission.

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

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

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

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

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

18. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
    a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. 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.
    c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
    d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

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

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

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

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

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

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

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

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

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

Senator Mike Lee
Questions for the Record
Robert Kirsch, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. How do you define "systemic racism?"

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

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

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

Questions for the Record for Robert Kirsch, nominated to be United States District Judge for the District of New Jersey

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

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

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

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

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

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

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

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

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

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

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

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

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

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

30. Is the criminal justice system systemically racist?

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

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

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

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

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

36. Have you ever personally owned any firearms?

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

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

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

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

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

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

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

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

45. Does the United States has an over-incarceration problem?

    a. If so, please identify the factors justifying your response.

46. Do judges need to be concerned about equity?

47. Do judges need to undergo implicit bias training?

48. Are there instances where a judge should not honor the judicial code of conduct?

    a. If so, can you please identify all instances?

    b. What justifies a departure from the judicial code of conduct?

Senator Josh Hawley
Questions for the Record

Judge Robert Kirsch
Nominee, U.S. District Court for the District of New Jersey

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

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

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

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

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

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

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

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

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

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

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

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

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

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

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

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

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

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

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

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

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

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

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

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

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

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

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

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

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

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

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

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

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

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

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

a. What do you understand this statement to mean?

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

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

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

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

35. How did you handle the situation?

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

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

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

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

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

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

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

44. Have you ever confessed error to a court?

45. If so, please describe the circumstances.

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

Questions from Senator Thom Tillis
for Robert Kirsch
Nominee to be United States District Judge for the District of New Jersey

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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

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

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

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

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

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

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

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Orelia Eleta Merchant
Nominee to be United States District Judge, Eastern District of New York

1. Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?

2. When was the last time you personally argued before a court?

3. How many antitrust cases have you personally handled during your legal practice?

4. How many securities litigation cases have you personally handled during your legal practice?

5. How many class actions suits have you personally handled during your legal practice?

6. How many narcotics cases have you personally handled during your legal practice?

7. How many firearm cases have you personally handled during your legal practice?

8. Under Supreme Court and Second Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

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

10. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

11. In what situation(s) does qualified immunity not apply to a law enforcement officer in New York?

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

13. Under Supreme Court precedent, is 18 U.S.C. § 1507, or a state statute modeled on § 1507, constitutional on its face?

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

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

16. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

17. Please identify a Second Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

18. Please state the governing law for self-defense in New York and the Second Circuit.

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

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

21. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

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

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

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

24. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
    a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. 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.
    c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
    d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

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

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

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

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

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

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

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

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

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

Senator Mike Lee
Questions for the Record
Orelia Merchant, Nominee to the United States District Court for the Eastern District of New York

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. How do you define "systemic racism?"

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

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

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

Questions for the Record for Orelia Eleta Merchant, nominated to be United States District Judge for the Eastern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

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

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

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

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

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

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

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

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

    a. Was it correctly decided?

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

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

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

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

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

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

30. Is the criminal justice system systemically racist?

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

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

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

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

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

36. Have you ever personally owned any firearms?

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

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

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

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

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

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

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

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

45. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

46. Would it be improper for a government attorney to publicly announce that a member of the community committed civil offenses without having done a shred of investigatory work about the case?

47. Were you aware of New York Attorney General Letitia James' statement that her office was going to sue Donald Trump before even doing a day of investigation into his conduct?

    a. Should you be confirmed, would this be appropriate conduct by a government attorney appearing in your court?

48. Were you aware of New York Attorney General Letitia James' statement the day after her election where she stated, "Oh, we're going to definitely sue him. We're going to be a real pain in the ass. He's going to know my name

personally.'"?

49. Were you aware that Attorney General James, prior to her election, accused then-President Trump of criminal offenses—specifically obstruction of justice, defrauding Americans, and money laundering—and called him an illegitimate president?

50. Were Attorney General James's comments prejudging President Trump proper?

51. Were Attorney General James's comments prejudging President Trump ethical?

52. If you are confirmed as a district judge, and you learned that a prosecutor that practices in front of you has publicly stated their intent to prosecute or sue a member of the community, before engaging in any investigation, would that concern you?

53. Do judges need to undergo implicit bias training?

54. Are there instances where a judge should not honor the judicial code of conduct?

    a. If so, can you please identify all instances?

    b. What justifies a departure from the judicial code of conduct?

Senator Josh Hawley
Questions for the Record

Orelia Merchant
Nominee, U.S. District Court for the Eastern District of New York

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    c. **The enhancement for offenses involving the use of a computer**

    d. **The enhancements for the number of images involved**

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

    a. **Do you agree with that philosophy?**

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

4. Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?

5. What is the standard for each kind of abstention in the court to which you have been nominated?

6. Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

8. Do you consider legislative history when interpreting legal texts?

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

b. If not, please explain why you disagree with Judge Learned Hand.

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

20. Please describe your understanding of the "federal common law."

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

a. Do you believe that identical texts should be interpreted identically?

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

23. Do federal courts have the legal authority to issue nationwide injunctions?

a. If so, what is the source of that authority?

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

25. What is your understanding of the role of federalism in our constitutional system?

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

28. What is your understanding of the Supreme Court's precedents on substantive due process?

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

33. Do you believe America is a systemically racist country?

34. Have you ever taken a position in litigation that conflicted with your personal views?

35. How did you handle the situation?

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

37. Which of the Federalist Papers has most shaped your views of the law?

38. Do you believe that an unborn child is a human being?

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

43. If so, please identify those cases with appropriate citation.

44. Have you ever confessed error to a court?

45. If so, please describe the circumstances.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Questions from Senator Thom Tillis
for Orelia Eleta Merchant
Nominee to be United States District Judge for
the Eastern District of New York

1. Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?

2. What is judicial activism? Do you consider judicial activism appropriate?

3. Do you believe impartiality is an aspiration or an expectation for a judge?

4. Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?

5. Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?

6. Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?

7. What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

    a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

    b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

    a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

    b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

    c. Do you think it is ***ever*** appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

    d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Charnelle Bjelkengren
Nominee to be United States District Judge for the Eastern District of Washington
February 1, 2023

1. **You have served as a superior court judge since 2019. In this role, you have issued hundreds of decisions and you have presided over approximately 130 jury or bench trials that proceeded to verdict or judgement.**

   Please give a general overview of your role as a superior court judge. What types of cases do you routinely handle?

   Response: In Washington State, Superior Court is a court of general jurisdiction and the highest trial court in the state. As a judge on the Spokane County Superior Court since 2019, I preside over jury trials, bench trials, and motions addressing a vast array of issues under state law including, but not limited to, felony cases (murder, assault, rape, harassment, arson, burglary and more), personal injury, product liability, class actions, dissolution/disassociation of a partnership, contract/commercial collection, consumer protection claims, property disputes, corporate receiverships, condemnation/eminent domain, unlawful detainer, domestic violence protection orders, sexual assault protection orders, injunctions, appeals from lower courts and administrative agencies, dissolution of marriage, legal separation, parenting plans, child support, adoptions, probate matters, trusts/estate dispute resolution, involuntary commitment cases, minor guardianship custody, juvenile shelter care, wage claims, and workers' compensation. As your question references, I have presided over approximately 130 jury or bench trials in less than four years as a state court judge. Additionally, I have conducted hundreds of sentencing hearings.

   Before I became a judge on the Spokane County Superior Court, I served from 2013 to 2019 as an Administrative Law Judge for the Washington State Office of Administrative Hearings. In this capacity, I presided over hearings involving multiple state agencies including the Department of Social and Health Services, the Department of Children Youth and Families, the Employment Security Department, and more. In this judicial capacity, I estimate that I issued over a thousand decisions that were appealable to a commissioner or board, which issued a final order. Finally, I would note that before I became an Administrative Law Judge, the majority of my practice involved litigating appeals from administrative agencies in Superior Court. I estimate I handled more than 150 cases in the Superior Court and the Court of Appeals.

2. **All judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a range of legal issues they have not confronted beforehand in their professional practice.**

   What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your practice?

Response: Due to the vast array of state law issues that are regularly presented to me, I have become adept at learning, analyzing, and applying the law to the facts before me when I encounter a new issue. I believe that these same skills would serve me well if confirmed to the federal bench. I review the briefs submitted by the parties; review the relevant laws, regulations and precedents; and conduct my own independent research. I accomplish the foregoing without assistance, as Superior Court Judges do not have law clerks on staff.

3. **During your confirmation hearing, you were asked questions about several issues that you said were not presented to you as a state assistant attorney general or as a state court judge. Please provide answers in writing to these questions.**

Response: Article II of the United States Constitution addresses the powers and duties of the executive branch of the federal government, as well as the process for electing the President of the United States.

Article V governs the process for constitutional amendments. Amendments to the United States Constitution may be proposed by two-thirds of the members of both the House and Senate, or by a Constitutional Convention that is called by two-thirds of the States. Amendments to the United States Constitution may be ratified by three-fourths of State Legislatures or State Ratifying Conventions, whichever method is specifically directed by Congress.

Purposivism is a method of statutory or constitutional interpretation. Specifically, it is "[t]he doctrine that texts are to be interpreted to achieve the broad purposes that their drafters had in mind; specif., the idea that a judge-interpreter should seek an answer not only in the words of the text but also in its social, economic, and political objectives." Black's Law Dictionary (11th ed. 2019). My own practice as a judge has been to start with the text of the statute or regulation itself, rather than an evaluation of the statute or law's purpose, because the text of the statute or regulation is the best evidence of what its purpose is.

The independent state legislature doctrine generally interprets Article I, Section 4 of the United States Constitution to give the state legislature exclusive authority to regulate federal elections within that state. This issue is pending before the United States Supreme Court in *Moore v. Harper*.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Charnelle Marie Bjelkengren
Nominee to be United States District Judge, Eastern District of Washington

1. **Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?**

   Response: In Washington State, Superior Court is a court of general jurisdiction and the highest trial court in the state. As a judge on the Spokane County Superior Court since 2019, I preside over jury trials, bench trials, and motions addressing a vast array of issues under state law including, but not limited to, felony cases (murder, assault, rape, harassment, arson, burglary and more), personal injury, product liability, class actions, dissolution/disassociation of a partnership, contract/commercial collection, consumer protection claims, property disputes, corporate receiverships, condemnation/eminent domain, unlawful detainer, domestic violence protection orders, sexual assault protection orders, injunctions, appeals from lower courts and administrative agencies, dissolution of marriage, legal separation, parenting plans, child support, adoptions, probate matters, trusts/estate dispute resolution, involuntary commitment cases, minor guardianship custody, juvenile shelter care, wage claims, and workers' compensation. I have presided over approximately 130 jury or bench trials in less than four years as a state court judge. Additionally, I have conducted hundreds of sentencing hearings.

   Before I became a judge on the Spokane County Superior Court, I served from 2013 to 2019 as an Administrative Law Judge for the Washington State Office of Administrative Hearings. In this capacity, I presided over hearings involving multiple state agencies including the Department of Social and Health Services, the Department of Children Youth and Families, the Employment Security Department, and more. In this judicial capacity, I estimate that I issued over a thousand decisions that were appealable to a commissioner or board, which issued a final order. Finally, I would note that before I became an Administrative Law Judge, the majority of my practice involved litigating appeals from administrative agencies in Superior Court. I estimate I handled more than 150 cases in the Superior Court and the Court of Appeals.

   In my 12 years as a Washington State Assistant Attorney General and 9 years as a Spokane County Superior Court Judge and Administrative Law Judge, I have not handled criminal cases in federal court. My legal experience is in the Superior Courts and the Courts of Appeals in the State of Washington. Again, as a Superior Court Judge, I have presided over felony jury trials, motions and hundreds of sentencing hearings.

2. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
    a. **How often have you cited to either of these tomes during the course of your work?**

        Response: In my 12 years as a Washington State Assistant Attorney General and 9 years as a Spokane County Superior Court judge and Administrative Law Judge, I have not had the opportunity to apply the Federal Rules of Criminal Procedure and Sentencing Guidelines. As a Superior Court Judge, I apply the State of Washington Superior Court Criminal Rules and the State of Washington Sentencing Reform Act. Based on my experience, I am confident in my ability to familiarize myself with the federal rules, sentencing guidelines, and applicable Supreme Court and Ninth Circuit precedent.

    b. **How often have you had an opportunity to work within these constructs during the course of your career?**

        Response: See Response to Question 2.a.

3. **How many antitrust cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

4. **How many social security cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

5. **How many securities litigation cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

6. **How many multi-district litigation matters have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

7. **How many Racketeer Influenced and Corrupt Organization Act cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

8. **How many False Claims Act cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

9. **How many class action suits have you:**

a. **Personally handled during your legal practice?**
b. **Presided over in your capacity as a judge?**

10. **How many §1983 suits have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your capacity as a judge?**

11. **How many copyright cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

12. **How many patent cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

13. **How many federal Indian law cases have you:**
    a. **Personally handled during your legal practice?**
    b. **Presided over in your career as a judge?**

14. **How many driver's license revocation hearings have you:**
    a. **Personally handled during your legal practice?**

       Response: approximately 150

    b. **Presided over in your capacity as a judge?** Response: 1

Response to Questions 3 –14: As I disclosed in my Senate Judiciary Questionnaire, 98% of my practice as an attorney was in state courts and 100% was in civil proceedings. As a result, I did not handle cases that arose under federal laws, such as 42 U.S.C. § 1983, federal Indian law, the federal Racketeer Influenced and Corrupt Organization Act, or the False Claims Act. As a Washington State Administrative Judge and as a Spokane County Superior Court Judge, I have presided over thousands of matters including felony criminal trials and criminal sentencings. I have presided over two class action lawsuits and one case that involved federal Indian law related issues. I have a proven ability to get up to speed on a wide variety of legal issues as a Superior Court Judge, including state criminal law issues, which I did not have familiarity with as an advocate. This should reassure the Committee of my ability to get up to speed in new areas of federal law, if confirmed to the United States District Court for the Eastern District of Washington.

15. **Please discuss your familiarity with the Federal Rules of Evidence. Specifically:**
    a. **How often have you cited to these rules during your legal practice?**

       Response: In my 12 years as a Washington State Assistant Attorney General, I do not recall citing the Federal Rules of Evidence. I am confident in my ability to

familiarize myself with the rules as they are similar to the Washington Rules of Evidence.

b. **How often have you cited to these rules during your career as a judge?**

Response: I cite the Washington Rules of Evidence, which are similar to the Federal Rules of Evidence, nearly daily as a judge.

c. **With the experience you outlined above, please explain how you intend to oversee a trial within the federal judicial system.**

Response: I am a sitting judge on the highest trial court in the state of Washington, which is a court of general jurisdiction. I have presided over 130 trials, hundreds of motions, and sentencing hearings. Due to the vast array of issues that are presented to me, I have become adept at learning, analyzing, and applying the law to the facts before me when I encounter a new issue. I thoroughly review the record, the laws cited by the parties, consider the arguments, and conduct my own independent research. I accomplish the foregoing without assistance, as superior court judges do not have law clerks on staff. I would apply these methods in presiding over trials in federal court, if I am confirmed.

16. **Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: A "fact" is defined as "1. Something that actually exists; an aspect of reality .... Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and the holding of opinions. 2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." Black's Law Dictionary (11th ed. 2019). Similarly, the Supreme Court has reasoned "findings as to the design, motive and intent with which men act [are] peculiarly factual issues for the trier of fact" *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (internal quotation marks omitted). Questions of fact require a review of the totality of the record. Questions of law require application of an objective legal standard. *Ornelas v. United States*, 517 U.S. 690 (1996). The standard for appellate review for findings of fact is clearly erroneous and questions of law are reviewed *de novo*. *Id.*

17. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: I am guided by precedent and the specific facts that are presented to me in distinguishing between attacks and mere criticism of an opinion issued by a sitting judge.

18. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: 18 U.S.C. § 3553(a) directs the court to consider the purposes of retribution, deterrence, incapacitation and rehabilitation when imposing a sentence. I am unaware of any Supreme Court or Ninth Circuit precedent directing the court to give greater weight to any specific principle.

19. **In what situation(s) does qualified immunity not apply to a law enforcement officer in Washington?**

Response: "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks and citation omitted). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted). If confirmed, I would follow all Supreme Court and Ninth Circuit precedent regarding qualified immunity.

In Washington, qualified immunity is not "available for claims of assault and battery arising out of the use of excessive force to effectuate an arrest." *Staats v. Brown*, 139 Wash.2d 757, 779 (2000). Similarly, qualified immunity does not apply to an arrest amounting to a statutory violation. *Id.*

20. **Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 generally prohibits picketing in or near a court or residence of a judge, witness, juror, or other court officer with the intent to interfere with the administration of justice or attempt to influence a judge, witness, juror, or other court officer.

21. **Under Supreme Court precedent, is 18 U.S.C. § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I do not believe there is Supreme Court precedent addressing the constitutionality of 18 U.S.C. § 1507.

22. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), the Supreme Court reasoned, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

23. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

Response: In *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (internal quotation marks and citations omitted), the Supreme Court reasoned, "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." Any ban on true threats must be content neutral. It is unconstitutional to ban only certain threats that are "directed toward one of the specified disfavored topics." *Id.* at 362 (internal quotation marks and citation omitted).

24. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: I have spent the last 9 years as an Administrative Law Judge and Spokane County Superior Court Judge. As a Superior Court Judge my judicial philosophy is to approach each case impartially, with an open mind and without prejudgment. I closely review the record, thoroughly research the applicable law, apply the law to the facts and in this way decide each case that comes before me. I issue decisions that are fair and free of bias, treating all participants with respect and dignity. I strive to treat each case as though it is the most important case because to the parties it is the most important case I will decide. If confirmed, this would continue to be my judicial philosophy. There is no single U.S. Supreme Court decision from the last 50 years that is most indicative of my philosophy.

25. **Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As a Superior Court Judge my judicial philosophy is to approach each case impartially, with an open mind and without prejudgment. I closely review the record, thoroughly research the applicable law, apply the law to the facts and in this way decide each case that comes before me. I issue decisions that are fair and free of bias, treating all participants with respect and dignity. I strive to treat each case as though it is the most important case because to the parties it is the most important case I will decide. If confirmed, this would continue to be my judicial philosophy. There is no single Ninth Circuit decision from the last 50 years that is most indicative of my philosophy.

26. **Please state the governing law for self-defense in Washington and the Ninth Circuit.**

Response: In the Ninth Circuit, "Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances." *Manual of Model Criminal Jury Instructions* (9th Cir. 2019).

Generally, in Washington, self-defense is the use of force on the person of another, when used by a person who reasonably believes that they are about to be injured, and the force is not more than necessary. The person using force may employ such force and means as a reasonably prudent person would use, under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident. *See Washington Pattern Instruction 17.02 Lawful Force – Defense of Self, Others, Property.*

An attempt to use force can also constitute self-defense. Lawfully aiding someone who is about to be injured can constitute self-defense. The use of force in preventing a malicious trespass or other malicious interference with property can constitute self-defense. The state has the burden of proving the absence of self-defense for assault charges. *State v. Acosta*, 101 Wn.2d 612 (Wash.1984).

27. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

a. **Was *Brown v. Board of Education* correctly decided?**

Response: Yes. The Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties that appear before me to be assured that I have not prejudged their case. However, it is unlikely that the facts of *Brown v. Board of Education* would come before me as the unconstitutionality of segregation is well settled law. Accordingly, I can say that it was correctly decided.

b. **Was *Loving v. Virginia* correctly decided?**

Response: Yes. The Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties that appear before me to be assured that I have not prejudged their case. However, it is unlikely that the facts of *Loving v. Virginia* would come before me as the unconstitutionality of a ban on inter-racial marriage is well settled law. Accordingly, I can say that it was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

d. **Was *Roe v. Wade* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct 2228 (2022). If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

e. **Was *Planned Parenthood v. Casey* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. The Supreme Court overturned *Planned Parenthood v. Casey* in *Dobbs v. Jackson Health Organization,* 142 S. Ct 2228 (2022). If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

f. **Was *Gonzales v. Carhart* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

g. **Was *District of Columbia v. Heller* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to

be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

h. **Was *McDonald v. City of Chicago* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided. Further, I want all parties that appear before me to be assured that I have not prejudged their case. If confirmed, I will apply all Supreme Court and Ninth Circuit precedent to the cases that come before me.

28. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022) *citing District of Columbia v. Heller*, 128 S. Ct 2783 (2008), the Supreme Court held "when the Second Amendment's plain text covers an individual's conduct, the

Constitution presumptively protects the conduct. To justify its regulation, . . . the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation."

29. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

       Response: No.

30. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

       Response: No.

31. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **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.**

       Response: No.

    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

       Response: No.

    d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

       Response: No.

32. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

       Response: No.

33. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

34. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: On March 1, 2021, I submitted my application to the nonpartisan Judicial Merit Selection Committee established by Senators Maria Cantwell and Patty Murray. On March 25, 2021, I interviewed with the Judicial Merit Selection Committee. I was notified that my name was forwarded by the committee to the senators. On April 19, 2021, I interviewed with Senator Cantwell's representatives. On April 20, 2021, I interviewed with Senator Murray's representatives. On May 13, 2021, I interviewed with Senator Murray. Senator Murray's office notified me that my name was forwarded to the White House. On May 26, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 11, 2022, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for potential nomination to Eastern District of Washington. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 19, 2022, my nomination was submitted to the Senate.

35. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

36. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf?? If so, what was the nature of those discussions?**

Response: No.

37. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

38. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

39. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

40. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: On May 26, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 11, 2022, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for a potential nomination to the Eastern District of Washington. On approximately September 1, 2022, I was notified by the White House Counsel's Office about the President's intent to nominate me.

41. **Please explain, with particularity, the process whereby you answered these questions.**

Response: I reviewed the questions, conducted research and consulted my records, when necessary. After completing my answers, I sent a draft to the Department of Justice's Office of Legal Policy (OLP). After I received feedback from OLP, I finalized responses for submission to the Senate Judiciary Committee.

Senator Mike Lee
Questions for the Record
Charnelle Bjelkengren, Nominee to the United States District Court for the Eastern District of Washington

1. How would you describe your judicial philosophy?

Response: As a Superior Court Judge my judicial philosophy is to approach each case impartially, with an open mind and without prejudgment. I closely review the record, thoroughly research the applicable law, apply the law to the facts and in this way decide each case that comes before me. I issue decisions that are fair and free of bias, treating all participants with respect and dignity. I strive to treat each case as though it is the most important case because to the parties their case is the most important case I will decide. If confirmed, this would continue to be my judicial philosophy.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: When interpreting a federal statute, I would look to the text of the statute and apply any binding Supreme Court and Ninth Circuit precedent. If there is no binding precedent, I would look to other circuit courts' interpretation of the statute at issue and consider canons of statutory construction. As a last resort, I might look to legislative history, but only to the extent the Supreme Court has authorized and being mindful of the types of legislative history that the Supreme Court has found most relevant.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: When interpreting a constitutional provision, I would apply Supreme Court and Ninth Circuit precedent, including the method of interpretation the courts have used. For example, the Supreme Court has applied the original public meaning of the Second Amendment in *Heller*, *McDonald*, and *Bruen*. "Constitutional rights are enshrined with the scope they are understood to have *when the people adopted them*." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The Supreme Court has applied the original public meaning of the Second Amendment in *Heller*, *McDonald*, and *Bruen*. "Constitutional rights are enshrined with the scope they are understood to have w*hen the people adopted them*." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35

(2008)). If confirmed, I will apply Supreme Court and Ninth Circuit precedent when interpreting provisions of the Constitution.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: I first review the text of a statute as that is the best indicator of the legislature's intent. I would give the plain meaning of a text great weight, together with Supreme Court and Ninth Circuit precedent.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Supreme Court reasoned that the plain meaning of the Second Amendment referred to the original public understanding of the amendment at the time of enactment. I would rely on precedent to interpret a statute or constitutional provision consistent with the Supreme Court and Ninth Circuit's interpretation.

6. What are the constitutional requirements for standing?

Response: Article III, Section 2 of the Constitution provides that federal courts have jurisdiction over cases and controversies. Standing requires 1) an injury in fact that is concrete and particularized, 2) the injury must be traceable to the alleged conduct, and 3) likely to be redressable by relief the court can order in a favorable decision.

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: According to Article I, Section 8 of the Constitution, Congress has those powers enumerated in the Constitution and the power to make laws necessary and proper for carrying out its enumerated powers. Further, *McCullough v. Maryland,* 17 U.S. 316 (1819), held that the Constitution grants congress implied powers (for example, establish a national bank) in order to implement its express powers (for example, taxation and spending).

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: I would apply applicable Supreme Court and Ninth Circuit precedent to evaluate the constitutionality of a law that Congress enacts.

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: Yes. In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court reasoned, "First, we have regularly observed that the Due Process Clause specially protects those fundamental right and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the Due Process Clause." (internal quotation marks and citations omitted).

These rights include, but are not limited to, the right to marry, have children, direct the education and upbringing of one's children, marital privacy, use of contraception, and bodily integrity. *Id.* at 720.

10. What rights are protected under substantive due process?

Response: See Response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: In *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct 2228 (2022), the Supreme Court held that abortion is not protected by the Due Process Clause of the Fourteenth Amendment. Similarly, *Lochner v. New York* is no longer binding precedent after the Supreme Court upheld the State of Washington's minimum wage legislation in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If presented with this issue, I would apply binding Supreme Court and Ninth Circuit precedent.

12. What are the limits on Congress's power under the Commerce Clause?

Response: Article I, Section 8 of the Constitution, grants Congress the power "to regulate commerce with foreign Nations, and among, the several States and with the Indian Tribes." The Supreme Court has held that Congress may "regulate the use of channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "those activities having a substantial relation to interstate commerce," "or substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Generally, Congress' power to regulate commerce prevents regulation of non-economic activity that does not burden commerce.

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: Suspect classes include race, religion, national origin, alienage and fundamental rights. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In determining whether a particular group qualifies as a suspect class, the Supreme Court has considered factors such as whether a group has historically been subjected to discrimination, "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group" and are "a minority or politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: Both checks and balances and separation of powers are crucial to the Constitution's structure and our democracy. For example, Article III standing prevents the judicial branch from usurping the powers of the legislative and executive branches. Similarly, the rule against advisory opinions "ensures that federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Center for Biological Diversity v. United States Forest Service*, 925 F.3d 1041, 1047 (9th Cir. 2019) (internal quotation marks and citations omitted).

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would consider the specific facts presented and apply Supreme Court and Ninth Circuit precedent.

16. What role should empathy play in a judge's consideration of a case?

Response: A judge's personal views should play no role in deciding a case. As a sitting judge, I treat all participants with respect and dignity, and if confirmed, would continue to do so.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Neither is a proper result. When reviewing the constitutionality of a law, I would apply Supreme Court and Ninth Circuit precedent.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not thoroughly studied the extent of judicial review in various time periods. My personal views on the downsides of aggressive judicial review or judicial passivity are not relevant to my decision making. In reviewing the constitutionality of a statute, I would be guided not by trends, but by precedent. In reviewing the constitutionality of a statute, I would faithfully apply Supreme Court and Ninth Circuit precedent.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: Judicial review is defined as "A court's power to review the actions of other branches or levels of government." Black's Law Dictionary (11th ed. 2019). Judicial supremacy is defined as "The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court held that while the legislature has the power to create the law, the court shall interpret the law. Accordingly, the Supreme Court is the chief interpreter of the Constitution. The separation of powers and checks and balances acknowledges each branch honoring the role of the other branches of government.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Judges are governed by the rule of law. It is of the utmost importance that judges not be influenced by their personal views, "partisan interests, public clamor, or fear of criticism" when issuing decisions. *See* Code of Conduct for United States Judges, Canon 3.A.(1). Further, judges should be careful to only decide the precise issue presented. I keep this in mind when issuing decisions and would continue to do so, if confirmed.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be

rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: The lower court has a duty to apply all binding precedent. The Supreme Court may overturn its own precedent and considers five factors when doing so: the nature of the error, the quality of the reasoning, the workability of the rules the precedent imposes, the disruptive effect on other areas of law, and reliance interests. *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct 2228, 2265 (2022), *citing Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: It should play no role. If confirmed, my sentencing analysis would be limited to the factors outlined in 18 U.S.C. § 3553, the United States Sentencing Commission's Sentencing Guidelines, and any Supreme Court and Ninth Circuit precedent.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: I am not aware of the statement made by the Biden Administration regarding equity. As a judge, my personal views play no part in my legal analysis or decision making. Equity is defined as, "Fairness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: Equality means, "The quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019). These definitions are different.

26. **Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?**

Response: The Fourteenth Amendment's Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The text of the Fourteenth Amendment does not address equity.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of systemic racism. Racism is defined as: "1. The belief that some races are inherently superior to other races. 2. Unfair treatment of people, often including violence against them, because they belong to a different race from one's own." Black's Law Dictionary (11th ed. 2019). If confirmed as a federal district judge, if claims involving race discrimination come before me, I will review the facts of the case and apply binding Supreme Court and Ninth Circuit precedent.

28. How do you define "critical race theory?"

Response: I do not have a personal definition of critical race theory. It is defined as: "A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: See response to Questions 27 and 28.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Charnelle Bjelkengren, nominated to be United States District Judge for the Eastern District of Washington

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **Is racial discrimination wrong?**

   Response: Both the Constitution and numerous federal laws prohibit racial discrimination. Any laws that discriminate based upon race, which is a suspect class, are subject to strict scrutiny. Accordingly, the law must be narrowly tailored to achieve a compelling government interest. If presented with a case involving racial discrimination, I would apply Supreme Court and Ninth Circuit precedent to the specific facts of the case.

2. **Is it ever permissible for the government to discriminate against religious organizations or religious people?**

   Response: A facially neutral and generally applicable governmental action will not trigger strict scrutiny. However, if the governmental action is not neutral and generally applicable, courts should apply strict scrutiny. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). Under a strict scrutiny analysis, the government action must be narrowly tailored to accomplish a compelling government interest.

   "A government policy will not qualify as neutral if it is specifically directed at . . . religious practice. A policy can fail this test if it discriminate[s] on its face, or if a religious exercise is otherwise its object. A government policy will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022) (internal quotation marks and citations omitted); *See also Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

   In addition, I would note that the federal government is subject to the Religious Freedom Restoration Act, which holds that even neutral and generally applicable laws are subject to strict scrutiny if they impose a substantial burden on religion. If presented with a case involving religious discrimination, I would apply Supreme Court and Ninth Circuit precedent to the specific facts of the case.

3. **Would it be appropriate for the court to provide its employees trainings which include the following:**

   a. **One race or sex is inherently superior to another race or sex;**

Response: No.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: No.

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

Response: No.

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response: No.

4. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I am not familiar with the trainings offered by the federal court for the Eastern District of Washington and whether I am a decisionmaker in determining what is offered.

5. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

6. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: The Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties who appear before to be assured that I have not prejudged their case.

7. **Is the criminal justice system systemically racist?**

Response: This is an issue for the policymakers to address, if they so choose. As a sitting judge, I apply precedent to the facts before me in an impartial and unbiased manner. If confirmed, I will continue to do so.

8. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the**

number of justices on the U.S. Supreme Court? Please explain.

Response: This is an issue for the Congress to address, if it so chooses. If confirmed, I will faithfully apply all Supreme Court precedent to the facts before me, without regard to the number of justices on the court.

9. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

10. **Is the ability to own a firearm a personal civil right?**

Response: Yes, the Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), held the Second Amendment confers an individual right to own a firearm.

11. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: No. "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York Rifle and Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

12. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: No. "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York Rifle and Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

13. **Does the President have the authority to abolish the death penalty?**

Response: No.

14. **Are there instances where a judge should not honor the judicial code of conduct?**

Response: Federal judges are bound by the Code of Conduct for United States Judges. The Commentary in the Code of Conduct states, "The Code is to be construed so it does not impinge on the essential independence of judges in making decisions."

a. **If so, can you please identify all instances?**

Response: As a judge I am first and foremost committed to the rule of law. If the

code of conduct was in conflict with Supreme Court or Ninth Circuit precedent, I would follow precedent.

b. **What justifies a departure from the judicial code of conduct?**

Response: See Response to Question 14.a.

15. **What is the cause of the systemic racial injustice you referenced in the Personal and Professional Commitment to Equality on behalf of the Spokane Superior Court?**

Response: The Personal and Professional Commitment to Equality on behalf of the Spokane Superior Court was intended to reference, for example, the system of chattel slavery that legally existed in the United States until 1865, Jim Crow laws, and other laws that maintained de jure segregation and discrimination throughout our Nation's history. The letter was prompted by the killing of George Floyd.

16. **Are the racist actors or institutions in the criminal justice system?**

Response: I am not personally aware of any racist actors or institutions in the criminal justice system. This is a question for the policymakers to address, if they so choose.

a. **If so, can you please identify and list those actors or institutions.**

Response: See Response to Question 16.

17. **Is there need for systemic reform in the criminal justice system?**

Response: As a sitting judge, it is my role to apply legal precedent to the facts that are presented to me. I do so fairly, impartially and without bias. Identifying and fixing flaws in the criminal justice system is the role of the legislature.

a. **If so, please identify the reforms you believe are necessary.**

Response: See Response to Question 17.

18. **Are judges "change agents" or neutral arbiters of the law?**

Response: As a sitting judge, I am a neutral arbiter of the law. Above all else, I am committed to the rule of law. If confirmed, I will maintain that commitment.

19. **Please list the matters you have litigated in federal court.**

Response: In Washington State, Superior Court is a court of general jurisdiction and the highest trial court in the state. As a judge on the Spokane County Superior Court since

2019, I preside over jury trials, bench trials, and motions addressing a vast array of issues under state law including, but not limited to, felony cases (murder, assault, rape, harassment, arson, burglary and more), personal injury, product liability, class actions, dissolution/disassociation of a partnership, contract/commercial collection, consumer protection claims, property disputes, corporate receiverships, condemnation/eminent domain, unlawful detainer, domestic violence protection orders, sexual assault protection orders, injunctions, appeals from lower courts and administrative agencies, dissolution of marriage, legal separation, parenting plans, child support, adoptions, probate matters, trusts/estate dispute resolution, involuntary commitment cases, minor guardianship custody, juvenile shelter care, wage claims, and workers' compensation. As your question references, I have presided over approximately 130 jury or bench trials in less than four years as a state court judge. Additionally, I have conducted hundreds of sentencing hearings.

Before I became a judge on the Spokane County Superior Court, I served from 2013 to 2019 as an Administrative Law Judge for the Washington State Office of Administrative Hearings. In this capacity, I presided over hearings involving multiple state agencies including the Department of Social and Health Services, the Department of Children Youth and Families, the Employment Security Department, and more. In this judicial capacity, I estimate that I issued over a thousand decisions that were appealable to a commissioner or board that issued a final order. Finally, I would note that before I became an Administrative Law Judge, the majority of my practice involved litigating appeals from administrative agencies in Superior Court. I estimate I handled more than 150 cases in the Superior Court and the Court of Appeals. As I disclosed in my Senate Judiciary Questionnaire, 98% of my practice as an attorney was in state courts and 100% was in civil proceedings.

20. **Please list all of the trials that you have personally tried to a jury.**

I have presided over approximately 130 jury or bench trials in less than four years as a state court judge. Additionally, I have conducted hundreds of sentencing hearings.

Before I became a judge on the Spokane County Superior Court, I served from 2013 to 2019 as an Administrative Law Judge for the Washington State Office of Administrative Hearings. In this capacity, I presided over hearings involving multiple state agencies including the Department of Social and Health Services, the Department of Children Youth and Families, the Employment Security Department, and more. In this judicial capacity, I estimate that I issued over a thousand decisions that were appealable to a commissioner or board that issued a final order. Finally, I would note that before I became an Administrative Law Judge, the majority of my practice involved litigating appeals from administrative agencies in Superior Court. I estimate I handled more than 150 cases in the Superior Court and the Court of Appeals.

Before I became a judge 9 years ago, in my 12 years as a Washington State Assistant Attorney General, I did not try a case before a jury.

21. **As a litigator, what percentage of your cases were devoted to driver's license revocations?**

Response: I have presided over approximately 130 jury or bench trials in less than four years as a state court judge. Additionally, I have conducted hundreds of sentencing hearings.

Before I became a judge on the Spokane County Superior Court, I served from 2013 to 2019 as an Administrative Law Judge for the Washington State Office of Administrative Hearings. In this capacity, I presided over hearings involving multiple state agencies including the Department of Social and Health Services, the Department of Children Youth and Families, the Employment Security Department, and more. In this judicial capacity, I estimate that I issued over a thousand decisions that were appealable to a commissioner or board that issued a final order. Before I became an Administrative Law Judge, the majority of my practice involved litigating appeals from administrative agencies in Superior Court. I estimate I handled more than 150 cases in the Superior Court and the Court of Appeals. Approximately 70-80% of these cases were related to driver's license revocations.

22. **Can a person be transracial in the eyes of federal law? That is, can a person, on a federal government form, legally identify themselves as belonging to an ethnic group they do not belong to, without committing perjury?**

Response: I am not aware of any precedent addressing this issue. The Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties that appear before me to be assured that I have not prejudged their case.

Senator Josh Hawley
Questions for the Record

Judge Charnelle Bjelkengren
Nominee, U.S. District Court for the Eastern District of Washington

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    c. **The enhancement for offenses involving the use of a computer**

    d. **The enhancements for the number of images involved**

    Response to all subparts: If confirmed, when making sentencing decisions, I will consider the factors identified in 18 U.S.C. § 3553; the Sentencing Guidelines, including any sentencing enhancements; the recommendations of the prosecution, defense, and probation office; and Supreme Court and Ninth Circuit precedent.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

Response to all subparts: The question of whether these penalties should be aligned is a question for policymakers. As a judge, I am bound to sentence individuals based on current law. If confirmed, I will apply Supreme Court and Ninth Circuit precedent to the facts of the case, including any changes to the sentencing guidelines should they be enacted.

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

   a. **Do you agree with that philosophy?**

      Response: As a sitting judge, I am first and foremost committed to the rule of law. I do not insert my personal views into my decision-making analysis.

   b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

      Response: I am not familiar with the context in which this statement was made. However, to the extent that a judge does not commit to upholding the Constitution and binding precedent, it is a violation of the judicial oath.

4. **Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?**

   Response: Yes.

5. **What is the standard for each kind of abstention in the court to which you have been nominated?**

   Response: The abstention doctrines identify exceptions to federal court jurisdiction and are named after the Supreme Court case establishing the doctrine.

   Pullman abstention is "appropriate where (1) the federal constitutional claim touches a sensitive area of social policy, (2) constitutional adjudication plainly can be avoided [or narrowed by] a definitive ruling by a state court, and (3) a possibly determinative issue of state law is doubtful." *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1147 (9th Cir. 2022) (internal quotation marks and citations omitted).

   Burford abstention permits "a court to decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *Knudsen Corp v. Nevada State Dairy Com'n*, 676 F.2d 374, 376 (1982). Applicability of *Burford* abstention requires "first, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts

might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy." *Id.* at 377 (citations omitted). The Ninth Circuit "has been careful to avoid extending *Burford*." *Id.*

Younger abstention "applies when there is a pending state proceeding that implicates important state interests and provides the federal plaintiff with an opportunity to raise federal claims" and "the federal relief sought must interfere in some manner with the state litigation." *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 616 (9th Cir. 2003) (citations omitted). In determining whether abstention is proper, the court considers, (1) The nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in state proceedings. *Id.* Abstention is not appropriate if "the state proceedings demonstrate bad faith, harassment, or some other extraordinary circumstances." *Id.*

Colorado River abstention requires evaluation of eight factors for determining whether exceptional circumstances exist warranting federal abstention from concurrent federal and state proceedings: "(1)which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *Seneca Insurance Company, Inc. v. Strange Land, Inc.*, 862 F.3d 835 (9th Cir. 2017).

Rooker-Feldman abstention states that "a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court. The United States Supreme Court is the only federal court with jurisdiction to hear such an appeal." *Noel v. Hall,* 341 F.3d 1148, 1154 (9th Cir. 2003). Further a district court "must also refuse to decide any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision." *Id.* at 1158.

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

Response: No.

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate

Response: See Response to Question 6.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: If confirmed as a federal district judge, I would apply the original public meaning of the constitution in all cases where the Supreme Court has made clear that it is the appropriate method of constitutional interpretation to use. For example, the Supreme Court has applied originalism to the interpretation of the Second Amendment in *Heller*, *McDonald*, and *Bruen*. "Constitutional rights are enshrined with the scope they are understood to have *when the people adopted them*." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

8. Do you consider legislative history when interpreting legal texts?

Response: When interpreting a law, I first start with the text and any binding legal precedent addressing the precise question. If the legal text is clear and unambiguous the inquiry ends there. If the text is ambiguous, I would look to canons of statutory construction and persuasive but non-binding precedent from other federal courts. The Supreme Court has sometimes looked to the legislative history, although it has cautioned that "legislative history is not the law." *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019).

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court has indicated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Commission v. GTE Sylvania, Inc.* 447 U.S. 102, 117 (1980) (quoting *United States v. Price* 361 U.S. 304 (1960)). "Committee Reports are more authoritative than comments from the floor." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotation marks omitted).

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: The U.S. Constitution is a domestic document and should be interpreted by domestic courts. If confirmed, I will apply Supreme Court and Ninth Circuit precedent.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: A challenge to the method of execution must "establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering and give[s] rise to sufficiently *imminent* dangers." *Atwood v. Shinn,* 36 F.4th 901 (9th Cir. 2022) (quoting *Glossip v. Gross,* 576 U.S. 863 (2015)).

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: The Supreme Court in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), held there is no postconviction constitutional right to DNA analysis.

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: A facially neutral and generally applicable governmental action will not trigger strict scrutiny. However, if the governmental action is not neutral and generally applicable, courts should apply strict scrutiny. *Kennedy v. Bremerton School District,* 142 S. Ct. 2407 (2022). Under a strict scrutiny analysis, the government action must be narrowly tailored to accomplish a compelling government interest.

"A government policy will not qualify as neutral if it is specifically directed at. . . . religious practice. A policy can fail this test if it discriminate[s] on its face, or if a religious exercise is otherwise its object. A government policy will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions." *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2422 (2022) (internal quotation marks and citations omitted); *See also Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: See Response to Questions 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: "[C]ourts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs. . . . if the free exercise right were dependent on one's ability to establish the truth of one's beliefs, then the First Amendment guarantees might be rendered illusory. *Callahan v. Woods,* 658 F.2d 679 (9th Cir. 1981), *citing United States v. Ballard,* 322 U.S. 78 (1944) (internal quotation marks omitted). In *Callahan*, the court concluded the plaintiff's concerns were derived from his understanding of the New Testament Book of Revelation, a text he considered holy. The plaintiff's beliefs were theological and addressed spiritual, not just worldly concerns. *Id.* at 686. A court's "narrow function" in evaluating the sincerity of a religious belief is whether the asserted belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (internal citation and quotation omitted).

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: The Supreme Court in *Heller* held the Second Amendment confers an individual right to bear a firearm.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: Justice Holmes explained what he meant, "But a Constitution is not intended to embody a particular economic theory." I agree that judges should issue decisions impartially and without inserting their personal view.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from offering my personal opinion on whether a matter was correctly decided.

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response to all subparts: I am not aware of any Supreme Court opinions that have not been formally overruled but are no longer good law. As a sitting judge, I faithfully apply all precedent, including Supreme Court precedent, and would continue to do so if confirmed.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge and nominee, it is not appropriate for me to offer my personal view on a judicial opinion. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: See Response to Question 19.a.

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: The percentage of market share is one factor in determining whether a company has a monopoly. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995). For a claim of actual monopolization, as opposed to attempt–to-monopolize, "a market share of less than 50 percent is presumptively insufficient to establish market power." *Id.* at 1438.

20. Please describe your understanding of the "federal common law."

Response: The Supreme Court has held there is no general federal common law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Likewise, *United States v. Hudson,* 11 U.S. 32 (1812), held there is no federal criminal common law. In limited circumstances, federal courts may create federal common law, such as when it is "necessary to protect a uniquely federal interest," *Scalia v. Employer Solutions Staffing Group, LLC*, 951 F.3d 1097, 1105 (9th Cir. 2020), and in areas of "strong national or federal concerns such as controversies between states, admiralty matters, or foreign relations." *Id.*

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: Federal courts must defer to state substantive laws and interpretation of the highest state court. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

a. Do you believe that identical texts should be interpreted identically?

Response: In the context of Question 21, federal courts are bound to apply a state court's interpretation of a state's constitutional provision.

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: States are permitted to grant greater protections than provided under federal law.

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: Yes. The Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties who appear before me to be assured that I have not prejudged their case. It is unlikely that the facts of *Brown v. Board of Education* would come before me as the unconstitutionality of segregation is well settled law. Accordingly, I can say that it was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: Federal courts have the authority to issue injunctions pursuant to Federal Rule of Civil Procedure 65, which sets out the legal standard for injunctions. Nationwide injunctions have been a source of debate amongst the courts. Justice Thomas and Justice Gorsuch have questioned the district courts' authority to issue nationwide injunctions. The Ninth Circuit has reasoned that "Although there is no bar against . . . nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled," and "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *City and County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020). If confirmed, I will carefully review the facts presented to me and apply any Supreme Court and Ninth Circuit precedent.

a. If so, what is the source of that authority?

Response: See Response to Question 23.

b. **In what circumstances, if any, is it appropriate for courts to exercise this authority?**

Response: See Response to Question 23.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: See Response to Question 23.

25. What is your understanding of the role of federalism in our constitutional system?

Response: "The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one." *Bond v. U.S.*, 564 U.S. 211, 220-21 (2011) (internal quotation marks omitted). "By denying any one government complete jurisdiction over all concerns in public life, federalism protects the liberty of the individual from arbitrary power." *Id.* at 222.

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: See Response to Question 5.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: Damages are generally awarded to remedy a past injury, whereas injunctive relief is granted prospectively to prevent a future harm. In awarding damages versus injunctive relief, I am guided by the specific facts of the case.

28. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court reasoned, "First, we have regularly observed that the Due Process Clause specially protects those fundamental right and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have

required in substantive due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the Due Process Clause." (internal quotation marks and citations omitted); *See also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: See Response to Question 13.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The free exercise of religion includes more than the freedom of worship. It also "protects against indirect coercion or penalties on the free exercise of religion." C*arson v. Makin*, 142 S. Ct. 1987 (2022) (holding it is a violation of the Free Exercise Clause to offer tuition assistance to nonsectarian schools and not religious schools). *See also Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: See Response to Question 13.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: See Response to Question 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not aware of the context of the statement by Justice Scalia. As a sitting judge, my first and foremost commitment is to the rule of law. I issue decisions without regard to my personal views. Consequently, on occasion, I may issue decisions that I personally do not prefer, but I am compelled to do so by the law.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: I do not recall ever taking the position or issuing a decision finding a statute unconstitutional.

a. If yes, please provide appropriate citations.

Response: See Response to Question 31.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: To the best of my knowledge, I have not. Last year, I deactivated my state court judicial Facebook account as it was no longer necessary after I was nominated for the federal district court position.

33. Do you believe America is a systemically racist country?

Response: I feel grateful and deeply blessed to live in America. I consider it a great privilege to serve our system of justice as a state trial judge. Systemic racism is an issue for the policymakers to address. As a sitting judge, I am committed to equal justice under law. I treat all participants in my courtroom with respect, dignity and fairness and will continue to do so, if confirmed.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: I do not recall taking a position in litigation that conflicted with my personal views. However, as a sitting judge, I have issued decisions that conflicted with my personal views.

35. How did you handle the situation?

Response: As a sitting judge, I am first and foremost committed to the rule of law. I issue decisions without regard to my personal views. I faithfully apply binding precedent and would continue to do so, if confirmed.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes, I have done so and will continue to do so, if confirmed.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: No specific Federalist Paper has shaped my views of the law.

38. Do you believe that an unborn child is a human being?

Response: My personal views have no impact on my legal analysis. The Supreme Court declined to address fetal personhood in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: No.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: No.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: No.

43. If so, please identify those cases with appropriate citation.

Response: See Response to Question 42.

44. Have you ever confessed error to a court?

Response: Yes.

45. If so, please describe the circumstances.

Response: I served the opposing party a brief one day past the deadline.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: Nominees swear an oath to answer all questions of the Judiciary Committee truthfully. This requires complete candor on all issues of inquiry to the best of their ability.

Questions from Senator Thom Tillis
for Charnelle Bjelkengren
Nominee to be United States District Judge for the Eastern District of Washington

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: No. A judge's personal views are not relevant to interpreting and applying the law. As a sitting judge, I do not insert my personal views into my decision-making analysis. When deciding an issue presented to me, I thoroughly research the law and apply the law to the record before me. If confirmed, I will continue to do so without regard to my personal views.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Judicial activism occurs when the judge inserts his or her personal views into the decision-making process. It also occurs by going beyond the issues presented. It is not appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Impartiality is a basic expectation for a judge. Judges are neutral arbiters and are required to decide cases fairly, impartially and without bias. For the past nine years as a neutral arbiter, I have approached each case without prejudgment and with an open mind and I would continue to do so if confirmed as a federal district court judge.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes. As a sitting judge, my first and foremost commitment is to the rule of law. I decide cases without regard to my personal views. I take the law and the facts where they lead me and, in this way, reach a decision. I am able to do this because my commitment is to upholding the law and if confirmed, I would continue to do so.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No. The Code of Conduct for United States Judges, Canon 3.A.(1) directs that a judge not be swayed by partisan interests.

7. What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?

Response: I will faithfully apply Supreme Court and Ninth Circuit precedent, including *Heller*, *McDonald*, and *Bruen*, to the facts of the cases that come before me.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: See Response to Question 7.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks and citation omitted). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal citations omitted). If confirmed, I would follow all Supreme Court and Ninth Circuit precedent regarding qualified immunity.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: As a sitting judge, I do not insert my personal views into my decision-making analysis. Whether qualified immunity is sufficient protection for law enforcement officers is an issue for the policymakers.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: See Response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: "The Court has long held that § 101 which defines the subject matter eligible for patent protection, contains an implicit exception for laws of nature, natural phenomena, and abstract ideas." *Alice Corp. Pty. Ltd. v. CLS Bank Intern*, 573 U.S. 208 (2014) (internal quotation marks omitted). If confirmed, I will apply the Patent Act, 35 U.S.C. § 101, and Supreme Court and Ninth Circuit precedent to the issue of patent eligibility.

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: As a nominee, it is not appropriate for me to comment on a matter that could come before me. I want all parties who appear before me to be assured that I have not prejudged their case. Therefore, it is not appropriate for me to comment on the clarity of the law or how I would decide a case. If confirmed, I will apply Supreme Court and Ninth Circuit precedent to the facts presented to me.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my 12 years as a Washington State Assistant Attorney General and 9 years as a judge, I have not addressed copyright law.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: In my 12 years as a Washington State Assistant Attorney General and 9 years as a judge, I have not addressed and have not had any particular experiences with the Digital Millennium Copyright Act.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: In my 12 years as a Washington State Assistant Attorney General and 9 years as a judge, I have not had the opportunity to address intermediary liability in this context.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: In my 12 years as a Washington State Assistant Attorney General and 9 years as a judge, I have addressed free speech issues but not in the context of intellectual property issues.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: When interpreting a law, I first start with the text and any binding legal precedent addressing the precise question. If the legal text is clear and unambiguous the inquiry ends there. The Supreme Court has reasoned that the plain meaning of the text reveals Congress' intent. If the text is ambiguous, I would look to canons of statutory construction and persuasive, non-binding precedent from other federal courts. The Supreme Court has sometimes looked to the legislative history, although it has cautioned that "legislative history is not the law." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1814 (2019) (internal citation omitted).

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: If Congress has addressed the precise issue presented to the court, the court will not defer to the expertise of the agency. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. However, if the law is ambiguous, and Congress has either expressly or implicitly delegated authority to the agency, the court will defer to the agency's reasonable interpretation of the applicable law. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a sitting judge, and nominee, the Code of Conduct for United States Judges, Canon 3.A.(6) and the Code of Judicial Conduct for Washington Judges, Canon 2, Rule 2.10 prohibit me from commenting on a matter that could come before me. I want all parties who appear before me to be assured that I have not prejudged their case. Therefore, it is not appropriate for me to comment on what constitutes notice. If confirmed, should this issue come before me, I will apply Supreme Court and Ninth Circuit precedent.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: This is an important issue for the policymakers to address. If confirmed, I would be bound to apply current Supreme Court and Ninth Circuit precedent related to the Digital Millennium Copyright Act.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: See Response to Question 16.a.

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: In the Eastern District of Washington, cases are randomly assigned to judges within the district.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: The Code of Conduct for United States Judges, Canon 3.A.(2) directs judges to "hear and decide matters assigned, unless disqualified." The Code of Conduct for United States Judges Commentary directs judges to "act in a manner that promotes public confidence in the integrity and impartiality of the judiciary." If confirmed, I will faithfully conduct myself in compliance with these principles and not engage in activity to encourage "judge shopping" or "forum shopping."

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Yes, I commit to not engage in such conduct.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: I believe it is important for a judge to have an understanding of the local rules and the practical consequences of the rules.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: If confirmed, I commit to adhere to the Code of Conduct for United States Judges, Canon 3.A.(2) directing judges to "hear and decide matters assigned, unless disqualified."

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Matthew P. Brookman
Nominee to be United States District Judge, Southern District of Indiana

1. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: Under *Terry v. Ohio*, 392 U.S. 1, 27 (1968), if police officers have a reasonable suspicion an individual is engaged in criminal activity he may be briefly detained. When a *Terry* stop is justified, whether a frisk is also justified is a separate question. *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009); *United States v. Thompson*, 842 F.3d 1002, 1007 (7th Cir. 2016). A lawful frisk must be based on reasonable suspicion that "criminal activity may be afoot and that the persons with whom [the officer] is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30.

2. **Under Supreme Court and Seventh Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

   Response: A fact is "an actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." Black's Law Dictionary (11th ed. 2019). Regarding whether something is a question of fact or a question of law, the courts should examine "whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). *See also Martinez-Baez v. Wilkinson*, 986 F.3d 966 (7th Cir. 2021).

3. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: I would define "attacks" on a sitting judge to include the leveling of unfounded or otherwise improper personal allegations or threats, or any physical confrontation unrelated to the substance of an opinion issued. Mere criticism of an opinion, by contrast, would be founded in the substance of the opinion in question. I would follow the guidance of any relevant Supreme Court or Seventh Circuit precedent in distinguishing between attacks and criticism if confronted with this issue.

4. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

   Response: District judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. If confirmed as a District Judge, I will consider all of the 3553(a) factors when making sentencing decisions, giving each

factor appropriate weight depending on the particular facts and circumstances of each case.

5. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?**

Response: The doctrine of qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). This "clearly established" standard ensures "that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)). Qualified immunity thus "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. "To overcome the defendant's invocation of qualified immunity, [a plaintiff] must show both (1) that the facts make out a constitutional violation, and (2) that the constitutional right was 'clearly established' at the time of the official's alleged misconduct." *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 713 (7th Cir. 2013). A government official's conduct violates clearly established laws when, at the time of the challenged conduct, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates the right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). I would follow *Pearson* and all other binding Supreme Court and Seventh Circuit precedent. The relevant standards are similar for a law enforcement officer in New Jersey and Indiana. *Abbott*, 705 F.3d at 713; *Curley v. Klem*, 499 F.3d 199 (3rd Cir. 2007).

6. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge, and, if confirmed, a District Judge, I am obligated to follow Supreme Court and Seventh Circuit precedent. This means, among other things, that I must use whatever philosophy or approach is reflected in that precedent. My judicial philosophy as a federal trial court level judge consists of a commitment to, (1) impartiality, (2) hard work, and (3) humility. I approach each case before me individually and without any preconceived notions. I take the time necessary to be prepared for every case, no matter how large or small. I strive to not let ego get in the way of fair and impartial judgment, and in all things maintain a measure of humility. I am unaware of any particular Supreme Court decision that would exemplify my philosophy.

7. **Please identify a Seventh Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge, and, if confirmed, a District Judge, I am obligated to follow Supreme Court and Seventh Circuit precedent. This means, among other things, that I must use whatever philosophy or approach is reflected in that precedent. My judicial philosophy as a federal trial court level judge consists of a commitment to, (1) impartiality, (2) hard work, and (3) humility. I approach each case before me individually and without any preconceived notions. I take the time necessary to be prepared for every case, no matter how large or small. I strive to not let ego get in the way of fair and impartial judgment, and in all things maintain a measure of humility. I am unaware of any particular Seventh Circuit decision that would exemplify my philosophy.

8. Please state the governing law for self-defense in Indiana and the Seventh Circuit.

Response: Under Indiana law to prevail on a self-defense claim, a person is required to show that he or she "was in a place where he or she had a right to be, acted without fault, and reasonably feared or apprehended death or great bodily harm." *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021). To defeat a self-defense claim the State must disprove at least one of these elements beyond a reasonable doubt. *Id.* As the concept of self-defense applies to the Second Amendment, the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) determined the original public meaning to be that possession of a firearm is an individual right. *See also New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (noting that the Second Amendment serves to protect an individual right to armed self-defense). In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm in the home for self-defense.

9. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

Response: 18 U.S.C. § 1507 prohibits conduct committed with "the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

10. Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?

Response: I am unaware of any Supreme Court or Seventh Circuit precedent that has directly addressed the Constitutionality of 18 U.S.C. § 1507. As a sitting judge and judicial nominee, it would be improper for me to comment on an issue that may come before me.

11. Please explain the differences in the introduction of evidence between federal courts and a military commission.

Response: The Military Rules of Evidence apply to courts-martial proceedings, to the extent and with the exceptions stated in Mil. R. Evid. 1101. In the absence of guidance from those rules, courts-martial will apply the Federal Rules of Evidence.

12. What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?

Response: The fighting words doctrine was articulated by the United States Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court found that, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the pace." *Id.* at 571-72. In *Cohen v. California*, 403 U.S. 15, 20 (1971), the Supreme Court noted that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction."

13. What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?

Response: The United States Supreme Court has held that "[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

14. Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:

a. Was *Brown v. Board of Education* correctly decided?

Response: Yes. As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of de jure school segregation is highly unlikely to arise in a case before me, I can, consistent with the practice of past nominees, state that *Brown v. Board of Education* was correctly decided.

b. Was *Loving v. Virginia* correctly decided?

Response: Yes. As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of a ban on interracial marriage is highly unlikely to arise in

a case before me, I can, consistent with the practice of past nominees, state that *Loving v. Virginia* was correctly decided.

c. Was *Griswold v. Connecticut* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Griswold v. Connecticut* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

d. Was *Roe v. Wade* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Roe v. Wade* is no longer binding Supreme Court precedent, and I would follow the binding precedent set in *Dobbs v. Jackson Women's Health Organization* as a United States Magistrate Judge and if confirmed as a District Court Judge.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Planned Parenthood v. Casey* is no longer binding Supreme Court precedent, and I would follow the binding precedent set in *Dobbs v. Jackson Women's Health Organization* as a United States Magistrate Judge and if confirmed as a District Court Judge.

f. Was *Gonzales v. Carhart* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Gonzales v. Carhart* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

g. Was *District of Columbia v. Heller* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the

case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *District of Columbia v. Heller* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *McDonald v. City of Chicago* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *New York Sate Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

k. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Dobbs v. Jackson Women's Health* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as District Court Judge.

15. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that Second Amendment challenges are based on the Amendment's text as well as history and tradition. *Id.* at 2129-2130. If the Second Amendment's plain text covers the regulated conduct, the conduct is presumptively protected, and the government bears a burden of showing that the regulation is consistent with history and tradition. *Id.* Only if the government affirmatively shows that the regulation is equivalent or analogous to well-established historical regulations can the regulation survive Second Amendment scrutiny. *Id.* at 2127, 2130. I would faithfully follow this and all other binding Supreme Court and Seventh Circuit precedent.

16. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

17. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **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.**

Response: No.

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. Are you currently in contact with anyone associated with the Open Society Foundations?

Response: No.

c. Have you ever been in contact with anyone associated with the Open Society Foundations?

Response: No.

20. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

21. Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: On October 22, 2021, I spoke with staffers from the Office of Congressman Andre Carson concerning possible judicial selection. I met with staff from the Offices of Senators Todd Young and Mike Braun on February 11, 2022, and I met with Senator Braun and members of his staff on May 20, 2022. I was interviewed by attorneys from the White House Counsel's Office on June 29, 2022. Since then, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me.

22. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

23. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf?? If so, what was the nature of those discussions?

Response: No.

24. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

25. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

26. During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

27. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

Response: I have met for interviews and otherwise communicated with attorneys from the White House Counsel's Office and the Department of Justice Office of Legal Policy on June 29, 2022, December 22, 2022, January 5, 2023, January 10, 2023, January 11, 2023, January 18, 2023, and January 24, 2023.

28. Please explain, with particularity, the process whereby you answered these questions.

Response: I reviewed these questions, performed as much research as time permitted, and drafted written responses. In advance of being finalized, my draft responses were shared with attorneys at the Department of Justice, Office of Legal Policy. But the work always remained my own.

Senator Mike Lee
Questions for the Record
Matthew Brookman, Nominee to the United States District Court for the Southern District of Indiana

1. How would you describe your judicial philosophy?

Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge, and, if confirmed, a District Judge, I am obligated to follow Supreme Court and Seventh Circuit precedent. This means, among other things, that I must use whatever philosophy or approach is reflected in that precedent. My judicial philosophy as a federal trial court level judge consists of a commitment to, (1) impartiality, (2) hard work, and (3) humility. I approach each case before me individually and without any preconceived notions. I take the time necessary to be prepared for every case, no matter how large or small. I strive to not let ego get in the way of fair and impartial judgment, and in all things maintain a measure of humility.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: I would review the language of the statute in question, in conjunction with binding Supreme Court and Seventh Circuit precedent.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: I would review the language of the constitutional provision in question, in conjunction with binding Supreme Court and Seventh Circuit precedent.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: My approach to reading and interpreting statutes starts with the recognition that, as a Magistrate Judge (and, if confirmed, a District Judge), I am obligated to follow Supreme Court and Seventh Circuit precedent. This means, among other things, that I must utilize whatever approach to reading and interpreting statutes is reflected in that precedent.

When I am confronted with a question of statutory interpretation of first impression, my analysis starts with the language of the statute. If the meaning of the language is clear and unambiguous, my analysis ends, and I issue my ruling in accordance with that meaning. If the meaning is ambiguous, or if different provisions of the statute are in conflict with one another, I employ other canons of construction to resolve the ambiguity or conflict.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court has held that the public understanding of relevant language at the time of enactment plays an important role in interpreting a statute or constitutional provision. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

6. What are the constitutional requirements for standing?

Response: The Supreme Court has held that, to establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause in Article I, Section 8, of the United States Constitution gives Congress certain implied powers that are not explicitly enumerated in the Constitution.

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: I would evaluate the constitutionality of any law in accordance with Supreme Court and Seventh Circuit precedent concerning Congress's powers, including *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535, 570 (2012) (holding that if "no enumerated power authorizes Congress to pass a certain law, that law may not be enacted," and that the "'question of the constitutionality of action

taken by Congress does not depend on recitals of the power which it undertakes to exercise it'") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Supreme Court has held that the Constitution protects unenumerated rights only if they are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

10. What rights are protected under substantive due process?

Response: See my answer to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The Supreme Court precedent holding that the rights identified in my answer to Question 9 are protected under the Fifth and Fourteenth Amendments remains good law. By contrast, the Supreme Court has recognized that the doctrine reflected in *Lochner* "has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) and, more recently, has held that abortion is not a constitutional right protected under substantive due process, or otherwise. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022).

12. What are the limits on Congress's power under the Commerce Clause?

Response: The Supreme Court has held that Congress has the power, through the Commerce Clause, to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, as well as persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Supreme Court has struck down legislation that exceeds the limits of Congress's authority under the Commerce Clause. *See, e.g.*, *id.*; *United States v. Morrison*, 529 U.S. 598 (2000). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has identified race, national origin, religion, and

alienage as suspect classes for which strict scrutiny applies. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: Separation of powers is a bedrock feature of our Constitution. The drafters of the Constitution intentionally sought to limit the power of each branch of government, while also giving each branch oversight authority over the others. Importantly, separation of powers principles are intended not just to "protect each branch of government from incursion by the others," but to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would identify and apply binding Supreme Court and Seventh Circuit precedent, in conjunction with the text of the Constitution, to determine whether the branch in question had exceeded its constitutional authority.

16. What role should empathy play in a judge's consideration of a case?

Response: Judges should make decisions based on the facts and law, not their personal views.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both are undesirable, and therefore I will strive to do neither.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have never studied trends in the Supreme Court's exercise of its authority to strike down federal statutes and am therefore unable to explain why the exercise of such authority is more prevalent in some eras than others. The aggressive exercise of judicial review could raise concerns about whether the judiciary is acting outside its limited constitutional role of deciding cases and controversies; conversely, judicial passivity could lead to the legislative or executive branches exceeding *their* constitutional boundaries. Ultimately, a judge must follow the law wherever it leads, and without respect to the number of federal statutes (if any) the judge is striking down.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: As it relates to constitutional issues, Black's Law Dictionary defines "judicial review" as a "court's power to review the actions of other branches or levels of government" and "judicial supremacy" as the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review . . . are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on how elected officials should strike this balance.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Federalist 78 recognizes that the role of a judge is to interpret and apply the law, not to make it. Similarly, it is important for a judge to decide only the case in front of him or her, and not offer advisory opinions on issues not properly before the court.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent regardless of whether I believe it is correctly decided. In the case of precedent that is not directly on point, a district judge still must consider whether it is so closely analogous that it should be

applied.

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: District judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. Section 3553(a) does not mention race, gender, nationality, sexual orientation, or gender identity as a factor in sentencing decisions. Accordingly, I would not consider them.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: One of the ways Black's Law Dictionary defines "equity" is "[f]airness, impartiality, evenhanded dealing." Black's Law Dictionary (11th ed. 2019). The word "equity" is also used in binding Supreme Court and Seventh Circuit precedent in a variety of other contexts. *See, e.g.*, *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992) ("[A] consent decree is a final judgment that may be reopened only to the extent that equity requires.").

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: If the definition of "equity" is understood as revolving around concepts of fairness and impartiality, it would be somewhat different than "equality," which is a term of comparison, i.e., "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019). There is, however, overlap between the two in the sense that equality (or equal treatment) may be an aspect of ensuring equity.

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Fourteenth Amendment does not include the word "equity." It does, however, forbid states from denying to any person within its jurisdiction the equal protection of the laws. I will faithfully follow any Supreme Court or Seventh Circuit precedent applying the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: I have no personal definition of the phrase "systemic racism" and am not aware of any consensus definition of the phrase.

28. How do you define "critical race theory?"

Response: Black's Law Dictionary defines "critical race theory" as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Response: Without a personal or consensus definition of the phrase "systemic racism," I am not able to compare it to "critical race theory."

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Matthew Brookman, nominated to be United States District Judge for the Southern District of Indiana

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. Is racial discrimination wrong?

Response: Yes. The Fourteenth Amendment prohibits a state from "denying to any person within its jurisdiction the equal protection of the laws" and is applicable to the federal government by virtue of the due process clause of the Fifth Amendment. In addition, there are federal statutes prohibiting racial discrimination in a variety of contexts, and the Supreme Court has held that any classifications based on race must satisfy strict scrutiny review. As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

2. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?

Response: The Supreme Court has held that the Constitution protects unenumerated rights only if they are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). I have no opinion as to any as yet unarticulated rights, and I will faithfully follow any Supreme Court or Seventh Circuit precedent applying the Fourteenth Amendment in the future.

3. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge, and, if confirmed, a District Judge, I am obligated to follow Supreme Court and Seventh Circuit precedent. This means, among other things, that I must use whatever philosophy or approach is reflected in that precedent. My judicial philosophy as a federal trial court level judge consists of a commitment to, (1) impartiality, (2) hard work, and (3) humility. I approach each case before me individually and without any preconceived notions. I take the time necessary to be prepared for every case, no matter how large or small. I strive to not let ego get in the way of fair and impartial judgment, and in all things maintain a measure of humility. I have a deep respect for the paths to the bench taken by many current and former Supreme Court Justices, but in particular Justice Thomas and late Justice Ginsburg.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?

Response: "Originalism" is defined as a doctrine of interpretation in which "words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). The Supreme Court has applied originalism

when deciding constitutional and statutory issues, for example in *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); and *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

5. Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?

Response: "Living constitutionalism" is defined as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I do not believe the meaning of the Constitution changes over time.

6. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: Given the abundance of precedent interpreting virtually every provision of the Constitution, I cannot imagine a scenario in which I would be presented with a constitutional issue of true first impression. At minimum, there almost certainly would be precedent closely on point, if not directly so. Therefore, I would be bound to follow the approach directed by the closely-on-point precedent. In a Second Amendment case, for example, I would be bound by the original public meaning of the Constitution. *See New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

7. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: Generally no. However, the Supreme Court has sometimes decided constitutional issues through reference to contemporary standards, such as when determining whether punishment is cruel and unusual under the Eighth Amendment. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1956). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

8. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: No.

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*

settled law?

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question. *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent, which I would follow as a United States Magistrate Judge and if confirmed as a District Court Judge.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of de jure school segregation is highly unlikely to arise in a case before me, I can, consistent with the practice of past nominees, state that *Brown v. Board of Education* was correctly decided.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: A rebuttable presumption in favor of pretrial detention arises under 18 U.S.C. § 3142(e)(2) and (f)(1) as to defendants who, (1) have previously been convicted of a

Federal offense that is described in subsection (f)(1) , or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed; the offense described in paragraph one was committed while the person was on release pending trial for a Federal, State, or local offense and a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense, or (2) have been charged with an offense for which a maximum term of imprisonment of 10 years or more is prescribed, or (3) an offense under 18 U.S.C. § 924(c). 18 U.S.C. § 3142(e), including firearms offenses, crimes of violence, terrorism offenses, and drug offenses carrying a potential maximum punishment of ten years or more.

a. What are the policy rationales underlying such a presumption?

Response: The policy rationale underlying the rebuttable presumption is that where there is a strong probability that a person will commit additional crimes if released, there is a need to protect the community.

13. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: The free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) create identifiable limits to what government may impose or require of religious organizations and small businesses operated by observant owners. For example, under RFRA, the federal government may not substantially burden a person's exercise of religion—even through a facially neutral law—unless the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Similarly, under the free exercise clause of the First Amendment, the government may not treat any comparable secular activity more favorably than religious exercise. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

14. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: Under the free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), the government is not permitted to discriminate against religious organizations or religious people unless the discriminatory law or regulation is narrowly tailored (or, under RFRA, the "least restrictive means") to achieve a compelling governmental interest. See, e.g., Tandon v. Newsom, 141 S. Ct. 1294 (2021); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while

certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: The Supreme Court held that the church and synagogues were entitled to a preliminary injunction because they had "made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (internal punctuation omitted). The Supreme Court reached this conclusion, in part, because of evidence that the challenged rules appeared to be targeting Orthodox Jews, as well as evidence that comparable secular activity was not subject to the same restrictions. *Id.* at 66-67. The Supreme Court further concluded that the challenged restrictions, if enforced, would cause irreparable harm in the form of lost First Amendment freedoms. *Id.*

16. **Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom.***

Response: In *Tandon*, the Supreme Court held that government regulations are not neutral and generally applicable if they treat *any* comparable secular activity more favorably than religious exercise. In such circumstances, the regulation must satisfy strict scrutiny review. *Tandon* held that Covid-19-related restrictions in California did not satisfy this standard.

17. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes.

18. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.***

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the First Amendment (free exercise) rights of a baker who declined for religious reasons to bake a cake for a couple's wedding. The Court held that, in applying a facially neutral law, the government is not permitted to treat religious activity with disfavor vis-à-vis non-religious activity. *Id.* at 1731.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes, if the beliefs are sincerely held. *See Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829 (1989).

a. Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?

Response: Under *Frazee* and other free exercise cases, a court would not be obligated to recognize a religious interpretation that was not sincerely held. However, the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). Courts have "no business" addressing whether the religious belief is reasonable. *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

b. Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?

Response: Under *Frazee* and other free exercise cases, a court would not be obligated to recognize a "view" or "interpretation" of religious and/or church doctrine that was not sincerely held. However, the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715(1981)). Courts have "no business" addressing whether the religious belief is reasonable. *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

c. Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?

Response: No.

20. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court reaffirmed its prior holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), that the First Amendment allows religious institutions to make employment decisions on the basis of religious considerations that otherwise might violate federal or state law, provided the employees in question hold positions in which they perform "vital religious duties." *See Morrissey-Berru*, 140 S. Ct. at 2066. These cases rest on the premise that the First Amendment gives religious institutions the right to decide matters of church governance free from state interference. *Id.* at 2060.

21. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide

whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1848 (2021), the Supreme Court held that the City of Philadelphia violated the First Amendment free exercise rights of Catholic Social Services by refusing to refer children to the agency after learning of the agency's refusal, on religious grounds, to certify same-sex couples to be foster parents. The City argued that the refusal was based on a facially neutral and generally applicable ordinance prohibiting discrimination on the basis of sexual orientation, as well as a standard contract with foster care agencies reaffirming the non-discrimination requirement. *Id.* at 1877-78. However, the Supreme Court applied strict scrutiny because the contract gave the City discretion to grant exceptions from complying with the non- discrimination requirements. *Id.* "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (cleaned up).

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause because a State may not exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. *Carson v. Makin*, 142 S. Ct. 1987, 1997-98, 2002 (2022).

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.***

Response: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from governmental reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022).

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: In his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch criticized Minnesota county officials and lower courts for misapprehending the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires the application of strict scrutiny to any law or regulation that imposes a substantial burden on a person's religious exercise. *Id.* at 2432. Justice Gorsuch explained that the county and lower courts erred in treating the county's *general* interest

in sanitation as a "compelling governmental interest" rather than considering the *specific* application of those rules to the Amish community and its sincerely-held religious beliefs. *Id.* He concluded that the county and lower courts further erred by failing to give appropriate weight to exemptions enjoyed by other, non-religious groups. *Id.*

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: 18 U.S.C. § 1507 prohibits conduct committed with "the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence." I am unaware of any Supreme Court or Seventh Circuit precedent that has directly addressed the Constitutionality of 18 U.S.C. § 1507. As a sitting United States Magistrate Judge and a District Court Judge nominee, it would be inappropriate for me to comment on an issue that may come before me.

26. Would it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

Response: No. I am not aware of any such training in the Seventh Circuit or Southern District of Indiana. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;

Response: No. I am not aware of any such training in the Seventh Circuit or Southern District of Indiana. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or

Response: No. I am not aware of any such training in the Seventh Circuit or Southern District of Indiana. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

d. Meritocracy or related values such as work ethic are racist or sexist?

Response: No. I am not aware of any such training in the Seventh Circuit or Southern District of Indiana. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

27. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: Yes. I am not aware of any such training in the Seventh Circuit or Southern District of Indiana. I will commit that my court, so far as I have a say, will provide trainings consistent with the Constitution and laws of the United States.

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

29. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: The Constitution gives the President the authority, with the advice and consent of the Senate, to make appointments to political positions. As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion as to what factors the President and Senate should consider in connection with these appointments or whether certain considerations would be constitutional.

30. Is the criminal justice system systemically racist?

Response: Whether the criminal justice system is systemically racist is a policy issue for policymakers to consider. However, in my personal experience with the criminal justice system within the United States District Courts of the Western District of Missouri and the Southern District of Indiana, I have never observed systemic racism.

31. President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: Whether the number of justices on the Supreme Court should be increased or decreased is a policy issue for policymakers to consider. I am obligated to follow Supreme Court precedent regardless of the Court's size.

32. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

33. What do you understand to be the original public meaning of the Second Amendment?

Response: The Supreme Court determined in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

34. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court has held that restrictions on the Second Amendment will only survive constitutional scrutiny if the government demonstrates that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). This holding is to be read in conjunction with the holdings established in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 752 (2010).

35. Is the ability to own a firearm a personal civil right?

Response: Yes.

36. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

Response: No. I am not aware of any Supreme Court or Seventh Circuit precedent holding that the right to own a firearm receives less protection than the other individual rights specifically enumerated in the Constitution.

37. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: No. I am not aware of any Supreme Court or Seventh Circuit precedent holding that the right to own a firearm receives less protection than the right to vote under the Constitution.

38. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: The Supreme Court has recognized that the executive branch has broad discretion in deciding whether or how to prosecute cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to

offer an opinion as to how this discretion should be exercised.

39. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: I am not aware of any Supreme Court or Seventh Circuit precedent definitively addressing this question. If such a question were to come before me, I would consider the arguments of the parties and carefully research the law.

40. Does the President have the authority to abolish the death penalty?

Response: The President cannot abolish the death penalty without the passage of legislation by Congress amending or repealing 18 U.S.C. § 3591, which authorizes capital punishment for certain offenses. However, the Supreme Court has recognized that the executive branch has broad discretion in deciding whether or how to prosecute cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). In addition, the President has the power under Article II of the Constitution to "grant Reprieves and Pardons for Offenses against the United States."

41. Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS.*

Response: In *Alabama Assn' of Realtors for Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court vacated a stay of an order holding that the Center for Disease Control and Prevention (CDC) exceeded its statutory authority when it imposed a nationwide moratorium on evictions of tenants. The Supreme Court held that the applicants had a substantial likelihood of success on the merits of their claim that the CDC exceeded its authority. *Id.* at 2488. Accordingly, and taking into account other factors relevant to whether to issue a stay, the Court concluded the stay should be vacated. *Id.* at 2489-90. The Court held that "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.* at 249.

42. Are there instances where a judge should not honor the judicial code of conduct?

Response: No.

a. If so, can you please identify all instances?

Response: Not applicable.

b. What justifies a departure from the judicial code of conduct?

Response: Not applicable.

43. Do judges need to undergo implicit bias training?

Response: I am unaware of any implicit bias training within the United States District Court for the Southern District of Indiana, and I do not perceive a need for such training.

44. Is it appropriate for a prosecutor to publicly announce that they were going to prosecute a member of the community before they even start an investigation?

Response: Generally no. However, as a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion as to legal propriety when an issue (or related issues) could come before me for decision in a future case.

Senator Josh Hawley
Questions for the Record

Judge Matthew Brookman
Nominee, U.S. District Court for the Southern District of Indiana

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

   a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

      Response: If confirmed as a District Court Judge, I will sentence defendants consistent with 18 U.S.C. § 3553(a) as applied to any statute to which a defendant pleaded guilty or of which a defendant was found guilty. I will take into account the sentencing guidelines, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

   b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

      Response: If confirmed as a District Court Judge, I will sentence defendants consistent with 18 U.S.C. § 3553(a) as applied to any statute to which a defendant pleaded guilty or of which a defendant was found guilty. I will take into account the sentencing guidelines, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

   c. **The enhancement for offenses involving the use of a computer**

      Response: If confirmed as a District Court Judge, I will sentence defendants consistent with 18 U.S.C. § 3553(a) as applied to any statute to which a defendant pleaded guilty or of which a defendant was found guilty. I will take into account the sentencing guidelines, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

   d. **The enhancements for the number of images involved**

      Response: If confirmed as a District Court Judge, I will sentence defendants consistent with 18 U.S.C. § 3553(a) as applied to any statute to which a defendant pleaded guilty or of which a defendant was found guilty. I will take into account the sentencing guidelines, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    Response: Whether statutory penalties should be changed for a federal crime is a question for policy makers. As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply the laws of the United States.

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

    Response: Whether statutory penalties should be changed for a federal crime is a question for policy makers. As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply the laws of the United States.

    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

    Response: If confirmed as a District Court Judge, I will sentence defendants consistent with 18 U.S.C. § 3553(a) as applied to any statute to which a defendant pleaded guilty or of which a defendant was found guilty. I will take into account the sentencing guidelines, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

    a. **Do you agree with that philosophy?**

    Response: I am not familiar with this quote, but I do not agree with the proposition that judges should do what they think is right regardless of what the law says. Judges are obligated to follow the law, not their personal beliefs as to what is "right."

    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

    Response: It would not be appropriate for me to offer an opinion on whether a current or former Supreme Court Justice violated a judicial oath.

4. **Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?**

Response: Yes.

5. **What is the standard for each kind of abstention in the court to which you have been nominated?**

Response: Under the *Rooker-Feldman* doctrine, a federal district court or court of appeals is not permitted to reverse or modify a state court judgment even if it implicates federal issues. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Instead, appellate review of any such judgment is limited to the U.S. Supreme Court. *Id.* The *Rooker-Feldman* doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before [federal] district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284.

Under the *Pullman* doctrine, federal courts should consider abstaining from deciding federal constitutional challenges to a state law if a state court might interpret the law in a way that avoids the federal issue. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The Seventh Circuit has held that the *Pullman* abstention is appropriate "only when (1) there is substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Intern'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 365 (7th Cir. 1998).

Under the *Burford* doctrine, a federal court should consider abstaining from deciding unsettled questions of state law that relate to a complex state regulatory scheme. *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18, 87 L.Ed. 1424 (1943). The doctrine is applied in two narrow circumstances. First, a federal court may choose to abstain when it is faced with "difficult questions of state law" that implicate significant state policies. *See New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 109 S. Ct. 2506, 105 L.Ed.2d 298 (1989). Second, abstention may also be appropriate when concurrent federal jurisdiction would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 491 U.S. at 361, 109 S. Ct. 2506, quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S. Ct. 1236 (1976).

Under the *Younger* doctrine, federal courts should abstain from interfering with state criminal proceedings or "particular state civil proceedings that are akin to criminal prosecutions . . . or that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013); *see also Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is appropriate only in "exceptional" cases. *Jacobs*, 571 U.S. at 73. According to

Seventh Circuit precedent, *Younger* and its progeny "require federal courts to obtain from enjoining ongoing state proceedings that are (1) judicial in nature, (2) implicate important state interests, and (3) offer an adequate opportunity for review of constitutional claims, (4) so long as no extraordinary circumstances—like bias or harassment—exist which auger against abstention." *Majors v. Engelbrecht*, 149 F.3d 709, 711 (7th Cir. 1998) (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 429, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1982)).

Under the *Colorado River* doctrine, federal courts should consider abstaining when there is parallel litigation in state court involving the same parties and the same issues. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" *id.* at 824, and thus *Colorado River* abstention is appropriate only in exceptional circumstances. *See Tyrer v. City of South Beloit, Ill.*, 456 F.3d 744 (7th Cir. 2006). Seventh Circuit precedent requires a two-part inquiry. First, the court must determine whether "the concurrent state and federal actions are actually parallel. Then, once it is established that the suits are parallel, the court must consider a number of non-exclusive factors that might demonstrate the existence of 'exceptional circumstances.'" *Clark v. Lacy* , 376 F.3d 681, 685 (7th Cir. 2004) (internal quotation marks and citations omitted). These factors include: (1) the difficulties posed when a state and federal court concurrently assume jurisdiction over the same *res*; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the state and federal proceedings were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will adequately protect the federal plaintiff's rights. *See Tyrer*, 456 F.3d at 751.

The *Brillhart/Wilton* abstention doctrine bears some similarity to the *Colorado River* doctrine but recognizes that "exceptional circumstances" need not be present when the federal case seeks declaratory relief while a state proceeding is pending. *See Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942). Under Seventh Circuit precedent, the classic example of *Brillhart/Wilton* abstention is where solely declaratory relief is sought in the federal litigation and a parallel state proceeding is ongoing. *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 (7th Cir. 2010).

Thibodaux abstention arises when state proceedings involve unresolved issues of state law that are of great importance to the state. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). The Seventh Circuit appears to have treated *Thibodaux* abstention as a subset of the other abstention doctrines, rather than an independent doctrine with its own standard. *See, e.g., Intern'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 362 (7th Cir. 1998) (citing *Thibodaux* to support opinion affirming application of *Burford* abstention).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

Response: No.

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

Response: Not applicable.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

8. Do you consider legislative history when interpreting legal texts?

Response: The Supreme Court has held that legislative history may be used to help interpret ambiguous statutory language. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). It should not, however, be used to create ambiguity where the text of a statute is clear. *Id.* I would follow this and all other binding precedent.

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court has held that the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has "eschewed reliance on the passing comments of one Member . . . and casual comments from the floor debates." *Id.* I would follow this and all other binding precedent.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: Unless there is binding Supreme Court or Seventh Circuit precedent directing me to do so, I would not consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: Under binding Supreme Court and Seventh Circuit precedent, an inmate must establish that the method of execution presents a risk that is "sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (cleaned up). The inmate further must establish that there is an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Id.* (cleaned up). The record must show that the state lacked a legitimate penological reason for refusing to adopt the alternative protocol. *Id. See also Bucklew v. Precythe*, 139 S. Ct. 1112, 203 L.Ed.2d 521 (2019) (confirming the test for challenges to lethal injection protocols announced in *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008) and *Glossip*).

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: An inmate must establish that there is an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015).

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: I am unaware of any Supreme Court or Seventh Circuit case reaching such a holding. In fact, in *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), the Supreme Court rejected a habeas petitioner's invitation to recognize a freestanding, due process right to access DNA evidence for testing.

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free

exercise of religion? Please cite any cases you believe would be binding precedent.

Response: If a state law is truly neutral and generally applicable, the law is subject to rational basis review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, a facially neutral law will not qualify for this deferential standard if its enactment or application was motivated by religious animus, *see, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018), or if the law is subject to exemptions that are being granted on more favorable terms to any secular activity than to comparable religious activity, *see, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Instead, strict scrutiny will apply in such circumstances. *See id.*

Given the question's reference to "state" governmental action, I do not understand it as implicating the Religious Freedom Restoration Act (RFRA), which applies only to the federal government. To the extent federal action is also at issue in the question, however, RFRA would require strict scrutiny review even of a facially neutral and generally applicable law if it imposes a substantial burden on a person's exercise of religion. *See Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: State governmental action that discriminates against a religious group or religious belief is subject to strict scrutiny review. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Supreme Court has held that the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 716) (1981)). Courts have "no business addressing []whether the religious belief asserted in a RFRA case is reasonable[]." *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *Heller*, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms that does not require a connection between the arms and service in a militia. The Court struck down as unconstitutional statutes banning handgun possession in the home and requiring other types of firearms to be unloaded and dissembled or bound by a trigger lock or similar device.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: I read the statement to be Justice Holmes expressing the view that judges should not use their personal disagreement with laws as a basis for finding them unconstitutional under the Fourteenth Amendment. I agree with the statement.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: The Supreme Court has recognized that the doctrine in *Lochner* "has long since been discarded," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: I cannot identify any Supreme Court opinions that have not been formally overruled but that I believe are no longer good law.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: In *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Court cited favorably to Judge Hand's conclusion that 90% market share constitutes monopoly power and concluded that 87% market share also "leaves no doubt" that monopoly power exists. In an earlier case, the Supreme Court held that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted a "substantial monopoly." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). Moreover, and more generally, the Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I do and will follow this and all other binding Supreme Court and Seventh Circuit precedent.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: See my response to Question 16(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: I am not aware of any Supreme Court or Seventh Circuit precedent establishing a minimum percentage of market share for a company to constitute a monopoly. However, the Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Court cited favorably to Judge Hand's conclusion that 90% market share constitutes monopoly power and concluded that 87% market share also "leaves no doubt" that monopoly power exists. In an earlier case, the Supreme Court held that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted a "substantial monopoly." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be

bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

20. Please describe your understanding of the "federal common law."

Response: "Common law" refers to areas of law that derive from judicial precedent rather than statute. However, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). "These areas have included admiralty disputes and certain controversies between States." *Id.* Federal judges may not make new common law without satisfying "strict conditions" such as the need to "protect uniquely federal interests." *Id.* (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: I would interpret the scope of the state constitutional right consistent with how it had been interpreted by the state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

a. Do you believe that identical texts should be interpreted identically?

Response: In our system of federalism, the highest court of a state is given the freedom to interpret that state's constitution differently than the Supreme Court has interpreted the U.S. Constitution even if the relevant text is identical in both documents, provided that the interpretation of the state constitution does not infringe on a right protected by the U.S. Constitution.

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: In our system of federalism, the highest court of a state is given the freedom to interpret that state's constitution more broadly than the Supreme Court has interpreted the U.S. Constitution even if the relevant text is identical in both documents, provided that the interpretation of the state constitution does not infringe on a right protected by the U.S. Constitution.

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue

of de jure school segregation is highly unlikely to arise in a case before me, I can, consistent with the practice of past nominees, state that *Brown v. Board of Education* was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: Federal courts have the authority to issue injunctive relief pursuant to Fed. R. Civ. P. 65. The Supreme Court has held that a party seeking injunctive relief must show: (1) it has suffered an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) that "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165. As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

a. If so, what is the source of that authority?

Response: See my answer to Question 23.

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: See my answer to Question 23.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: See my answer to Question 20.

25. What is your understanding of the role of federalism in our constitutional system?

Response: Federalism is a central feature of our constitutional system. The Constitution intentionally gives only limited powers to the federal government and reserves all other powers to the States. In so doing, the Constitution leaves room for states to enact their own laws and regulations according to the needs and circumstances of that state.

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: See my answer to Question 5.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: As a sitting judge and judicial nominee, I am obligated to follow the law without regard to my personal views. Under binding Supreme Court precedent, a party seeking injunctive relief must show: (1) it has suffered or will suffer an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) that "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165. As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

28. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: The Supreme Court has held that the substantive due process clauses of the Fifth and Fourteenth Amendments protect unenumerated rights that are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: My understanding of the scope of the First Amendment's right to free exercise of religion is based on binding Supreme Court precedent, important examples of which are set forth in my answers to Questions 13, 14, and 15.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: I am not aware of any Supreme Court or Seventh Circuit precedent definitively comparing "free exercise" with "free worship," although *Lee v. Weisman*, 505 U.S. 577, 591 (1992), appeared to treat "exercise" more broadly than "worship" when it said the "Free Exercise Clause embraces a freedom of conscience and worship…"

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: The Seventh Circuit has held that "a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Kroger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (cleaned up). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I am and will be bound to apply this and all other binding Supreme Court and Seventh Circuit precedent.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: The Supreme Court has held that the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). Courts have "no business addressing []whether the religious belief asserted in a RFRA case is reasonable[]." *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: Judges should follow the law regardless of their personal views or preferences.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

33. Do you believe America is a systemically racist country?

Response: Whether America is a systemically racist country is a policy issue for policymakers to address However, in my personal life experience I have not found our country to be systemically racist.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: I cannot recall a specific instance where as a litigator I took a position on behalf of a client that I did not support as a matter of policy. Every client, however, was entitled to zealous representation, which I provided in accordance with my ethical obligations.

35. How did you handle the situation?

Response: I was ethically obligated to zealously represent my clients even if it meant taking positions that I might not have supported as a matter of policy. I satisfied my ethical obligation to do so.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: No single Federalist Paper has shaped my views of the law any more than any other Federalist Paper.

38. Do you believe that an unborn child is a human being?

Response: As a sitting judge and judicial nominee, it would be improper for me to offer an opinion on an issue like this one. As a Magistrate Judge (and if confirmed as a District Judge), I am obligated to follow all binding Supreme Court and Seventh Circuit precedent.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: No.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

41. Do you currently hold any shares in the following companies:

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: No.

43. If so, please identify those cases with appropriate citation.

Response: Not applicable.

44. Have you ever confessed error to a court?

Response: To the best of my recollection, I never confessed error to a court.

45. If so, please describe the circumstances.

Response: Not applicable.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I am obligated to answer all questions truthfully and have done so to the best of my ability and recollection. Similarly, I am obligated to answer all questions fully except where judicial ethics require me to limit an answer in some way.

Questions from Senator Thom Tillis
for Matthew P. Brookman
Nominee to be United States District Judge
for the Southern District of Indiana

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: I interpret "judicial activism" to refer to situations where a judge decides a case based on the judge's personal preferences, rather than the law. Under this interpretation, I consider judicial activism inappropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: It is an expectation.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes, there will be times when the law requires a result that some, or even most, observers would consider undesirable. Judges are obligated to follow the law in every case, regardless of the perceived or actual desirability of the outcome.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: I will faithfully follow all binding Second Amendment precedent, including, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognizes an individual Second Amendment right to keep and bear arms, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that this individual right is applicable to the

States, and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which held that the right extends beyond the home and also clarified the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: I would evaluate any such lawsuit in accordance with binding precedent, including, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognizes an individual Second Amendment right to keep and bear arms, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that this individual right is applicable to the states, and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which held that the right extends beyond the home and also clarified the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: The doctrine of qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). This "clearly established" standard ensures "that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)). Qualified immunity thus "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. "To overcome the defendant's invocation of qualified immunity, [a plaintiff] must show both (1) that the facts make out a constitutional violation, and (2) that the constitutional right was 'clearly established' at the time of the official's alleged misconduct." *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 713 (7th Cir. 2013). A government official's conduct violates clearly established laws when, at the time of the challenged conduct, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates the right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up). As a sitting United States Magistrate Judge, and if confirmed as a District Court Judge, I would follow *Pearson* and all other binding Supreme Court and Seventh Circuit precedent.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on whether I believe an area of law has been correctly decided when the issues in that area (or related issues) could come before me for decision in a future case. I am bound to follow all Supreme Court and Seventh Circuit binding precedent, and this would be an issue for policymakers to consider.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on whether I believe an area of law has been correctly decided when the issues in that area (or related issues) could come before me for decision in a future case. I am bound to follow all Supreme Court and Seventh Circuit binding precedent, and this would be an issue for policymakers to consider.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on Supreme Court jurisprudence involving issues that could come before me for decision in a future case. I am bound to follow all Supreme Court and Seventh Circuit binding precedent, and this would be an issue for policymakers to consider.

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: The question of whether patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation is a question for policy makers to consider. The Supreme Court has held that "[l]aws of nature, natural phenomena, and abstract ideas are not patentable." *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012)). However, "an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Mayo*, 566 U.S. at 71

(quoting *Diamond v. Diehr*, 450 U.S. 175, 187 (1981) (emphasis in original)). In *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 573 U.S. 208, 217 (2014), the Supreme Court summarized a two-part framework for distinguishing between patent-eligible and -ineligible applications. First, a court must "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If so, the court must proceed to the second step of "consider[ing] the elements of each claim both individually and as an ordered combination to determine whether the additional elements transform the nature of the claim into a patent-eligible application." *Id.* (internal punctuation omitted). In any case involving patent eligibility, I would apply *Alice Corp.*, *Myriad Genetics*, *Mayo*, and all other binding Supreme Court and Seventh Circuit precedent.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: I have been involved in a handful of cases and matters as a United States Magistrate Judge involving issues of copyright law.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or judge involving the Digital Millennium Copyright Act.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or judge involving intermediary liability for online service providers that host unlawful content posted by users.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or judge involving the First Amendment and free speech issues, nor the relationship between free speech and intellectual property (including copyright).

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address

infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: When the meaning of a legislative text is clear and unambiguous, that meaning should be followed without respect to legislative history. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). If the text is ambiguous, or if different provisions of the text conflict with one another, the Supreme Court has held that courts may use legislative history to help resolve the ambiguity or conflict. *See id.* The Supreme Court has explained that the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has "eschewed reliance on the passing comments of one Member . . . and casual comments from the floor debates." *Id.* I would follow this and all other binding precedent.

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: I am not aware of any binding Supreme Court or Seventh Circuit precedent definitively addressing whether, and to what extent, the analysis of the U.S. Copyright Office should play a role in deciding how to apply the law to the facts in a particular copyright case. Other circuits, however, have concluded that some level of deference should be given to the U.S. Copyright Office. *See, e.g.*, *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 478 (6th Cir. 2015) (summarizing cases).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: This is a policy issue for policymakers to address.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: Judges must apply the Digital Millennium Copyright Act according to the language of the statute and governing precedent.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Judges must apply the Digital Millennium Copyright Act according to the language of the statute and governing precedent.

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: In the Southern District of Indiana, cases are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant in the Southern District of Indiana to engage in judge-shopping or forum-shopping, and I am not aware of any complaints or allegations of such conduct.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Judges are obligated to decide cases based on the facts and law. Whether the judge's adherence to the rule of law encourages or discourages forum shopping is irrelevant, provided the judge is following the law.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: Judges are obligated to decide cases based on the facts and law. To the extent litigants see adherence to the rule of law in a particular forum as a reason for that forum to be more attractive than others, I do not view this as problematic. By contrast, if a judge is *declining* to adhere to the rule of law so as to attract certain types of cases or litigants, I would view this as highly problematic

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: I will commit to deciding cases based on the facts and law. Whether my adherence to the rule of law attracts or discourages litigants from bringing cases in my district is irrelevant to the strength of this commitment.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: I am not familiar with the procedures or rules for case assignment in districts other than the Southern District of Indiana. In the Southern District of Indiana, cases are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant to engage in judge-shopping or forum- shopping, and I am not aware of any complaints or allegations of such conduct.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: In the Southern District of Indiana, patent cases, like all other types of cases, are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant in the Southern District of Indiana to engage in judge-shopping or forum-shopping, and I am not aware of any complaints or allegations of such conduct.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Michael Etan Farbiarz
Nominee to be United States District Judge, District of New Jersey

1. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: "[U]nder the exception to the warrant requirement established in Terry v. Ohio, 392 U.S. 1 (1968), '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.'" United States v. Brown, 448 F.3d 239, 244 (3d Cir. 2006) (citation omitted). Such "an investigatory stop" is "also known as . . . a 'stop and frisk.'" Id.

2. **Under Supreme Court and Third Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

   Response: "[T]he appropriate methodology for distinguishing questions of fact from questions of law has been . . . elusive[,]" Miller v. Fenton, 474 U.S. 104, 113 (1985) (collecting cases), and "the [Supreme] Court has yet to arrive at "'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" Id. (1985) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)). This said, the Court has described a "fact" as "a recital of external events," Thompson v. Keohane, 516 U.S. 99, 110 (1995) (internal quotation marks omitted), and has stated that a question of fact includes, at a minimum, the determination of "what happened," id. (internal quotation marks omitted). That an issue is factual or legal can impact, among other things, whether appellate review is de novo or for clear error. See, e.g., Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020). In light of this, the Supreme Court has distinguished questions of law from questions of fact by considering whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Miller, 474 U.S. at 114; see also, e.g., U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 966-67 (2018); cf. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996). The Third Circuit has followed this approach. See United States v. Brown, 631 F.3d 638, 642-45 (3d Cir. 2011); see also, e.g., In re Fosamax (Alendronate Sodium) Prod. Liab. Litig., 852 F.3d 268, 289–93 (3d Cir. 2017), vacated and remanded sub nom. Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019).

3. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: Criticism is common -- every motion for reconsideration and every appeal is, in some sense, a criticism of a judicial opinion, and the Supreme Court has affirmed that the Constitution protects criticism of public officials, including judges. See, e.g., Bridges v. State of Cal., 314 U.S. 252, 270-71 (1941). The particular distinction referenced in the question, between criticism and verbal attacks, is not one I have used. But there is a sharp divide between criticism and physical threats. See, e.g., Chief Justice John G. Roberts, Jr., 2022 Year-End Report on the Federal Judiciary at 3 (Dec. 31, 2022).

4. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: Title 18, United States Code, Section 3553(a) mandates consideration of each of the above-listed principles in fashioning a sentence. The statute does not assign weights to them. Federal sentencing involves a number of steps: (1) gathering factual information as to the offense and the defendant by the United States Probation Office, see Fed. R. of Crim. Pr. 32(c); (2) reviewing the Presentence Report and assessing any objections to it, see id. 32(c)-(g); (3) calculating the applicable United States Sentencing Guidelines; (4) considering counsel's arguments; (5) affording victims, see 18 U.S.C. § 3771(a)(4), and the defendant, see Fed. R. of Crim. Pr. 32(i) (4)(a)(ii), the right to be heard; and then (5) imposing sentence in light of the factors set out in Title 18, United States Code, Section 3553(a). See generally United States v. Tomko, 562 F.3d 558, 567-69 (3d Cir.2009) (en banc) (describing the sentencing process). This process is designed to be both fact-intensive and rigorous. At the conclusion of the sentencing process in a particular case, it might become clear, as to that case, that one of the Section 3553(a) sentencing factors looms relatively larger than the others.

5. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?**

Response: Qualified immunity does not shield a New Jersey law-enforcement officer who violates another person's federal constitutional right if the right was "clearly established." See Anderson v. Creighton, 483 U.S. 635, 638 (1987); see also, e.g., Clark v. Coupe, 55 F.4th 167, 178 (3d Cir. 2022). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam)). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." Id. at 7–8 (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)); see also, e.g., Clark, 55 F.4th at 178.

6. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments. Numerous Supreme Court decisions exemplify this philosophy. One is Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502 (2022), in which the Court resolved a choice-of-law issue that arose under the Foreign Sovereign Immunities Act of 1978. The Court's decision was rooted in consideration of the facts, see id. at 1506-08; focused on analysis of the law (and not, for example, on policy concerns), see id. at 1508-10; and proceeded from the arguments made orally and in writing by the various participants in the case, see id. at 1509-10.

7. **Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As to my judicial philosophy, please see my response to Question 6. Numerous Third Circuit decisions exemplify this philosophy. One is Xerox Corp. v. SCM Corp., 576 F.2d 1057 (3d Cir. 1978), in which the Third Circuit affirmed a denial of a motion to dismiss in a District of New Jersey patent infringement case; the basis of the motion had been that the patent infringement claims were compulsory counterclaims, and accordingly should have been raised in a separate federal case then-pending between the parties, an antitrust action in the District Connecticut. The Third Circuit's decision was rooted in the facts, see id. at 1057-59; focused closely on the law, see id. at 1059-61; and considered the arguments made by the parties, see id. at 1060 and id. at 1060 n.4.

8. **Please state the governing law for self-defense in New Jersey and the Third Circuit.**

As to New Jersey law: "The New Jersey Code of Criminal Justice . . . defines the manner and circumstances in which a person may use force to protect himself from harm. [The Code] . . . generally provides that 'the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.' The Code, however, places specific constraints on the use of deadly force in self-defense[:] The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if: (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . ." State v. Rodriguez, 195 N.J.

165, 171-72, 949 A.2d 197, 201 (2008) (internal quotation marks and citations removed); see also, e.g., State v. Handy, 215 N.J. 334, 356–57, 73 A.3d 421, 434 (2013).

As to federal law, the Third Circuit has treated self-defense as a justification. In the context of a Title 18, United States Code Section 922(g) prosecution, the Third Circuit has held that the defendant can establish this justification by showing that: "(1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm." United States v. Alston, 526 F.3d 91, 95 (3d Cir. 2008) (internal quotation marks, citation, and footnote omitted). Somewhat different formulations have also been used. See, e.g., Third Circuit Model Criminal Jury Instructions, Section 8.04 (Justification).

9. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: Title 18, United States Code, Section 1507, is a criminal statute. It reads: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be [punished.]"

10. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: If confirmed, and confronted with a case that required consideration of the constitutionality of Title 18, United States Code, Section 1507, I would assess the matter based on the facts before the Court; the governing law, including, as appropriate, Cox v. Louisiana, 379 U.S. 559 (1965), which upheld an arguably analogous state statute against a First Amendment challenge; and the parties' arguments.

11. **Please explain the differences in the introduction of evidence between federal courts and a military commission.**

Response: The introduction of evidence is generally governed in federal court by the Federal Rules of Evidence ("Federal Rules") and in a military commission by the Military Commission Rules of Evidence ("Military Rules"). There is overlap between these Rules. For example, Rule 401 of the Federal Rules determines what evidence is relevant, and Rule 401 of the Military Rules is similar to Rule 401 of the Federal Rules. To cite another example, Federal Rule 404 limits the use of character evidence, and Rule 404 of the Military Rules is similar to Rule 404 of the Federal Rules. There are also

differences between the Federal Rules and the Military Rules. For example, the Federal Rules' approach to hearsay, see Federal Rules 801-807, is different in certain respects than the Military Rules' approach, see Military Rules 801, 803, 805, 807.

12. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: "Fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). To determine what constitutes "fighting words," courts ask "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Texas v. Johnson, 491 U.S. 397, 409 (1989) (citation omitted).

13. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

Response: "True threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359-60 (2003). Whether a statement is a "true threat[]" "cannot be determined solely by the reaction of the recipient, but must instead be 'determined by the interpretation of a reasonable recipient familiar with the context of the communication[.]'" Elonis v. United States, 575 U.S. 723, 751 (2015) (citation omitted).

14. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

    a. **Was *Brown v. Board of Education* correctly decided?**

    Response: Yes. There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered consistent with the Code of Conduct for United States Judges, and the practice of other nominees. I believe that Brown was correctly decided.

    b. **Was *Loving v. Virginia* correctly decided?**

    Response: Yes. There is no likelihood that legal restrictions on interracial marriage will be re-imposed, and Loving follows closely from Brown. This question may therefore be answered consistent with the Code of Conduct for

United States Judges, and the practice of other nominees. I believe that Loving was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: I am unable to answer the above questions "yes" or "no." Supreme Court nominees, such as now-Justices Barrett and Jackson, have regularly declined to provide a "thumbs-up" or "thumbs-down" as to Supreme Court precedents. Following this approach is especially important for prospective lower federal court judges, who must faithfully follow Supreme Court precedent, and who lack any power to alter such precedent. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997).

15. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: When the text of the Second Amendment covers an individual's firearms-related conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify regulation of such conduct, the government must show "that the regulation is consistent with this Nation's historical tradition of firearm regulation." Id. (citations omitted).

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

17. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: Not to my knowledge.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **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.**

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: I have had no contact with the organizations listed above. As I understand it, New Venture Fund provides administrative, accounting, and other services as a "fiscal sponsor" to numerous non-profit organizations; from 2020 to 2022, the "fiscal sponsor" of an organization my wife worked for was New Venture Fund.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: Not to my knowledge.

b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

Response: Not to my knowledge.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response: Not to my knowledge.

20. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: Not to my knowledge.

b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: Not to my knowledge. Note that I do not know, and have never interacted with, any of the listed people.

21. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: I received a questionnaire from a member of Senator Booker's Judicial Selection Advisory Group during April 2021. I submitted it in May 2021 and was interviewed by the Group in August 2021. I was interviewed by Senator Booker in August 2022. Shortly thereafter, I was interviewed by Senator Menendez and then by attorneys at the Office of the White House Counsel. Since August 15, 2022, I have been in contact with the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me, and on January 3, 2023 the President nominated me.

22. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

23. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

24. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated**

with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: I have had no contact with the organizations listed above. As I understand it, New Venture Fund provides administrative, accounting, and other services as a "fiscal sponsor" to numerous non-profit organizations; from 2020 to 2022, the "fiscal sponsor" of an organization my wife worked for was New Venture Fund.

25. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

26. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

27. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination**.

Response: I was interviewed by White House Counsel personnel on August 11, 2022, and I have communicated with Department of Justice and/or White House Counsel personnel at various points from August 11 to the present.

28. **Please explain, with particularity, the process whereby you answered these questions.**

Response: I received these questions from the Department of Justice, along with questions from other Senators. I conducted some legal research, wrote out answers to each question, and sent my answers back to the Department of Justice. After submitting my answers, I received comments from the Department of Justice. I considered the comments, revised my answers in certain respects, and conveyed a final set of answers to the Department of Justice, for conveying to the Committee.

Senator Mike Lee
Questions for the Record
Michael Farbiarz, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by consistently deciding each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: I would first determine whether there is any binding Supreme Court or Third Circuit precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020); see also, e.g., Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Third Circuit precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court and Third Circuit as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: I would first determine whether there is any binding Supreme Court or Third Circuit precedent resolving the issue presented. From my experience as a practicing lawyer, I believe that faithful consideration of binding precedents resolves all or virtually all questions that might face a district judge with respect to constitutional interpretation. In the rare instance when that might not be the case, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. The Supreme Court has stated that "the public

understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed). In addition, the Supreme Court has directed lower federal courts to zero in on historical understandings of the Constitution in a number of areas. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022); (First Amendment, Establishment Clause); New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); United States v. Jones, 565 U.S. 400 (2012) (Fourth Amendment); Crawford v. Washington, 514 U.S. 36 (2006) (Sixth Amendment, Confrontation Clause). In other areas, the Supreme Court has directed lower federal courts to broaden the focus, to consider additional interpretive approaches. See, e.g., Reed v. Town of Gilbert, Ariz., 675 U.S. 155, 163 (2015) (interpreting the First Amendment's Free Speech Clause in light of a narrow tailoring/strict scrutiny test).

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The "public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation[.]" District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question 2.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: As to interpreting statutes, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." New Prime, Inc. v. Oliveira, 139 S.Ct. 532, 539 (2019) (internal quotation marks omitted). As to interpreting constitutional provisions, "when it comes to interpreting the Constitution, not all history is created equal[,]" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022), because "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." Id. (internal quotation marks omitted, emphasis in original).

6. What are the constitutional requirements for standing?

Response: "[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

7. **Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?**

Response: The Constitution enumerates the powers of Congress, in, for example: Article I; Section Two of the Thirteenth Amendment; Section Five of the Fourteenth Amendment; and Section Two of the Fifteenth Amendment. One of Congress' Article I powers is the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Under the quoted Necessary and Proper Clause, Congress may legislate, where the end is "within the scope of the constitution[,]" by "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution." McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

8. **Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?**

Response: I would evaluate the statute based on the facts; the law as set out by the Supreme Court and the Third Circuit, including the law that governs the reach of particular enumerated Congressional powers; and the parties' arguments. It bears noting that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (internal quotation marks omitted).

9. **Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?**

Response: Based on substantive due process, the Supreme Court has held that the Constitution protects certain rights that are not expressly enumerated, including, for example: the right to interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); the right to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right of adults to engage in private, consensual sexual acts, Lawrence v. Texas, 539 U.S. 558 (2003); and the right to marry a person of the same sex, Obergefell v. Hodges, 576 U.S. 644 (2015). See generally Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2257-58 (2022) (setting out a fuller list); see also, e.g., TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 453-54 (1993) ("the Due Process Clause of the Fourteenth Amendment imposes substantive limits" on civil punitive damages). When a litigant claims that a right, not previously recognized by the Supreme Court, is protected by substantive due process, that claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997), which requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21.

10. **What rights are protected under substantive due process?**

Response: Please see my response to Question 9 above.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The Supreme Court has held that substantive due process protects neither economic rights of the type at issue in Lochner, see Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), West Coast Hotel v. Parrish, 300 U.S. 379 (1937), nor abortion rights, see Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242, 2262 (2022).

12. What are the limits on Congress's power under the Commerce Clause?

Response: Congress' power under the Commerce Clause includes power to regulate: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558-59 (1995). This power does not allow Congress to require "individuals to become active in commerce by purchasing a product." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012). As to statutes that concern criminal conduct and that "d[o] not regulate economic activity[,]" Gonzales v. Raich, 545 U.S. 1, 25 (2005), the limits on Congress' Commerce Clause power include those set out in Lopez and United States v. Morrison, 529 U.S. 598 (2000).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has defined "suspect" classes with reference to "an immutable characteristic determined solely by the accident of birth" or "such disabilities, or . . . such a history of purposeful unequal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974). The Supreme Court has identified race, religion, national origin, and alienage as "suspect." See New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." INS v. Chadha, 462 U.S. 919, 951 (1983). "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" Bowsher v. Synar, 478 U.S. 714, 721 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J.,

concurring)). "[S]eparating and dividing" power allows power to check and balance power, and such checks and balances are "the foundation of a structure of government that would protect liberty." Bowsher, 478 U.S. at 722.

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: If confirmed, and such a case came before me, I would proceed as in any case: based on the facts before the Court; the law as set out by the Supreme Court and the Third Circuit; and the parties' arguments.

16. What role should empathy play in a judge's consideration of a case?

Response: I believe that judges should set aside all passions. Empathy often implies identifying closely and emotionally with someone. But that can be a kind of partiality and even pre-judgment, and can threaten a judge's even-handedness. A good judge's critical traits --- fairness, for example, and patience --- must be there in full and equal measure for all. As noted above, in response to Question 1, I believe that a judge should consistently decide each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments. This approach, I believe, helps to ensure lawful treatment of all parties and all claims.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Responses: Judges should work to avoid both outcomes. Every failure to decide a case in accord with the Constitution is an error.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I was not previously aware of the statistics described above, and I have not studied the referenced phenomena. Accordingly, I have no opinion as to what accounts for the referenced historical change. As to the final two questions, please see my response to Question 17.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: "It is emphatically the province and duty of the judicial department to say what the law is[,]" and as part of that duty judges must sometimes determine whether legislative actions or executive actions are constitutionally valid. Marbury v. Madison, 5 U.S. 137 (1803). That is judicial review. Judicial supremacy is a term

that may mean different things in different contexts. It is, however, often taken to stand for "the principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18 (1958).

20. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?**

Response: Elected officials might potentially strike this balance in any number of ways, including by pursuing an appeal from a judicial decision or by criticizing a decision. Especially against this backdrop, I do not believe it is appropriate for me to express any personal beliefs as to how elected officials should proceed.

21. **In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.**

Response: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." INS v. Chadha, 462 U.S. 919, 951 (1983). I understand Federalist 78 to emphasize the importance of that separation. The Judicial branch does not make the laws, the Legislative branch does. The Judicial branch does not enforce the laws, the Executive branch does. This is important to keep in mind when judging because "[t]he declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" Bowsher v. Synar, 478 U.S. 714, 721 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Judges must stay within their prescribed lane in our constitutional system, as must each branch of the government.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: A lower court judge must faithfully apply binding precedent. This is so even if a judge believes that the "underpinnings" of a precedential decision are or have become questionable. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with the quoted definition. Equity is a term that means different things in different contexts. Black's Law Dictionary defines "equity" as: "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: As to equity, please see my response to Question 24. Black's Law Dictionary defines "equality" as: "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th Ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." No Supreme Court decision that I am aware of has applied the definition quoted above.

27. How do you define "systemic racism?"

Response: Systemic racism is a term that means different things to different people. Black's Law Dictionary defines "systemic discrimination" to mean "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society." Black's Law Dictionary (11th ed. 2019).

28. How do you define "critical race theory?"

Response: Critical race theory is a term that means different things to different people. Black's Law Dictionary defines "critical race theory" to mean "[a] reform movement within the legal profession, particularly within academia, whose adherents

believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: The definitions between the terms, as set out in response to Question 27 and Question 28 are different from each other.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Michael Farbiarz, nominated to be United States District Judge for the District of New Jersey

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes, and it is illegal. See, e.g., Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: When a litigant claims that an unenumerated right, unarticulated by the Supreme Court, is protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, the claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997). Glucksberg requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21. If confirmed, and confronted with a claim for an unenumerated right that has not been articulated by the Supreme Court, I would assess the claim based on the facts before the Court; controlling law, including the Glucksberg test; and the parties' arguments. What I personally may or may not believe would not be relevant. Personal beliefs have no place in judicial decision-making, and to the extent they exist they must affirmatively be set aside. This is so for many reasons, including to ensure, as the Supreme Court said in Glucksberg, that the law is not "subtly transformed" by judges' "policy preferences." Id. at 720.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

I have not studied the Justices' individual philosophies. But there are many Justices that I admire deeply. For example, I admire the plainspoken and powerful writing of Justices Kagan and Gorsuch, and I admire the service that Justice Robert Jackson performed for our country when he temporarily stepped away from the Supreme Court to serve as chief United States prosecutor at the Nuremberg war crimes trials.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

Response: Originalism is both an interpretive method and a judicial philosophy. It is often understood as the doctrine that "a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed

observer at the time when the text first took effect[,]" Black's Law Dictionary (11th ed. 2019), and it is an unmistakable part of our law. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 605 (2008) ("the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation") (emphasis removed).

As to interpretive methods, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. As to judicial philosophy, each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: Living constitutionalism is both an interpretive method and a judicial philosophy. It is often understood as the doctrine that "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

Lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. I am not aware of a context in which the Supreme Court has directed lower federal courts to follow a "living constitutionalism" interpretive method. As to judicial philosophy, each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by deciding each case in precisely the same way: on the facts before the Court; on the law; and based on the parties' arguments.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: From my experience as a practicing lawyer, I believe that faithful consideration of binding precedents resolves all or virtually all questions that might face a district judge with respect to constitutional interpretation. In the rare instance when that might not be the case, lower federal court judges are bound to follow the interpretive methods set down by the Supreme Court. I would do so. The Supreme Court has stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed). And the Supreme Court has directed lower federal courts to zero in on historical understandings of the Constitution in a number of areas. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022) (First Amendment, Establishment Clause); New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); United States v.

Jones, 565 U.S. 400 (2012) (Fourth Amendment); Crawford v. Washington, 514 U.S. 36 (2006) (Sixth Amendment, Confrontation Clause). In other areas, the Supreme Court has directed lower federal courts to broaden the focus, to consider additional interpretive approaches. See, e.g., Reed v. Town of Gilbert, Ariz., 675 U.S. 155, 163 (2015) (interpreting the First Amendment's Free Speech Clause in light of a narrow tailoring/strict scrutiny test).

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: "[T]he public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis removed); see also, e.g., Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). But Supreme Court precedent sometimes requires consideration of current understandings. For example, the Supreme Court has directed lower federal courts to look to "contemporary community standards," Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 574-75 (2002), in evaluating certain First Amendment claims.

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: The Constitution may be changed only through the amendment process described in Article V. For lower federal court judges, the meaning of the Constitution is fixed by the decisions of the Supreme Court.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

a. **Was it correctly decided?**

Response: Supreme Court nominees, such as now-Justices Barrett and Jackson, have regularly declined to provide a "thumbs-up" or "thumbs-down" as to Supreme Court precedents. Following this approach is especially important for prospective lower federal court judges, who must faithfully follow Supreme Court precedent, and who lack any possible power to alter such precedent. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997).

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

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11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

a. Was it correctly decided?

Response: There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered, consistent with the practices of prior nominees and my ethical obligations. I believe that Brown was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: Pretrial detention determinations by federal judicial officers are controlled by Title 18, United States Code, Section 3142. Under Section 3142(e)(3), "if the judicial officer finds that there is probable cause to believe that the person committed" an offense listed in Sections 3142(e)(3)(a) through (e), there is a rebuttable presumption in favor of pretrial detention. The listed offenses include, among others, certain enumerated violent crimes. In addition, when a detention hearing is held pursuant to Section 3142(f)(1), if the judicial officer "finds" that each of the conditions set out in

Section 3142(e)(2) have been met, there is also a rebuttable presumption of detention. These conditions focus on whether and when the defendant was convicted of a qualifying crime, and whether that crime was committed while the defendant was on release pending trial.

a. **What are the policy rationales underlying such a presumption?**

Response: I am unaware of any Supreme Court or Third Circuit opinion that describes the referenced policy rationales.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. Focusing solely on federal law, there are identifiable statutory limits. For example, the Religious Freedom Restoration Act ("RFRA"), prohibits the "Government [from] substantially burden[ing] a person's exercise of religion" unless it "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). RFRA covers, among other things, closely-held for-profit entities. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014); see generally 42 U.S. Code § 2000bb–3(a) (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise").

In addition, there are identifiable constitutional limits. For example, the Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). But if the law is not neutral, or is not generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); see also Lasche v. New Jersey, No. 20-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct[,]" Hialeah, 508 U.S. at 533, for example, or if enforcement of the law was motivated by hostility to religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); see also Lasche, 2022 WL 604025, at *5. A law is not "generally applicable" if the law provides a mechanism for individual exemptions, see, e.g., Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021), see also Lasche, 2022 WL 604025, at *5, for example, or if the law prohibits religious conduct while permitting secular conduct that is comparable in terms of the

governmental interests in play, see Tandon v. Newsom, 141 S. Ct. 1294 (2021). The First Amendment also imposes other limits. For example, the First Amendment "precludes application" of certain legislation "to claims concerning the employment relationship between a religious institution and its ministers[.]" Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).

14. **Is it ever permissible for the government to discriminate against religious organizations or religious people?**

Response: Such discrimination is subject to strict scrutiny, and "will survive strict scrutiny only in rare cases." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

15. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: In Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020), the Supreme Court held that the referenced applicants were entitled to a preliminary injunction. The Court held that the applicants were likely to succeed on the merits of their Free Exercise claim because "the challenged [Covid-19] restrictions . . . must satisfy 'strict scrutiny,'" id. at 67, and an insufficient showing had been made that they were narrowly-tailored enough to satisfy that test, id., because, "[a]mong other things, the maximum attendance [restrictions] at a religious service could be tied to the size of the church or synagogue," and they had not been, id. In addition, the Supreme Court held that "the challenged restrictions, if enforced, will cause irreparable harm[,]" based on "[t]he loss of First Amendment freedoms, for even minimal periods of time[.]" Id. at 67 (internal quotation marks and citations omitted).

16. **Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom.***

Response: In Tandon v. Newsom, 141 S. Ct. 1294 (2021), the Supreme Court enjoined California's enforcement of certain Covid-19 restrictions that forbade gathering for at-home religious services. The Court reasoned that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they," like the California restrictions at issue, "treat any comparable secular activity more favorably than religious exercise." Id. at 1296 (emphasis in original). The Court held: that the applicants were likely to succeed on the merits of their claims, id. at 1297, in part because California did not "explain why it could not safely

permit at-home worshipers to gather in larger numbers while using precautions used in secular activities," id.; that the applicants were irreparably harmed by the loss of Free Exercise rights, id.; and that California had failed to show "that public health would be imperiled by employing less restrictive measures" than the complained-of restrictions, id. at (internal quotation marks omitted).

17. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes. See, e.g., Kennedy v. Bremerton, 142 S. Ct. 2407 (2022) (so holding).

18. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.***

Response: A baker refused to create a wedding cake for a same-sex couple, on the ground that doing so would violate his religious beliefs. The couple filed a state law anti-discrimination claim; the baker responded by invoking his constitutional Free Exercise rights; and the relevant state agency resolved the matter in favor of the couple. The Supreme Court held that the record demonstrated "clear and impermissible hostility" on the part of the agency "toward the sincere religious beliefs that motivated [the baker's] objection," Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 1729 (2018). The Court cited both certain language used by the agency and the "disparate," id. at 1732, manner in which the agency treated the baker's case in comparison with other cases. The baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it[.]" Id. Accordingly, the Court invalidated the rulings of both the state agency and the state court that enforced those rulings. Id. at 1732.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to

inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714. Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith"); cf. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("it is not for us to say that their religious beliefs are mistaken or insubstantial"); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990).

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: I have not studied the Catholic Church's official position with respect abortion.

20. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012), the Supreme Court confirmed "the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of [anti-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." Id. at 188. In Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), the Supreme Court held that whether a particular employment relationship falls within the ministerial exception depends on "what an employee does." Id. at 2064. Applying this test, the Supreme Court held that the ministerial exception applies to employees, such as the Our Lady of Guadalupe School claimants, focused on "educating young people in their faith, inculcating its teachings, and training them to live their faith." Id. at 2064.

21. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: "[L]aws 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 v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (describing the Court's holding in Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990)). But 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." Id. at 1877 (internal quotation marks omitted). In Fulton, the Supreme Court noted that Philadelphia's approach to foster care procurements "incorporates a system of individual exemptions," id. at 1878-79, and accordingly assessed Philadelphia's refusal to contract for foster care services with Catholic Social Services under a strict scrutiny standard. See id. at 1881. Applying this standard, the Court held that Philadelphia's stated interests --- "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children," id. at 1881 --- did not justify burdening the Free Exercise rights of Catholic Social Services. Id. at 1881-82.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: Maine's tuition assistance program required participating schools to be "nonsectarian." This requirement excluded otherwise-qualified religious schools "on the basis of their religious exercise." Carson v. Makin, 142 S. Ct. 1987, 2002 (2022). The Supreme Court struck down the program, holding that a "[a] State's antiestablishment interest," which Maine had proffered, "does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." Id. at 1998.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.***

Response: A school district disciplined a football coach "for engaging in a brief, quiet, personal" prayer. Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2433 (2022). Concluding that the coach's prayers were not offered while he was "acting within the scope of his duties as a coach," id. at 2424-25, the Court granted summary judgment to the coach on his Free Exercise claim, reasoning that "the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." Id. at 2433.

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: The Supreme Court in Mast v. Fillmore County, 141 S. Ct. 2430 (2021), vacated a state court judgment and remanded the case, a Religious Land Use and Institutionalized Persons Act ("RLUIPA") matter, for further consideration in light of Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch concurred to identify issues the state courts "may wish to consider on remand" as to the proper interpretation of RLUIPA. Id. at 2430. For example, Justice Gorsuch stated that the state courts had erred by treating the government's "general interest" in enforcing certain sanitation rules as "'compelling' without reference to the specific application of those rules" to the RLUIPA claimants before the state courts. Id. at 2432.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: If confirmed, and confronted with a case that required interpretation of Title 18, United States Code, Section 1507 in light of its constitutionality, I would assess the matter based on: the facts before the Court; the governing law, including, as appropriate, Cox v. Louisiana, 379 U.S. 559 (1965), which upheld an arguably analogous state statute against a First Amendment challenge; and the parties' arguments.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**

Response: No.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: No.

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

Response: No.

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response: No.

27. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I am not aware of the trainings that might or might not be offered. If confirmed, I would not support such trainings.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

29. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: Claims of discrimination in hiring by federal, state, or local governments on the basis of race or sex are routinely pressed in federal court. Against that backdrop, I believe that I should not provide any views that I may or may not have as to when, if

ever, it is appropriate and lawful to consider race and sex in hiring. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case Judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

30. **Is the criminal justice system systemically racist?**

Response: Claims of racial discrimination as to various aspects of the criminal justice system are routinely pressed in federal court, and some invoke "systematic[] racism" or "systemic racism." Against that backdrop, I believe that I should not provide any views that I may or may not have as to when, if ever, it is appropriate and lawful to consider race and sex in hiring. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case Judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: This is not an issue that I have studied.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No. Each currently sitting Justice was nominated by the President and confirmed by the United States Senate, as required by Article II of the Constitution.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: Applying the Constitution's original public meaning, the Supreme Court has held that the Second Amendment "protect[s] an individual right to armed self-defense[.]" New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128 (2022).

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: When the text of the Second Amendment covers an individual's firearms-related conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify a regulation on such conduct, the government must show "that the regulation is consistent with this

Nation's historical tradition of firearm regulation." Id. (citations omitted). The Supreme Court has stated, as to "legislative assemblies, polling places, and courthouses," that "[w]e . . . can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." Id. at 2133. The Supreme Court has further stated that "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." Id.; see also District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (noting other "longstanding prohibitions" on firearms).

35. **Is the ability to own a firearm a personal civil right?**

Response: Yes. See District of Columbia v. Heller, 554 U.S. 570 (2008).

36. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: "The constitutional right to bear arms in public for self defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

37. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: "The constitutional right to bear arms in public for self defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks and citation omitted).

38. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: If confirmed, and confronted with a case that required consideration of this question, I would assess the matter based on the facts before the Court; the governing law, including, as appropriate, Heckler v. Chaney, 470 U.S. 821, 831 (1985), which holds that the federal Executive Branch's decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," id. at 831; and the parties' arguments.

39. **Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.**

Response: Prosecutorial discretion generally refers to the discretion vested in a prosecutor to initiate or not to initiate enforcement proceedings. A substantive administrative rule change is a change to a rule.

40. **Does the President have the authority to abolish the death penalty?**

Response: The federal death penalty is reflected in a statute, Title 18, United States Code, Section 3591, and the President does not have the power to unilaterally abolish federal statutes.

41. **Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS.***

Response: The federal Health and Human Services agency imposed a moratorium on evictions in areas experiencing certain levels of Covid-19 transmission, citing particular provisions of a statute. The Supreme Court held that: the agency's reading of the statute was "unprecedented," Alabama Association of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021), and that the statute did not provide the clear Congressional authorization required to permit the agency "to exercise powers of 'vast economic and political significance.'" Id. at 2489 (citations omitted).

42. **Do judges need to undergo implicit bias training?**

Response: I am not aware of whether such trainings exist or whether they are mandatory.

43. **Are there instances where a judge should not honor the judicial code of conduct?**

Response: No.

a. **If so, can you please identify all instances?**

b. **What justifies a departure from the judicial code of conduct?**

Senator Josh Hawley
Questions for the Record

Michael Farbiarz
Nominee, U.S. District Court for the District of New Jersey

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

Response: Federal sentencing involves a number of steps: (1) gathering of factual information as to the offense and the defendant by the United States Probation Office, see Fed. R. of Crim. Pr. 32(c); (2) reviewing the Presentence Report and assessing any objections to it, see id. 32(c)-(g); (3) calculating the applicable United States Sentencing Guidelines, see United States v. Jackson, 862 F.3d 365, 370 (3d Cir. 2017); (4) considering counsel's arguments; (5) affording victims, see 18 U.S.C. § 3771(a)(4), and the defendant, see Fed. R. of Crim. Pr. 32(i) (4)(a)(ii), an opportunity to be heard; and then (5) imposing sentence in light of the factors set out in Title 18, United States Code, Section 3553(a). See generally United States v. Tomko, 562 F.3d 558, 567-69 (3d Cir. 2009) (en banc) (describing the sentencing process). "[I]mproperly calculating[] the Guidelines range" is a "significant . . . error," Gall v. United States, 552 U.S. 38, 51 (2007), and in each case I would work to accurately calculate each relevant aspect of the Guidelines, including applicable enhancements. I would do so in light of the facts that have been developed through the sentencing process described above; the law that controls application of a particular Guideline; and the arguments of the parties. It is not possible to say, now, the impact that a given Guideline might have on the ultimate sentence imposed in a particular case. Among other reasons, this is because after the Guidelines are calculated the sentence is imposed in light of Title 18, United States Code, Section 3553(a), see Tomko, 562 F.3d at 567-69, and under Section 3553(a) judges "shall" sentence based on information about the details of the offense of conviction and the history of the defendant. See 18 U.S.C. § 3553(a)(1). This is necessarily case-specific information, and it cannot be known in advance or in the abstract.

   a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

      Response: Please see my Response to Question 1.

   b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

Response: Please see my Response to Question 1.

c. The enhancement for offenses involving the use of a computer

Response: Please see my Response to Question 1.

d. The enhancements for the number of images involved

Response: Please see my Response to Question 1.

2. Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.

a. Do you agree that the penalties should be aligned?

Response: I am aware that this issue has been the subject of analysis by the United States Sentencing Commission and that policymakers have considered it. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018). If confirmed, I would apply the law and the Guidelines as they are; judges and judicial nominees should, I believe, leave policymaking questions to policymakers.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my Response to Question 2(a).

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: I would aim to sentence all offenders using the case-by-case process set out in response to Question 1. It would short-circuit that process to pre-judge what the sentence should be in a class of cases.

3. Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."

a. Do you agree with that philosophy?

Response: I do not how Justice Marshall would have described his overarching judicial philosophy. Each federal judge swears to "administer justice without respect to persons[.]" 28 U.S.C. § 453. My judicial philosophy would be to honor the judicial oath, by consistently deciding each case in the same way: on the facts before the Court; on the law; and based on the parties' arguments.

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

Response: I do not know how Justice Marshall understood his judicial oath and acted on it. The judicial oath requires judges to "faithfully . . . discharge and perform all the duties incumbent upon" them, 28 U.S.C. § 453, and one "duty of the judicial department" is "to say what the law is[.]" Marbury v. Madison, 5 U.S. 137 (1803).

4. Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?

Response: I am not aware of an established definition of "settled law." The Supreme Court has held that "a precedent of this Court must be followed by the lower federal courts[.]" Hutto v. Davis, 454 U.S. 370, 375 (1982). This is a fundamental rule-of-law principle, and in accord with it all Supreme Court decisions "must be followed" in a faithful manner by lower federal court judges. That is what I would do.

5. What is the standard for each kind of abstention in the court to which you have been nominated?

Response: There are six major doctrines that cover matters related to federal abstention.

First, the Pullman doctrine comes into play when a federal constitutional challenge is raised as to a state's action. When such a challenge presents an uncertain state law issue that could be dispositive, such that resolving the state law issue could avoid the need to reach the federal constitutional issue, federal court abstention may be appropriate. See R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498–501 (1941). In the Third Circuit, "[t]he first step in the Pullman analysis is to determine whether three special circumstances exist: (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; (3) A federal court's erroneous construction of state law would be disruptive of important state policies. If the district court finds that all three of the 'special circumstances' are present, it must then make a discretionary determination as to whether abstention is in fact appropriate under the circumstances of the particular case, based on the weight of these criteria and other relevant factors." Chez

Sez III Corp. v. Twp. of Union, 945 F.2d 628, 631 (3d Cir. 1991) (internal quotation marks and citations omitted).

Second, the Burford doctrine applies when federal court consideration of an issue arising from a state regulatory scheme "so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943); see also Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959). In the Third Circuit, "Burford abstention calls for a two-step analysis. The first question is whether timely and adequate state-court review is available. Only if a district court determines that such review is available, should it turn to the other issues and determine if the case before it involves difficult questions of state law impacting on the state's public policy or whether the district court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern." Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995) (internal quotation marks and citation omitted).

Third, the Younger doctrine generally forbids a federal court from enjoining ongoing state criminal and similar enforcement proceedings out of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971). In the Third Circuit, Younger abstention is generally appropriate "when federal litigation threatens to interfere with one of three classes of cases: (1) state criminal prosecutions, (2) state civil enforcement proceedings, and (3) state civil proceedings involving orders in furtherance of the state courts' judicial function." ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127, 138 (3d Cir. 2014).

Fourth, the Colorado River doctrine concerns abstaining in favor of a concurrent state court proceeding based on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citation omitted). In the Third Circuit, "cases are parallel so as to justify abstention under Colorado River when they involve the same parties and claims." Trent v. Dial Med. of Fla., Inc., 33 F.3d 217, 223 (3d Cir. 1994). In a case "in which Colorado River abstention may be appropriate, . . . The factors which govern a district court's exercise of discretion in deciding whether to abstain . . . are: (1) Which court first assumed jurisdiction over property involved, if any; (2) Whether the federal forum is inconvenient; (3) The desirability of avoiding piecemeal litigation; (4) The order in which the respective courts obtained jurisdiction; (5) Whether federal or state law applies; and (6) Whether the state court proceeding would adequately protect the federal plaintiff's rights." Id. at 225.

Fifth, the Brillhart/Wilton doctrine applies when a plaintiff seeks federal declaratory relief and there is a pending state-court action. See Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494 (1942); Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995). In the Third Circuit, "[c]ourts should give the following and other factors meaningful consideration . . . : (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in settlement of the uncertainty of obligation; (4) the availability and relative convenience of other remedies; (5) a general policy of restraint when the same issues are pending in a state court; (6) avoidance of duplicative litigation; (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for res judicata; and (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion." Kelly v. Maxum Specialty Ins. Grp., 868 F.3d 274, 282–83 (3d Cir. 2017) (internal quotation marks and citation omitted).

Sixth, under the Rooker-Feldman doctrine, federal courts generally do not hear "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005); see generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). In the Third Circuit, "[t]here are four requirements that must be met for the Rooker–Feldman doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff complain[s] of injuries caused by [the] state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." Great W. Mining & Min. Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010) (internal quotation marks omitted).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: Not that I recall.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

7. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: The "public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation[.]" District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (emphasis omitted).

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed and confronted with a statutory interpretation matter, I would first determine whether there is any binding Supreme Court or Third Circuit precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Third Circuit precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court and Third Circuit as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: Please see my response to Question 8.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: The Supreme Court has looked to early English precedents in interpreting various constitutional provisions. See, e.g., New York Rifle & Pistol Assoc. v. Bruen, 142 S. Ct. 2111, 2135-42 (2022); Crawford v. Washington, 541 U.S. 36, 42-61 (2004). The Supreme Court has also held that "the laws of other countries" are "instructive," but not "controlling," for interpreting "the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" Roper v. Simmons, 543 U.S. 551, 575 (2005). I am not aware of other contexts in which the Supreme Court has determined that courts should examine the law of foreign nations when interpreting the Constitution.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: "A death row inmate may attempt to show that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on cruel and unusual punishment. To succeed on that claim, . . . he must satisfy two requirements. First, he must establish that the State's method of execution presents a 'substantial risk of serious harm' --- severe pain over and above death itself. Second, . . . he 'must identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." Nance v. Ward, 142 S. Ct. 2214, 2219–20 (2022) (internal quotation marks and citations omitted).

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: The Supreme Court has held that a habeas corpus petitioner has no "freestanding right to access DNA evidence for testing" under the Due Process Clause, District Attorney's Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 73-74 (2009), and so has the Third Circuit, see Grier v. Klem, 591 F.3d 672, 678 (3d Cir. 2010).

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free

exercise of religion? Please cite any cases you believe would be binding precedent.

Response: I understand this question to focus on federal constitutional claims, and not on statutory claims under, for example, the Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act.

The Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). But if the law is not neutral, or is not generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); see also Lasche v. New Jersey, No. 20-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct[,]" Hialeah, 508 U.S. at 533, for example, or if enforcement of the law was motivated by hostility to religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); see also Lasche, 2022 WL 604025, at *5. A law is not "generally applicable" if the law provides a mechanism for individual exemptions, see, e.g., Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021), see also Lasche, 2022 WL 604025, at *5, for example, or if the law prohibits religious conduct while permitting secular conduct that is comparable in terms of the governmental interests in play, see Tandon v. Newsom, 141 S. Ct. 1294 (2021).

In addition to the above, the Free Exercise Clause prohibits enforcement of certain employment laws, to avoid interference with a religious institution's employment of certain of its employees. See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); see also Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018) (applying ministerial exception).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: "Only beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981); see also DeHart v. Horn, 227 F.3d 47, 56 (3d Cir. 2000) (en banc). But determining what constitutes such a belief does "not turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," Thomas, 450 U.S. at 714. In addition, sincerely-held religious beliefs need not "mandate[e]" particular conduct for the conduct to merit First Amendment protection. See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 171 (3d Cir. 2002). Courts have a "narrow function" in this area: to determine whether the First Amendment claimant has an "honest conviction," id. at 716, not to assess whether that conviction is "reasonable," or how it may line up with religious and/or church doctrine. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014); see also, e.g., Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990); Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834 (1989) (rejecting the "notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas, 450 U.S. at 716 ("it is not within the judicial function . . . to inquire whether the petitioner . . . correctly perceived the commands of [his] faith").

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to "keep and bear Arms," including the right to keep a usable handgun at home for self-defense. See id. at 629. Based on this holding, the Court struck down certain District of Columbia laws. See id. at 629.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: I believe Justice Holmes meant that a judge's personal opinion as to certain approaches to economic policy "ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). I agree.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: Lochner was overruled by West Coast Hotel v. Parrish, 300 U.S. 379 (1937) and Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: Some Supreme Court opinions have been overruled not by the Supreme Court, but by a statute or an amendment to the Constitution. An example is Dred Scott v. Sandford, 60 U.S. 393 (1857), which was abrogated by the Reconstruction Amendments. In addition, the Supreme Court has stated that Korematsu v. United States, 323 U.S. 214 (1944), "was gravely wrong the day it was decided," and "has been overruled in the court of history." Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I have not studied Judge Hand's views with respect to monopolies, or the history of the ALCOA case. In addition, I do not have an understanding of the state of Second Circuit law when the case was decided. I do not have a personal view on Judge Hand's statement.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my response to Question 19(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: Market share is an aspect of monopoly power, and monopoly power is one of the two elements of the offense of monopoly under Section 2 of the Sherman Act. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). The Supreme Court has not set an across-the-board minimum percentage of market share in this context --- "no magic inheres in numbers," the Court has stated, and the "relative effect of percentage command of a market varies with the setting in which that factor is placed." Times-Picayune Publishing Corporation v. United States, 345 U.S. 594, 612 (1953). If confirmed, and confronted with a case that requires me to assess the significance of a given percentage of market share for Sherman Act purposes, I would examine, among other things, all of the applicable case law. See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 452, 481 (1992) (company "controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes"); Grinnell, 384 U.S. at 571 (87% of market share); American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (over two-thirds of the market).

20. Please describe your understanding of the "federal common law."

Response: The Constitution "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020) (citations omitted). Accordingly, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role," id., and the Supreme Court has held that there is "no federal general common law." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This said, there are "limited areas . . . in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." Rodriguez, 140 S. Ct. at 717. In addition, there are certain areas where Congress has directed federal courts to engage in common law-making. See, e.g., Textile Workers Union of

America v. Lincoln Mills, 353 U.S. 448 (construing Labor Management Relations Act of 1947).

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: I would determine the scope of any state constitutional provision by consulting the opinion or opinions of the state's highest court. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts").

a. Do you believe that identical texts should be interpreted identically?

Response: I understand this question to focus on interpretation of a state constitutional provision that is identical to a federal constitutional provision. In such a situation, I would determine the meaning of the state constitutional provision by consulting the opinion or opinions of the state's highest court. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts").

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: Certain federal constitutional protections are binding on the states. States may opt to provide greater protections under their own constitutions. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Cooper v. State of California, 386 U.S. 58, 68 (1967). This is their choice. See id; see, e.g., State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975) (interpreting provision of the New Jersey Constitution to provide greater protection than the identically-worded provision of the United States Constitution).

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: There is no likelihood that de jure segregation will be re-imposed in American public schools. Accordingly, no federal judge "will have to face the question . . . whether Brown v. Board of Education was rightly decided." Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. PA. J. CONST. L. 1, 17 (2016). This question may therefore be answered, consistent with

the practices of prior nominees and my ethical obligations. I believe that Brown was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: Federal Rule of Civil Procedure 65 authorizes a federal court to issue injunctions, and the Supreme Court has affirmed the issuance of a nationwide injunction. See Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088–89 (2017). This said, a federal court's equitable power is constrained by the historical limits on equity, see Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-319 (1999), and an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see also, e.g., Free Speech Coal., Inc. v. Att'y Gen. United States, 974 F.3d 408, 430 (3d Cir. 2020) (vacating a District Court's imposition of a nationwide injunction, and holding that "[i]njunctive relief should be no broader than necessary to provide full relief to the aggrieved party") (internal quotation marks removed). If confirmed, and presented with a request for the imposition of a nationwide injunction, I would assess the matter based on the facts before the Court; the governing law; and the parties' arguments.

a. If so, what is the source of that authority?

Response: Please see my response to Question 23 above.

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: Please see my response to Question 23 above.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 23 above.

25. What is your understanding of the role of federalism in our constitutional system?

Response: "Our federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous

society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). In addition, "the federalist system is a check on abuses of government power[;]" "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Id.

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: "[F]ederal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant," but there are "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 72–73 (2013). The major such "instances" are described in my response to Question 5 above.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: An "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course[,]" Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010), and "[w]hether an injunction is warranted in any particular case depends on a variety of factors, including irreparable injury and inadequacy of legal remedies." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) (internal quotation marks omitted). The advantages and disadvantages of different forms of relief are highly fact-specific, and depend on the particular circumstances of the case in which they arise.

28. **What is your understanding of the Supreme Court's precedents on substantive due process?**

Response: Based on substantive due process, the Supreme Court has held that the Constitution protects certain rights that are not expressly enumerated, including, for example: the right to interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); the right to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right of adults to engage in private, consensual sexual acts, Lawrence v. Texas, 539 U.S. 558 (2003); and the right to marry a person of the same sex, Obergefell v. Hodges, 576 U.S. 644 (2015). See generally Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2257-58 (2022) (setting out a fuller list); see also, e.g., TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 453-54 (1993) ("the Due Process Clause of the Fourteenth

Amendment imposes substantive limits" on civil punitive damages). When a litigant claims that a right, not previously recognized by the Supreme Court, is protected by substantive due process, that claim is assessed under Washington v. Glucksberg, 521 U.S. 702 (1997), which requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Id. at 719–21.

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. **What is your view of the scope of the First Amendment's right to free exercise of religion?**

Response: Please see my response to Question 13.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Free Exercise Clause protects "not only belief and profession but the performance of (or abstention from) physical acts[.]" Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878 (1990); see also, e.g., Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2421 (2022) (the Free Exercise Clause "protects religious exercises, whether communicative or not," and "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts") (quotation marks and citations omitted).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my response to Question 13.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: Judges must resolve each case based on the facts, the law, and the parties' arguments, not their personal preferences or opinions.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: No.

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No. I do not have, and have never had, social media accounts.

33. Do you believe America is a systemically racist country?

Response: Claims of discrimination on the basis of race are routinely pressed in federal court, and some invoke "systemic[]" or "systematic" racism. Against that backdrop, I believe that I should not provide any views that I may or may not have as to the referenced question. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases.

Litigants are entitled to an open-minded and case-by-case judge, who studies their arguments fairly, in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

35. How did you handle the situation?

Response: My obligation was to represent the interests of my client and I did so.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes, provided the legislation is constitutional.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: Number 10.

38. Do you believe that an unborn child is a human being?

Response: Abortion-related litigation is routinely pressed in federal court, and such litigation can implicate questions about whether an unborn child is a human being. Accordingly, I believe that I should not provide any views that I may or may not have as to the referenced question. As to why, please see my response to question 33.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: No.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

Response: No, to each of the above.

41. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: I do not hold individual shares in any of these entities. My wife and I hold a number of diversified index funds that each own shares in a large number of companies. A description of my assets is set out in my Financial Disclosure Report and Net Worth Statement submitted to the Committee.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: I have not authored a brief that was filed in court without my name on it. Over the years, I have provided feedback on numerous briefs filed in court by my clients that my name did not appear on. Recent examples include briefs filed in federal court by the Port Authority of New York and New Jersey, in Galicki v. New Jersey, et al., 2:14-cv-00169 (JXN) (D.N.J.) and Baroni v. Port Authority of New York and New Jersey, 1:21-cv-5961 (LTS) (S.D.N.Y.).

43. If so, please identify those cases with appropriate citation.

Response: Please see my response to Question 42.

44. Have you ever confessed error to a court?

Response: Not that I recall.

45. If so, please describe the circumstances.

Response: Please see my response to Question 44.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when

testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I understand it is my responsibility to answer all questions with honesty, candor, and to the best of my ability and recollection.

Questions from Senator Thom Tillis
for Michael Farbiarz
Nominee to be United States District Judge
for the District of New Jersey

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response. Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Judicial activism is a "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). It is not appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: It is an expectation. The judicial oath requires proceeding "impartially," 28 U.S.C. § 453, and disqualification is required when the judge's "impartiality might reasonably be questioned," 28 U.S.C. § 455. See generally, e.g., Tumey v. Ohio, 273 U.S. 510, 535 (1927) (describing the "right to have an impartial judge").

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: In each case, a judge should pursue the same outcome: a decision based solely on the facts before the Court; the law; and the parties' arguments. This is a desirable outcome.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No. "It is Congress's job to enact policy," and it is a judge's "job to follow the policy Congress has prescribed." SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed, the first meaningful step I would take is the judicial oath. The oath requires judges to "faithfully . . . discharge and perform all the duties incumbent upon"

them, 28 U.S.C. § 453, and one "duty of the judicial department" is "to say what the law is[,]" Marbury v. Madison, 5 U.S. 137 (1803). The law as it "is" protects Second Amendment rights, see, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), and I would faithfully follow the law, as to the Second Amendment and across the board.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: When the Second Amendment's plain text covers an individual's conduct, that conduct is "presumptively constitutional." New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022). To justify a regulation on such conduct, the government must show "that the regulation is consistent with this Nation's historical tradition of firearm regulation." Id. (citations omitted). In the hypothetical Sheriff's lawsuit, and in each case, I would proceed in the same way: by focusing on the facts before the Court; the applicable law, including the Second Amendment jurisprudence set out above; and the parties' arguments.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: Qualified immunity is an immunity from damages. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It is also an "immunity" from having "to stand trial or face the other burdens of litigation[.]" Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Accordingly, "[u]nless the plaintiff's allegations [in the complaint] state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Forsyth, 472 U.S. at 526. This means that qualified immunity can be (and often is) raised as part of a motion to dismiss under Rule 12(b)(6) of the Federal Rule of Civil Procedure. If the Rule 12(b)(6) motion is denied, an interlocutory appeal can be taken, see Behrens, 516 U.S. at 307, or the parties can proceed with the case, including to summary judgment. At that point, qualified immunity can again be raised, this time as part of a summary judgment motion under Rule 56 of the Federal Rule of Civil Procedure. If the motion is denied, an interlocutory appeal can again be taken. See id.

As to the governing substantive standards, the Supreme Court has held "officers are entitled to qualified immunity . . . unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam)). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional

question beyond debate." Id. at 7–8 (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam)).

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: If confirmed, I would be expected to, and would, faithfully follow the qualified immunity jurisprudence of the Supreme Court and the Third Circuit. Any personal views that I may have on the subject would not be relevant.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: The District of New Jersey, to which I have been nominated, has for years handled a particularly large docket of patent cases, including with respect to pharmaceutical patents. Especially against that backdrop, I believe that I should not provide any views that I may or may not have as to this question. Among other things, doing so could be (erroneously) understood to suggest how I might think about future litigants and their cases. Litigants are entitled to an open-minded and case-by-case judge, who studies their arguments fairly in light of the particular facts of their case and then-current law, and does not reach any conclusions before doing so.

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 12.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: For the last six years, I have been the General Counsel of a large public agency. In that capacity, I have supervised various matters related to intellectual property, including both (a) highly complex federal court trademark litigation and (b) a range of licensing matters related to both trademark and patent issues. I have not done copyright work.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: Please see my response to Question 14(a).

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: I do not have experience with intermediary liability for online service providers that host unlawful content posted by users.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: For the last six years, I have been the General Counsel of a large public agency. In that capacity, I have supervised numerous matters related to First Amendment free speech issues. Some of these have been litigated federal court matters. Others have been regulatory matters, related to promulgating and applying the rules that govern (a) government employees' speech, and (b) the public's exercise of free speech rights at regional airports and other major transportation facilities. As to intellectual property experience, please see my response to Question 14(a).

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: In any case concerning statutory interpretation, I would first determine whether there is any binding Supreme Court or Court of Appeals precedent that resolves the issue presented. If not, I would look to "the statutory text, not the legislative history or any other extrinsic material," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), and would focus on interpreting the "statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1739 (2020); see also, e.g., Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). If the statutory text is ambiguous under binding precedent, see, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive"), I would look to other interpretive tools, to the extent doing so is authorized by Supreme Court and Court of Appeals precedent. These tools might include application of certain canons of construction. If ambiguity persists, I would consider the statute's legislative history, with a focus on those parts of the legislative history identified by the Supreme Court as more reliable. Compare, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984) (describing more reliable sources) with NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: "If a court, employing traditional tools of statutory construction," determines that a law's meaning is clear, it must apply that clear meaning "and must reject administrative constructions contrary to clear congressional intent." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n. 9 (1984). If the court determines the law's meaning is ambiguous, formal agency interpretations based on "a permissible construction of the statute" may be entitled to deference, see id. at 843, while informal agency advice and analysis is entitled to deference only to the extent that those interpretations have the "power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: In certain circumstances, the Digital Millennium Copyright Act provides a safe harbor for service providers. See 17 U.S.C. § 512. My role would be to

faithfully apply the statute in a given case, on the facts before the Court and based on the parties' arguments. I do not believe it is appropriate for me to express any views, now, as to whether certain facts or circumstances should suffice to put an online service provider on notice of copyright infringement.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: As to statutory interpretation in general, please see my response to Question 15(a). In a variety of contexts, courts consider how statutory (or constitutional) provisions should be applied in light of technological changes. See, e.g., Carpenter v. United States, 138 S. Ct. 2206 (2018); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Riley v. California, 573 U.S. 373 (2014); Twentieth Century Music Corporation v. Aiken, 422 U.S. 151 (1975). Given the likelihood that, if confirmed, I would handle DMCA cases, I think it is not appropriate for me to express any general views as to how the statute should best be interpreted.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my response to Question 16(a).

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: Improper forum shopping has been identified as a "danger" by the Supreme Court, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987), and as a practice to be "discourage[d]," Hanna v. Plumer, 380 U.S. 460, 468 (1965). But the particular issues described in the question are not likely to emerge in the District of New Jersey, to which I have been nominated. In the District of New Jersey, there are three federal courthouses, and substantial numbers of District Judges are assigned to each courthouse; there is no one-Judge courthouse.

Moreover, cases are allocated to the appropriate courthouse by the Clerk of Court, pursuant to rules that require consideration of certain elemental aspects of the case, including "the residence of the defendant, . . . and the place where the cause of action arose." United States District Court for the District of New Jersey, Local Civil Rule 40.1(a).

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Please see my response to Question 17(a).

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: If confirmed, in each case I would focus solely on the facts before the Court; the law; and the parties' arguments. I am unaware of any body of law that permits a judge to proceed so as to attract a particular type of case or litigant.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Please see my response to Question 17(c).

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: Please see my response to Question 17(a).

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 17(a).

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Robert Kirsch
Nominee to be United States District Judge, District of New Jersey

1. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: Yes. Under the principles first established in *Terry v. Ohio*, 392 U.S. 1 (1968), police may engage in an investigatory stop "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). However, to proceed from a stop to a "frisk," the officer "must reasonably suspect that the person is armed and dangerous." *Id.* at 326-27.

2. **Under Supreme Court and Third Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

   Response: The U.S. Supreme Court has described "facts" – either "basic" or "historical" – as "addressing questions of who did what, when or where, how or why." *U.S. Bank Nat'l Assoc. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The Third Circuit "[has] followed the Supreme Court's definition of factual issues . . . in the sense of a recital of external events and the credibility of their narrators." *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007) (quotations omitted) (citing *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995)).

   The line between a question of fact for the jury and a question of law to be resolved by the judge, however, is "slippery" and often unclear. *Thompson v. Keohane*, 516 U.S. at 111. Mixed questions of law and fact ask whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *U.S. Bank* at 966. In *Markman v. Westview Instruments*, the Supreme Court advised that where the constitutional or statutory text is unclear, courts tasked with distinguishing between a question of fact and a question of law should "consult existing precedent and consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation." 517 U.S. 370, 384 (1996) (ultimately finding that the construction of a patent claim was a question of law to be resolved by a judge).

3. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: Criticism of a judicial opinion is protected speech and permissible in an open society. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964) (protecting

the right to criticize public officials). "Attacks" on a judge, however, depending on their nature, may rise to the level of potential criminal conduct. 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge . . . in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge . . . . "

4. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: If confirmed, I would consider all of the factors outlined in 18 U.S.C. § 3553(a) and sentence defendants individually, with consideration to the specific facts of the case before me, and in accordance with the applicable advisory guidelines range. Consistent with the rationales governing sentencing, I would consider, among other factors, the need for the sentence imposed "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

5. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?**

Response: Qualified immunity "shields law enforcement officers from personal liability for civil rights violations when the officers are acting under color of law in the performance of official duties, unless the officers' performance is not objectively reasonable." *Harris v. City of Newark*, 250 N.J. 294, 299-300 (2022). *See also Thomas v. Tice*, 948 F.3d 133 (3d Cir. 2020) ("Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.").

6. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a federal district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me.

7. **Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

   Response: Please see my answer to Question 6.

8. **Please state the governing law for self-defense in New Jersey and the Third Circuit.**

   Response: In New Jersey, the standard for self-defense is set forth in *N.J. Stat. Ann.* § 2C:3-4. The Model Criminal Jury Charge (Rev. June 2011) for a self-defense claim instructs that a person may use force in self-protection if the following elements are met: (1) the person reasonably believes they must use force; (2) the person reasonably believes that the use of force is immediately necessary; (3) the person reasonably believes they are using force to defend themselves against unlawful force; and (4) the person reasonably believes that the level of intensity of the force is proportionate to the unlawful force they are attempting to prevent against. A self-defense claim fails if the state is able to disprove any element beyond a reasonable doubt. *See also Palmer v. Hendricks*, 592 F.3d 386, 396 (3d Cir. 2010) (articulating the New Jersey standard for self-defense) (citing *State v. Jenewicz*, 193 N.J. 440, 450 (N.J. 2008).

   In the Third Circuit, for a self-defense claim to succeed, the claimant must prove by a preponderance of the evidence each of the following four elements: (1) that the claimant was under an immediate, unlawful threat of death or serious bodily injury to themselves or others; (2) that the claimant had a well-grounded fear that the threat would be carried out if they did not commit the offense (i.e., the criminal act in self-defense); (3) that the criminal action was directly caused by the need to avoid the threatened harm and that there was no reasonable, lawful opportunity to avoid the threatened harm without committing the offense; and (4) that the claimant had not recklessly placed themselves in a situation in which they would be forced to engaged in criminal conduct. THIRD CIRCUIT MODEL JURY INSTRUCTIONS § 8.04 (Rev. Dec. 2021). *See also United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991).

9. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

   Response: 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer." In addition, the statute prohibits the use of a "sound-truck or similar device" or resorting "to any other demonstration in or near any such building or residence." *Id.*

10. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am unaware of any U.S. Supreme Court decision interpreting 18 USC § 1507 or a state analogue. As a sitting superior court judge and as a nominee to serve as a federal district judge, it is inappropriate for me to express a view on the merits of a matter that may come before the courts.

11. **Please explain the differences in the introduction of evidence between federal courts and a military commission.**

Response: Federal courts follow the evidentiary admissibility procedures codified in the Federal Rules of Evidence, as amended each year by the U.S. Supreme Court. While I have never practiced before a military commission or tribunal and am unfamiliar with its precise evidentiary procedures, my understanding is that the introduction of evidence before a military commission is governed by the Uniform Code of Military Justice. *See, e.g.*, 10 USCS § 850 (discussing the admissibility of certain forms of sworn testimony at trial before a court-martial, military commission, or other court of inquiry).

12. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: The Supreme Court has found "fighting words" to consist of "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971).

13. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

Response: Under the true threats doctrine, a statement does not constitute protected free speech where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citation omitted).

14. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

    a. **Was *Brown v. Board of Education* correctly decided?**

    Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

b. **Was *Loving v. Virginia* correctly decided?**

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Loving v. Virginia* was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Griswold* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

d. **Was *Roe v. Wade* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent.

e. **Was *Planned Parenthood v. Casey* correctly decided?**

Response: Please see my answer to Question 14(d).

f. **Was *Gonzales v. Carhart* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Gonzales* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

g. **Was *District of Columbia v. Heller* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding

whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit, including *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle & Pistol Association v. Bruen*.

h. **Was *McDonald v. City of Chicago* correctly decided?**

Response: Please see my answer to Question 14(g).

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Hosanna-Tabor* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: Please see my answer to question 14(g).

k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

15. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the U.S. Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: No.

17. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**

a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **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.**

Response: No.

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response: No.

20. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

21. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: In December 2014, I was referred to Senators Booker and Menendez for consideration for a judicial position on the U.S. District Court for the District of New Jersey. In early 2015, I was interviewed by Senator Cory Booker's Judicial Advisory Committee and was subsequently contacted by Senator Menendez's staff. Senator Booker's Judicial Advisory Committee recommended that I be interviewed by the Senator's staff. As a result, I was interviewed by members of Senator Booker's staff. A few days later, I was interviewed by Senator Booker. In early 2021, I was telephonically interviewed by both Senators Booker and Menendez. On August 4, 2022, I was interviewed by Senator Menendez. On August 9, 2022, I was interviewed telephonically by Senator Booker. On August 12, 2022, I interviewed with attorneys from the White House Counsel's Office. Since August 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me, and on January 3, 2023, the President nominated me to serve as a U.S. District Judge for the District of New Jersey.

22. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

23. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf?? If so, what was the nature of those discussions?**

Response: No.

24. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

25. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

26. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

27. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: Please see my answer to Question 21.

28. **Please explain, with particularity, the process whereby you answered these questions.**

Response: On February 1, 2023, these questions were provided to me by the Office of Legal Policy at the Department of Justice. I reviewed the questions and prepared answers to each of the questions. I researched any relevant case law as needed to prepare my

answers. I provided my answers to attorneys from the Office of Legal Policy who reviewed my answers and provided me with feedback. The final answers are my own.

Senator Mike Lee
Questions for the Record
Robert Kirsch, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

Response: As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a federal district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me. I have appeared before and admired many federal judges, including the federal district judge for whom I clerked. I have attempted to emulate their approach in terms of handling each matter with the utmost care and consideration, and treating every lawyer and litigant with dignity and respect.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: With regard to the interpretation of a federal statute, the first inquiry is to examine whether the U.S. Supreme Court or Third Circuit has interpreted the statutory provision at issue. If so, as a lower court judge, I would apply the holding regarding the statutory interpretation by the higher court. If there were no precedents, I would examine the text of the statute itself. If the text is clear and unambiguous, I would apply the plain meaning of the text and the interpretive inquiry ends. If the language is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedents, relevant canons of interpretation, and legislative history, if authorized and/or applied by the Supreme Court and Third Circuit.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: When interpreting a constitutional provision, I would examine the text of the constitutional provision itself and any applicable Supreme Court or Third Circuit precedent and, if necessary, further consult applicable canons of interpretation or other sources, such as legislative history, if authorized and/or applied by the Supreme Court and Third Circuit.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: The U.S. Supreme Court has applied the original meaning of the text in its analysis when interpreting a number of constitutional provisions, including for example, the individual right to keep and bear arms under the Second Amendment

and the right of confrontation under the Sixth Amendment. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent regarding the interpretation of constitutional provisions, including the appropriate method of interpretation.

5. **How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

Response: Please see my answer to Question 2.

a. **Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: Please see my answer to Questions 2 and 3.

6. **What are the constitutional requirements for standing?**

Response: To establish standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) that they suffered an "injury in fact" which is concrete and particularized, not speculative or hypothetical; (2) a causal nexus between the alleged injury and the alleged conduct; and (3) that the injury will likely be redressable through the judicial process. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

7. **Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?**

Response: The U.S. Supreme Court held in *McCulloch v. Maryland* that the Necessary and Proper Clause of the Constitution grants Congress implied powers necessary to implement its enumerated powers. 17 U.S. 316 (1819); U.S. Const. Art. I, § 8, cl. 18 (vesting in Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

8. **Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?**

Response: The U.S. Supreme Court has held that the constitutionality of an action taken by Congress is not dependent on explicit recitals of the power which it undertakes to exercise. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). Thus, I would evaluate the constitutionality of an enacted law, whether or not it references a specific constitutionally enumerated power, based upon applicable Supreme Court and Third Circuit precedents.

9. **Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?**

Response: The Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9. In addition, most of the rights outlined in the first eight Amendments to the U.S. Constitution, including but not limited to, the right of free speech, the right to bear arms, the right to a public and impartial jury in a criminal case, the right to be free from an unlawful search, etc., are considered substantive due process rights which have been incorporated through the Due Process Clause of the Fourteenth Amendment and thus applicable to the states as well.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The U.S. Supreme Court held that substantive due process protects neither abortion nor the economic rights at stake in *Lochner v. New York*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (abortion); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (*Lochner*-type economic rights). If confirmed to serve as a federal district judge, I would faithfully apply U.S. Supreme Court and Third Circuit precedents regarding the existence of substantive due process rights.

12. What are the limits on Congress's power under the Commerce Clause?

Response: The Supreme Court has held that Congress may regulate three broad categories under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or the persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The U.S. Supreme Court has defined "suspect" or "quasi-suspect" classes as generally having "been subjected to discrimination," who "exhibit obvious, immutable, or distinguishing characteristics that define them as a group," and are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Supreme Court has recognized that race, religion, national origin, and alienage meet the criteria of a suspect class. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: In *Buckley v. Valeo*, 424 U.S. 1, 123 (1976), the U.S. Supreme Court cited the Constitution's inherent, explicit checks and balances and separation of powers which serve as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: When confronting the issue of whether one branch of government assumed an authority not granted to it by the text of the Constitution, I would examine and analyze the text of the Constitution, and apply relevant, binding U.S. Supreme Court or Third Circuit precedent. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)) (discussing framework for evaluating exercises of presidential power).

16. What role should empathy play in a judge's consideration of a case?

Response: A judge's duty is to apply the law fairly, neutrally, and objectively without regard to improper considerations such as personal opinions, viewpoints, or sympathies.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Neither are desirable outcomes.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: In my career as federal law clerk, trial attorney at the Department of Justice, Assistant U.S. Attorney, and superior court judge, I have not had occasion to study this historical trend, or its significance. Accordingly, I am unable to provide an informed response.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: Judicial review is the authority of the judicial branch to determine the constitutionality of governmental actions. *Marbury v. Madison*, 5 U.S. 137, 177– 78 (1803). Judicial supremacy refers to the binding power of Supreme Court constitutional interpretation on the other branches of government. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials take an oath to uphold the Constitution. Elected officials also are bound by Supreme Court decisions interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a sitting superior court judge and as a nominee to serve as federal district judge, it would be inappropriate for me to comment upon the conduct of elected officials.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: My understanding of Hamilton's statement in Federalist 78 is that the role of the judiciary is circumscribed and limited solely to interpreting the law, whereas the other branches of government have the power to make and enforce the law. The significance of this observation is for judges to apply the law to the facts of the case before the court, without reference to any impermissible and extraneous considerations.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend

the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Lower federal court judges are dutybound to faithfully apply the binding precedents of the U.S. Supreme Court and the circuit court which oversees the district judge. However, the premise of the question poses a hypothetical that there exists no binding precedent which "speak[s] directly to the issue at hand." Accordingly, absent binding precedent, I would approach the issue as I would any unresolved issue. I would first look to the U.S. Supreme Court and Third Circuit for guidance through their analyses of analogous constitutional or statutory text. I would also examine the text of the constitutional provision or statutory text to discern its plain and unambiguous meaning. If the meaning is unclear and ambiguous, I would consider other sources, such as legislative history, when authorized by the U.S. Supreme Court and Third Circuit to do so. I would also consider the arguments of counsel regarding each of the above steps in order to reach an outcome consistent with the rule of law.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: None. When imposing a sentence on a defendant, a judge may only consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable relevant Sentencing Commission policy statements. Personal characteristics of a defendant's race, sex, national origin, creed, religion, and socioeconomic status may not be considered as such "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." I am not familiar with the specific definition of equity set forth in the question or the context in which it was made.

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: Equity and equality are typically construed to have different meanings. In contrast to the definition of equity provided in my answer to Question 25, Black's Law Dictionary (11th ed. 2019) defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status."

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?

Response: The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of any binding decision that has considered or adopted the definition of equity addressed in Question 25 for equal-protection purposes. If confirmed to serve as a federal district judge, I would follow Supreme Court and Third Circuit precedents in analyzing Fourteenth Amendment issues.

27. How do you define "systemic racism?"

Response: I am not aware of a consensus definition of systemic racism. I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed to serve as a federal district judge, and as I have done my whole life, I would ensure that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

28. How do you define "critical race theory?"

Response: I am not aware of a consensus definition of critical race theory. Black's Law Dictionary defines critical race theory as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: As I have not researched "critical race theory" or "systemic racism," kindly see my responses to Questions 27 and 28.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Robert Kirsch, nominated to be United States District Judge for the District of New Jersey

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Racial discrimination is unlawful and is proscribed by a variety of statutes and the U.S. Constitution. For example, Title VII of the Civil Rights of 1964 prohibits discrimination in employment on the basis of race, religion, sex and national origin and the Equal Protection Clause of the Fourteenth Amendment prohibits discriminating on the basis of race, among other things.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: The Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As a sitting superior court judge and nominee to serve as a U.S. district court judge, it would be inappropriate for me to express an opinion regarding the existence of any additional unenumerated rights in the Constitution. If confirmed to serve as a U.S. district judge, I would faithfully abide by the precedents of the U.S. Supreme Court and Third Circuit.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: I do not identify with any particular Justice's philosophy, and thus do not identify with any particular Justice's philosophy. As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a U.S. district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me. I have appeared before and admired many federal judges, including the U.S. district judge for whom I clerked. I have attempted to emulate their approach in terms of handling each matter with the utmost care and consideration, and treating every lawyer and litigant with dignity and respect.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

Response: Black's Law Dictionary defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism, Black's Law Dictionary* (11th ed. 2019). While I do not subscribe to a particular label, the Supreme Court has applied the interpretive doctrine of originalism to a number of constitutional provisions, including for example, the individual right to keep and bear arms under the Second Amendment and the right of confrontation under the Sixth Amendment. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed to serve as a U.S. district judge, I would be bound by Supreme Court and Third Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: My understanding is that the term "living constitution" refers to a theory of constitutional interpretation that interprets the Constitution according to society's current norms, practices, and values. *Living Constitution, Black's Law Dictionary* (11th ed. 2019). While I do not subscribe to a particular label, if confirmed, I would be bound by Supreme Court and Third Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: In the exceedingly rare circumstance that there existed no controlling case law interpreting a constitutional provision, my analysis would begin with examining the specific language of the text. I would then look to the U.S. Supreme Court and Third Circuit for guidance as to their interpretative approach through analogous constitutional provisions. I would follow the precedent established by the Supreme Court and the Third Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: Generally, no. *But see Ashcroft v. ACLU*, 535 U.S. 564, 574-75 (2002) (citing *Miller v. California*, 413 U.S. 15, 24 (1973) (referencing, with approval, the use of a "contemporary community standard" by which to evaluate whether material is obscene

and thus unprotected by the First Amendment). Absent binding precedent, when interpreting constitutional and statutory provisions, judges should follow the plain meaning of the constitutional or statutory provision if that plain meaning is clear and unambiguous. If confirmed to serve as a U.S. district judge, I would faithfully apply the precedents of the U.S. Supreme Court and Third Circuit regarding specific statutory and constitutional provisions, including the appropriate method of interpretation.

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: My belief is that the Constitution is a fixed and enduring document, meaning that the Constitution does not change unless amended through Article V of the Constitution but its provisions may apply to new circumstances.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Bruen* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: 18 U.S.C. § 3142 addresses pretrial detention. 18 U.S.C. § 3142(e)(3) establishes that in certain types of cases a rebuttable presumption of detention arises that no release conditions will reasonably assure the defendant's appearance in court and the safety of the community. A presumption in favor of pretrial detention applies to violent offenses, offenses for which the maximum sentence is life in prison or death, drug offenses carrying maximum sentences of ten years or more, offenses involving underage victims, crimes involving slavery or human trafficking, and other enumerated offenses and factors related to certain offenders, including their prior criminal history.

a. **What are the policy rationales underlying such a presumption?**

Response: As set forth in 18 U.S.C. § 3142(f), the presumption in favor of pretrial detention reflects Congress's determination that defendants accused of the certain crimes present a greater flight risk or danger to the community.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. Under U.S. Supreme Court precedents, government regulations that burden a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable" receive strict scrutiny. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). A regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). Neither is a government regulation neutral – even if it appears facially neutral – where the record reveals animus or hostility toward a particular religious belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Moreover, a regulation will not be generally applicable where it is subject to discretionary individualized exemptions. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

When strict scrutiny is triggered, the government bears the burden to demonstrate that its action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Kennedy*, 142 S. Ct. at 2422 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)); *Tandon*, 141 S. Ct. at 1296 (2021). If instead the

regulation is found to only "incidentally burden[] religion" but otherwise be neutral and generally applicable, then rational basis review is applied. *Fulton*, 141 S. Ct. at 1878 (2021).

In addition, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government's action places a substantial burden on the exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* at § 2000bb-1(b).

14. **Is it ever permissible for the government to discriminate against religious organizations or religious people?**

Response: Generally, no. Under the Free Exercise Clause of the First Amendment, laws that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). When government action burdens an individual's sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable," the action is subject to strict scrutiny whereby the government must demonstrate that its action is justified by a compelling state interest and is narrowly tailored in pursuit of that interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)). As stated in the previous response to Question 13, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government's action places a substantial burden on the exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* at § 2000bb-1(b).

15. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the U.S. Supreme Court held that certain restrictions imposed by the Governor of New York in response to the COVID-19 pandemic, capping the number of individuals who could participate in religious services in certain designated areas, were unlawful under the Free Exercise Clause of the First Amendment. The Court applied the strict scrutiny test,

finding that the law was not neutral and generally applicable. While the Court agreed that the state demonstrated a compelling interest in stemming the spread of COVID-19, it failed to satisfy the "narrowly tailored" prong of the inquiry as retail stores and factories were treated more favorably.

16. **Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom.***

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the U.S. Supreme Court enjoined the restrictions imposed by the State of California regarding the prohibition to hold private gatherings, specifically at-home worship, during the COVID-19 pandemic. In granting the injunction pending appeal, the Court noted that strict scrutiny applied to California's activity because "California's Blueprint System contains myriad exceptions and accommodations for comparable activities." *Id.* at 1298. Under strict scrutiny analysis, "[a]pplicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State has not shown that public health would be imperiled by employing less restrictive measures." *Id.* at 1297 (quotations and citations omitted).

17. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes.

18. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.***

Response: In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court vacated the state agency's enforcement of Colorado's anti-discrimination law in a case where a baker refused to make a wedding cake for a same-sex couple, citing petitioner's religious beliefs. The Supreme Court held that the facially neutral public accommodations law violated the Free Exercise Clause because the evidentiary record demonstrated that the state's civil rights commissioners had openly expressed hostility toward the petitioner's religious beliefs in the issuance of a cease-and-desist order, which the Court found sufficient to show animus in violation of the Free Exercise Clause. *Id.* at 1729-31.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes. An individual's religious belief, provided it is "sincerely held," need not be "logical, consistent and comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)); *see also Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 832-35 (1989). The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Person Act also

expressly include broad language protecting "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: Generally, yes. The U.S. Supreme Court held that federal courts have "no business" addressing whether an individual's asserted religious belief is "reasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Instead, the "narrow function" is to "determine whether the line drawn reflects an honest conviction." *Id.* at 725 (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981)). "Only beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas*, 450 U.S. at 713 (internal citations omitted).

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: Please see my answers to Question 19 and 19(a).

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: I lack the knowledge and expertise to comment on the Catholic Church's official position on the acceptability or moral righteousness regarding abortion.

20. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the U.S. Supreme Court held that, under the "ministerial exception," religious organizations are exempt from employment discrimination claims because the plaintiffs' roles in educating and guiding students in their faith were at the "core" of the private religious school's mission. As a result, the government was prohibited under the First Amendment to intrude in such employment decisions.

21. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the City of Philadelphia refused to work with a Catholic organization in its foster care program because the organization would not certify same-sex couples as foster parents. *Id.* at 1874-75. The U.S. Supreme Court found that the City's action was subject to strict scrutiny, reasoning that the contract's nondiscrimination provision was not "neutral and generally applicable" because the provision allowed the City to grant exceptions in its "sole discretion." *Id.* at 1879, 1881. Applying strict scrutiny, the Court held that the City offered "no compelling reason why it has a particular interest in denying an exception to [the religious entity] while making them available to others." *Id.* at 1882. As a result, the Court remanded case for further proceedings.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the U.S. Supreme Court held that Maine's "nonsectarian" mandate for its tuition assistance program for private secondary schools was unconstitutional. Specifically, the Court found that the law was subject to and could not pass the strict scrutiny analytical framework because it conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court found that the program violated the Free Exercise Clause of the First Amendment because the "State's anti-establishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: The U.S. Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), held that the school district's sanctions, including firing the coach, for his post-game brief, quiet, and personal prayer at midfield violated his right to free exercise of religion and free speech under the First Amendment.

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: In *Mast v. Fillmore County*, the U.S. Supreme Court vacated the judgment of the lower court and remanded the matter in light of its recent decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). 141 S. Ct. 2430 (2021). The case involved Fillmore County's refusal to grant an exception to the County's septic system mandate requested by an Amish community based on their sincerely held religious beliefs. *Id.* at 2431. In his concurrence, Justice Gorsuch explained that the County and lower courts misapplied the

strict scrutiny analysis required under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by treating the County's general interest in sanitation regulation as compelling without reference to applying those rules specifically to the Amish community. Instead, under *Fulton*, strict scrutiny requires "a more precise analysis" that scrutinizes "the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 2432.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer." In addition, the statute prohibits the use of a "sound-truck or similar device" or resorting "to any other demonstration in or near any such building or residence." *Id.* As a sitting superior court judge and nominee to serve as a U.S. district judge, it would be inappropriate for me to express my personal views on protests in front of the homes of U.S. Supreme Court Justices.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**

Response: No, and I am not familiar with any judicial trainings which teach, counsel, or promote any of the examples set forth in this question.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: No.

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

Response: No.

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response: No.

27. **Will you commit that your court, so far as you have a say, will not provide trainings**

that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: Yes.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

29. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: Article II, Section 2, Clause 2 of the Constitution vests the authority to make political appointments with the President of the United States, upon advice and consent of the Senate. As a sitting superior court judge and nominee to serve as a U.S. district judge, it would be inappropriate for me to express a view on either the appropriateness or constitutionality of considerations made in the political appointment process because such an issue may come before the courts.

30. **Is the criminal justice system systemically racist?**

Response: I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed to serve as a U.S. district judge, and as I have done my whole life, I would ensure that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: The question of whether the number of Supreme Court Justices should be altered is a question for policymakers. As a nominee to serve as a U.S. district judge, it would be inappropriate for me to express a view. I am bound by the precedent of the U.S. Supreme Court regardless of the size of its composition.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the original public meaning of the Second Amendment protects an individual's right to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2021), the Court concluded that the original public meaning of the Second Amendment also afforded the right to keep and bear arms for self-defense outside the home.

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the U.S. Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

35. **Is the ability to own a firearm a personal civil right?**

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

36. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: I am unaware of any Supreme Court or Third Circuit precedent that suggests that the right to own a firearm receives less constitutional protection than the right to vote.

37. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: I am unaware of any Supreme Court or Third Circuit precedent that suggests that the right to own a firearm receives less constitutional protection than the right to vote.

38. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: Under Article II, Section 3 of the United States Constitution, the President "shall take Care that the Laws be faithfully executed." In *United States v. Nixon*, 418 U.S. 683 (1974), the U.S. Supreme Court found that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *Id.* at 693.

During my tenure as an Assistant United States Attorney prosecuting a wide variety of federal crimes, including most specifically complex criminal fraud matters, I have made prosecutorial charging decisions based on the specific facts of a case and have never been instructed that an entire category of laws should not be enforced. As a sitting superior

court judge and as a nominee to serve as a U.S. district judge, it is not appropriate for me to opine or comment further.

39. **Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.**

Response: Generally, prosecutorial discretion refers to decisions by members of the executive branch to charge a matter based on the specific facts and circumstances of the case. Prosecutors typically have near-absolute discretion on whether or not to prosecute, what to charge to bring, and whether to engage in plea bargaining. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). I am unsure exactly what the question asks by "a substantive administrative rule change" but administrative rule changes are subject to the Administrative Procedure Act.

40. **Does the President have the authority to abolish the death penalty?**

Response: No, the President does not have the unilateral authority to abolish the death penalty.

41. **Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS.***

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the U.S. Supreme Court granted the plaintiffs' application to vacate a stay of a judgment that declared that a nationwide eviction moratorium that was imposed by the Director of Centers for Disease Control and Prevention in response to the COVID-19 pandemic was unlawful. The Court determined that the plaintiffs had a substantial likelihood of success on the merits as the CDC exceeded its authority and a balancing of equities weighed against a stay of the judgment in favor of the plaintiffs pending appeal.

42. **Does the United States have an over-incarceration problem?**

Response: As a sitting superior court judge and a nominee to serve as a U.S. district judge, it would be inappropriate to express an opinion on this issue which relates to a policy issue more appropriately left to the legislative branch.

a. **If so, please identify the factors justifying your response.**

Response: Please see my answer to Question 42.

43. **Do judges need to be concerned about equity?**

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing" and "the body of principles constituting what is fair and right." As a superior court judge, I strive to adjudicate each matter impartially and without bias or

favoritism. If confirmed, I will follow the law and apply Supreme Court and Third Circuit precedent.

44. **Do judges need to undergo implicit bias training?**

Response: This is a question is best left to policymakers and those who manage the federal judicial system. If confirmed, I will do everything in my power to ensure that litigants are afforded respect and dignity, and that I adjudicate each case in a fair and impartial manner.

45. **Are there instances where a judge should not honor the judicial code of conduct?**

Response: No.

a. **If so, can you please identify all instances?**

Response: N/A.

b. **What justifies a departure from the judicial code of conduct?**

Response: N/A.

Senator Josh Hawley
Questions for the Record

Judge Robert Kirsch
Nominee, U.S. District Court for the District of New Jersey

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**
    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**
    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**
    c. **The enhancement for offenses involving the use of a computer**
    d. **The enhancements for the number of images involved**

    Response includes subparts (a), (b), (c), and (d): I am not familiar with Justice Jackson's sentencing practices during her time as a district judge. A sentencing court is required to fashion a sentence that is sufficient but not greater than necessary, and district judges must first begin by calculating the applicable advisory guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 50 (2007). The district judge should also consider all of the factors outlined in 18 U.S.C. § 3553(a) and sentence defendants individually. If confirmed, I would consider the specific facts of the case, the history and characteristics of the defendant in determining whether a given sentencing enhancement is appropriate, and in so doing, I would consider the positions of the government, probation and the defendant.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**
    a. **Do you agree that the penalties should be aligned?**
    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**
    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

    Response includes subparts (a), (b), and (c): As a sitting superior court judge and a nominee to serve as a federal judge, it would be inappropriate to express an opinion on this issue which relates to a policy issue that is left to the legislative branch. If

confirmed to the federal district court, I would follow and apply all current federal law.

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**
   a. **Do you agree with that philosophy?**

      Response: I am not familiar with Justice Marshall's comments nor the context in which they were given; however, I do not agree that judges should inject their personal beliefs into judicial decision-making.

   b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

      Response: As stated in response to Question 3(a), I am not familiar with Justice Marshall's comments nor the context in which they were given. It would nonetheless be inappropriate for me to comment on whether a current or former Supreme Court Justice violated a judicial oath.

4. **Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?**

   Response: Yes.

5. **What is the standard for each kind of abstention in the court to which you have been nominated?**

   Response: New Jersey district court judges may apply several forms of abstention. The doctrines described below are the most common.

   Under *Pullman* abstention, the federal court must find that (1) uncertain issues of state law underlie the federal constitutional claims; (2) the state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, adjudication of the federal claim; and (3) important state policies would be disrupted through a federal court's erroneous construction of state law. *Artway v. Attorney Gen.*, 81 F.3d 1235, 1270 (3d Cir. 1996); *Chez sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991). If all factors are present, the court must further consider whether abstention is appropriate based on "the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." *Artway*, 81 F.3d at 1270.

   Younger abstention requires a federal court to refrain from hearing a case that threatens to interfere with a pending state-court case, provided that the state-court case is either "(1) [a] state criminal prosecution[]; (2) [a] civil enforcement proceeding[]; [or] (3) [a] civil proceeding[] involving orders in furtherance of the state courts' judicial function." *Smith*

& Wesson Brands, Inc. v. AG, 27 F.4th 886, 891 (3d Cir. 2022) (quotations omitted) (citing Sprint *Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)).

Burford abstention instructs courts to "avoid federal intrusion into matters of local concern [] which are within the special competence of local courts." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303-04 (3d Cir. 2004). Deciding whether to abstain under *Burford* requires a two-step analysis. *Riley v. Simmons*, 45 F.3d 764, 771 (3d Cir. 1995) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)). First, the court must assess "whether timely and adequate state-court review is available." *Id.* If so, the court must then consider the second step, which assesses whether the case "involves difficult questions of state law impacting on the state's public policy or whether the court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern." *Id. See also Hi Tech Trans*, 382 F.3d at 304.

Colorado River abstention permits a federal court to abstain for reasons of judicial economy where a "parallel" proceeding exists in state court involving the same parties, claims, and remedies sought. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307-08 (3d Cir. 2009); *Yang v. Tsui*, 416 F.3d 199, 204 (3d Cir. 2005). If the court finds that the proceedings are parallel, it must then determine whether "extraordinary circumstances meriting abstention" exist. *Nationwide*, 571 F.3d at 308 (quoting *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 171 (3d Cir. 1999)). Such factors include "(1) [in an *in rem* case,] which court first assumed jurisdiction over [the] property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties." *Id.*

Rooker-Feldman abstention "precludes federal district courts from exercising jurisdiction over appeals from unfavorable state court judgments." *Vuyanich v. Smithton Borough*, 5 F.4th 379, 381 (3d Cir. 2021). In order for a federal court to abstain on *Rooker-Feldman* doctrine grounds, the court must find that each of the following four requirements are met: "(1) the federal plaintiff lost in state court; (2) the plaintiff 'complains of injuries caused by the state-court judgments'; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Id.* at 385 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

Response: No.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

Response: N/A.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: The Supreme Court has looked to the original public meaning to interpret the Constitution in a number of cases. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court looked to the original public meaning of the text of the Confrontation Clause in its decision. If confirmed, I will follow Supreme Court and Third Circuit precedent regarding the appropriate method of constitutional interpretation.

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed and I am confronted with a question of the interpretation of a statute not previously addressed by Supreme Court or Third Circuit precedent, I would first look to the statute's text to determine if its meaning is clear and unambiguous. If the meaning is clear and unambiguous, the inquiry ends. However, to the extent the meaning is unclear or ambiguous, the Supreme Court has authorized other methods to assist statutory interpretation, including statutory canons of construction and, when appropriate, legislative history. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: Not all legislative history is to be treated the same. The U.S. Supreme Court has recognized that some types of legislative history (e.g., contemporaneous committee reports) are more probative of legislative intent than others (e.g., comments made during floor debate). *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *Garcia v. United States*, 469 U.S. 70, 76 (1984). I would follow the teachings of the U.S. Supreme Court and Third Circuit on the issue of whether and when to consult legislative history to discern legislative intent.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: The Constitution is a domestic document that should generally be interpreted consistent with domestic authorities. If confirmed, I would follow all binding U.S. Supreme Court and Third Circuit precedent in interpreting provisions of the United States Constitution. Except as directed by the U.S. Supreme Court and Third Circuit, I would not consult or defer to the laws of foreign nations, other than in the narrow circumstances when the U.S. Supreme Court has ruled that doing so is appropriate.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The Supreme Court has held that "all Eighth Amendment method-of-execution claims" are governed by the following two-part standard. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). First, the prisoner must show that the state's method of execution presents a "substantial risk of serious harm," described as "severe pain over and above death itself." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). Second, the prisoner must establish that an alternative method exists that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Id.* (citations and quotations omitted). To my knowledge, the Third Circuit has not developed any additional standards beyond this framework.

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: The Supreme Court has "reject[ed] the invitation" to recognize a substantive due process right to DNA analysis. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009). Relying upon *Osborne*, the Third Circuit has acknowledged that "[t]here is no substantive due process right to access DNA evidence." *Grier v. Klem*, 591 F.3d 672, 678 (3d Cir. 2010). However, a habeas petitioner may raise a procedural due process claim on the grounds that a State's procedures for postconviction relief—and in particular those procedures in place for consideration of DNA-testing requests—are so flawed as to be "fundamentally unfair or constitutionally inadequate." *Id.* at 679.

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free

exercise of religion? Please cite any cases you believe would be binding precedent.

Response: Under U.S. Supreme Court precedents, a plaintiff bears the initial burden of showing that a government regulation has burdened his or her sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). A regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Neither is a government regulation neutral – even if it appears facially neutral – where the record reveals animus or hostility toward a particular religious belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Moreover, a regulation will not be generally applicable where it is subject to discretionary individualized exemptions. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

If the plaintiff meets their initial burden, strict scrutiny is triggered and the burden shifts to the government to demonstrate that its action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Kennedy*, 142 S. Ct. at 2422 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)); *Tandon*, 141 S. Ct. at 1296 (2021). If instead the regulation is found to only "incidentally burden[] religion" but otherwise be neutral and generally applicable, then rational basis review is applied. *Fulton*, 141 S. Ct. at 1878 (2021).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my answer to Question 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Third Circuit, following Supreme Court guidance on the matter, has emphasized that "no court should inquire into the validity of plausibility of the beliefs; instead, the task of a court is 'to decide whether the beliefs professed [] are sincerely held and whether they are, in [the believer's] own scheme of things, religious.'" *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487 (3d Cir. 2017) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). To evaluate whether a belief is "religious," courts in the Third Circuit must consider whether the beliefs "address[] fundamental and ultimate questions having to do with deep and imponderable matters, are comprehensive in nature, and are accompanied by certain formal and external signs." *Id.* at 491 (quotations omitted) (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)). Regarding the sincerity

component, the court must determine whether the belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014).

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense inside the home.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: In *Lochner*, in his dissent, Justice Holmes expressed the view that the case should have been decided on legal principles and not "a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a sitting superior court judge and nominee to the federal bench, it would not be appropriate for me to express an opinion regarding the merits of Justice Holmes's statement.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: *Lochner* was effectively overturned by a number of subsequent U.S. Supreme Court decisions and thus *Lochner* is no longer controlling. *See West Coast Hotel, Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer binding U.S. Supreme Court precedent. As a sitting superior court judge and as nominee to the federal judicial bench, it would not be appropriate for me to opine or comment on whether a decision of the Supreme Court was correctly decided. If confirmed, I would follow current binding Supreme Court and Third Circuit precedent, including the decisions of *West Coast Hotel* and *Ferguson*.

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

Response: No, I am not aware of any U.S. Supreme Court opinions that have not been formally overruled by the Supreme Court but are no longer good law.

a. If so, what are they?

Response: N/A.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with Judge Learned Hand's statement in *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945). As a sitting superior court judge and as a nominee to serve as a federal judge, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully apply all binding precedent of the Supreme Court and the Third Circuit as to what constitutes a monopoly.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my answer to 19(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: If confirmed, I will apply all Supreme Court and Third Circuit precedents to the facts of the case before me. For example, the Third Circuit has found that absent other pertinent factors, a market share significantly larger than 55% has been required to established prima facie market power. *United States v. Dentsply, Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir., 2005). The Supreme Court has also held that "80% to 95% [of a market] . . . with no readily available substitutes" is sufficient to constitute a monopoly. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992).

20. Please describe your understanding of the "federal common law."

Response: In general, there is no "federal common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: If confirmed, I would defer to the interpretation of the state constitution provided by the state's highest court. In *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), the U.S. Supreme Court stated that "the views of the state's highest court with respect to state law are binding on the federal courts." *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (standing for the general proposition that there is no general federal common law and that federal courts sitting in diversity should defer to state court interpretations of state substantive law).

a. Do you believe that identical texts should be interpreted identically?

Response: Please see my answer to Question 21. Generally, identical texts should be interpreted in an identical manner.

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: Yes, state constitutions may afford greater, but not lesser, protections than federal constitutional protections. *See Florida v. Powell*, 559 U.S. 50, 59 (2010).

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: I am unaware of any U.S. Supreme Court or Third Circuit precedent prohibiting a federal district court from issuing a nationwide injunction.

a. If so, what is the source of that authority?

Response: Article III's general equitable power and Federal Rule of Civil Procedure 65 provide the authority for issuing an injunction. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding the district court's grant of a nationwide injunction to bar the enforcement of an executive order provision which suspended the entry of certain foreign nationals into the United States). However, while district courts often have discretion in framing injunctions, the Third Circuit and the U.S. Supreme Court have noted that injunctions are "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Free Speech Coal, Inc., v. AG of the United States*, 974 F.3d 408, 430 (3d Cir. 2020) (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010)).

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to comment on a legal issue that is likely to come before the courts. If confirmed, and presented with this question, I would carefully review the facts of the case and the applicable law, the rules, and U.S. Supreme Court and Third Circuit precedent to determine the proper scope of any proposed injunction.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my answer to Question 23(b).

25. What is your understanding of the role of federalism in our constitutional system?

Response: Federalism is one of the critical governmental constructs to diffuse centralized governmental power, one of the framers' central priorities. As the U.S. Supreme Court noted: "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012).

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Please see my answer to Question 5.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: The advantages and disadvantages of awarding damages versus injunctive relief are fact and case specific. Generally, money damages compensate for past injuries and may be the preferred remedy where some amount of money may adequately make the plaintiff whole. Injunctive relief, generally, may be sought to address or prevent future harm and irreparable injury.

28. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: Aside from the substantive rights articulated in the first eight amendments of the U.S. Constitution that have been incorporated as against the states through the Due Process Clause, the Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please see my answer to Question 13.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Free Exercise Clause encompasses the freedom of worship and protects religious practices. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940); *Lee v. Weisman*, 505 U.S. 577, 591 (1992). *See also Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my answer to Question 13.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my answer to Question 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The U.S. Supreme Court has instructed that the Religious Freedom Restoration Act has broad applicability to all federal laws. The statute, by its terms, applies "to all Federal law, and the implementation of that law, whether statutory or otherwise," subject to limited exceptions. 42 U.S.C. § 2000bb-3.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with this quote by Justice Scalia or the context in which it was made but I understand it to mean that a judge must objectively apply the facts to the law regardless of one's personal views or beliefs.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: No.

a. If yes, please provide appropriate citations.

Response: N/A.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

33. Do you believe America is a systemically racist country?

Response: I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed, I would ensure – as I have done my whole life – that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

35. How did you handle the situation?

Response: As a lawyer, I was duty-bound to represent my client's best interest within the bounds of the law and consistent with professional rules of responsibility, without consideration to my personal views or beliefs. Similarly, as a judge, I am dutybound to abide by precedents of higher courts and faithfully to apply the law without regard to my personal views.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: No single Federalist Paper has shaped my view of the law more than any of the others.

38. Do you believe that an unborn child is a human being?

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or may come before the court. In *Dobbs v. Jackson Women's Health Org.*, the U.S. Supreme Court explicitly left this question open and declined to express a "view about if and when prenatal life is entitled to any of the rights enjoyed after birth." 142 S. Ct. 2228, 2261 (2022). If confirmed to serve as a federal district judge, I would faithfully apply Supreme Court and Third Circuit precedent.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is

available online or as a record, please include the reference below or as an attachment.

Response: Yes. I was deposed in the matter of *Daibo v. Ned and Melvin Kirsch, et al.*, 316 N.J. Super. 580 (1998). I was dismissed from the matter.

I testified as a non-party witness in a civil action in *Simone v. United States*, 2015 WL 419691 (E.D.N.Y. Jan. 31, 2015), *aff'd*, 642 Fed. Appx. 73 (2d Cir. March 16, 2016).

I also testified in my confirmation hearing to serve as a superior court judge in or around December of 2009, and in my reconfirmation hearing approximately 7 years later.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

41. Do you currently hold any shares in the following companies:

a. Apple?

Response: Yes.

b. Amazon?

Response: Yes.

c. Google?

Response: No.

d. Facebook?

Response: Yes.

e. Twitter?

Response: No.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: No.

43. If so, please identify those cases with appropriate citation.

Response: N/A.

44. Have you ever confessed error to a court?

Response: No.

45. If so, please describe the circumstances.

Response: N/A.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: Pursuant to my oath administered to me at the confirmation hearing held on January 25, 2023, I provided truthful answers to all questions put to me on that date and continue to do so in these inquiries.

Questions from Senator Thom Tillis
for Robert Kirsch
Nominee to be United States District Judge for the District of New Jersey

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: While I do not believe there is a settled definition of judicial activism, my understanding is that it involves a judge's insertion of their personal beliefs and views into their judicial decision-making. I do not believe judicial activism is appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: I have served as a superior court judge for 13 years and view impartiality as a prerequisite and expectation for a judge.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes, there are occasions when faithfully interpreting the law may sometimes run counter to a judge's personal beliefs or views, but judges are required to follow the law as enacted by the legislature regardless of their personal opinions.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed to serve as a federal district judge, I will faithfully follow the U.S. Supreme Court precedents relating to an individual's Second Amendment rights, and follow binding precedents such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: If confirmed, I would faithfully apply U.S. Supreme Court and Third Circuit precedent regarding the Second Amendment, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). As to this specific hypothetical, as a sitting superior court judge and as a nominee to serve as a federal judge, I must refrain from offering any opinion as the above issue may be litigated and come before the court.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: Qualified immunity is a judicial doctrine created by the U.S. Supreme Court, which immunizes a government official from civil damages who acted under color of state law unless they violated a clearly established right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted). Under the Supreme Court's decision in *Pearson*, a court must consider: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. If confirmed to serve as a federal district court judge, I would follow Supreme Court and Third Circuit precedent regarding the application of qualified immunity.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a policy consideration for the legislature. As a sitting superior court judge and nominee to serve as a federal judge, and out of respect for the separation of powers, it would be inappropriate for me to comment or render an opinion on the issue.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my answer to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: During my more than 30 years of practice, which included a two-year clerkship with a federal district judge; approximately 8 years practicing civil litigation on behalf of the

United States at both the U.S. Department of Justice and U.S. Attorney's Office; approximately 8 years as a federal criminal prosecutor at the U.S. Attorney's Office; and 13 years as a superior court judge, I have not handled any cases involving patent jurisprudence. If confirmed to serve as a federal district judge, I would – as I have in the past when confronted with an issue with which I was unfamiliar – carefully consider the arguments and submissions of the parties, independently research all applicable areas of the law, and render an objective, well-reasoned opinion, subject to applicable U.S. Supreme Court and Third Circuit precedent.

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it would not be appropriate for me to comment on a decision best left to the legislature, or on issues which may come before me in the future. If a patent eligibility issue comes before me, I will apply the Patent Act, 35 U.S.C. § 101, and all binding U.S. Supreme Court and Third Circuit precedent.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled a case involving copyright law.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled a case involving the Digital Millennium Copyright Act.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a

superior court judge, I have not handled a case involving intermediary liability for online service providers that host unlawful content by users.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled any cases involving First Amendment free speech issues or intellectual property issues, including copyright matters.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: With regard to the interpretation of a federal statute, the first inquiry is to examine whether the U.S. Supreme Court or Third Circuit previously interpreted the subject statutory provision at issue. If there is binding precedent from a higher court, I would apply its guidance regarding the statutory interpretation. If there were no precedents, I would examine the text of the statute itself. If the text is clear and unambiguous, I would apply the plain meaning of the text and the interpretive inquiry would end. If the language is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedents, relevant canons of interpretation, and legislative history, if necessary and authorized by a higher court.

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: The level of deference given to an agency's interpretation of a statute depends on the facts of the case and the textual clarity of the statutory provision in

question. The court must first assess the asserted power at issue in the context of the statutory text. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is not unambiguous on its face, then the court will defer to the agency's interpretation of the text provided that the interpretation is reasonable and "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority." *La. Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 670 (3d Cir. 2014) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

The agency's method of interpretation also influences the level of deference provided. For example, an interpretation promulgated through formal or informal rulemaking will usually be afforded *Chevron* deference. In contrast, agency interpretations set forth in pamphlets, circulars, or informal guidelines are entitled deference "only to the extent that those interpretations have the power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Recently, however, the Supreme Court found it inappropriate to defer to an agency's interpretation of ambiguous text where the asserted power would constitute a "radical or fundamental change" to the statutory scheme or grant the agency significant control over the national economy. *West Virginia v. EPA*, 597 U.S. ____, 18-19 (2022).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it would not be appropriate for me to comment on or predict how I might rule on hypothetical cases involving issues which may come before me in the future. If confirmed, I will faithfully follow all U.S. Supreme Court and Third Circuit precedent.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: Please see my answer to Question 15(c).

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my answer to Question 15(c).

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: In the District of New Jersey, there are 17 "active" district judges (and a number of additional senior district judges). All active district judges in New Jersey are assigned every type of case, including patent cases, and the cases are generally assigned through a computer-generated program, thereby foreclosing the potential problem outlined in the question.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Please see my answer to Question 17(a).

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Yes, I commit not to engage in such conduct.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: This poses an issue for consideration by policymakers or the U.S. Judicial Conference. As a sitting superior court judge and as a nominee to serve as a federal district judge, it would not be appropriate for me to opine or comment on these issues.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my answer to Question 17(a).

Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Orelia Eleta Merchant
Nominee to be United States District Judge, Eastern District of New York

1. **Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?**

   Response: During my time as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, from 2002 to 2016, I prosecuted several criminal forfeiture cases, including health care fraud and drug money laundering cases. Also, while serving as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including general crimes and drug crimes cases. My representation in these matters included arraignments, pre-trial conferences, detention, revocation, and sentencing hearings, and assistance with criminal trials. I do not specifically recall the number of criminal cases that I handled.

2. **When was the last time you personally argued before a court?**

   Response: The last time I personally argued before a court was in or around 2016, when I was appointed as Executive Assistant United States Attorney in the U.S. Attorney's Office for Eastern District of New York (the "Office") with oversight of the Civil and Administrative Divisions of the Office. From 2002 to 2016, as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, and from 2001 to 2001, as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, I personally argued in federal court routinely and appeared in all stages of litigation in a wide variety of practice areas on cases in federal district court frequently, often several times a week.

3. **How many antitrust cases have you personally handled during your legal practice?**

   Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. Where a matter involved an area of law that I had not previously handled, I quickly came up to speed. I have not had an occasion to personally handle an antitrust case. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant binding Supreme Court and Second Circuit precedent before rendering any decisions in an antitrust case.

4. **How many securities litigation cases have you personally handled during your legal practice?**

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. As an Executive Assistant United States Attorney, I represented the U.S. Attorney's Office for the Eastern District of New York in settlement discussions and negotiations related to complex residential mortgage-backed securities fraud investigations of several large banks. However, I have not served as counsel of record in a securities litigation case. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a securities case.

5. **How many class actions suits have you personally handled during your legal practice?**

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. Where a matter involved an area of law that I had not previously handled, I quickly came up to speed. In my capacity as Chief Deputy Attorney General for State Counsel, overseeing the State Counsel Division in the New York State Attorney General's Office, I have provided oversight for defense of class action lawsuits. However, I have not served as counsel of record in a class action lawsuit. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a class action suit.

6. **How many narcotics cases have you personally handled during your legal practice?**

Response: During my time as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, from 2002 to 2016, I prosecuted several criminal forfeiture cases, including drug money laundering cases. Also, while serving as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including drug crimes cases. I do not specifically recall the number of narcotics cases that I handled. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a narcotics case.

7. How many firearm cases have you personally handled during your legal practice?

Response: During my time as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including firearms related crimes. I do not specifically recall the number of firearms related cases that I handled. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a firearms related case.

8. Under Supreme Court and Second Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: Black's Law Dictionary defines a "fact" as, inter alia, "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." The Supreme Court has explained that "findings of a "basic" or "historical" fact–addressing questions of who did what, when or where, how or why," are reviewable only for clear error. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Regarding whether something is a question of fact or a question of law, the courts should examine "whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). If confirmed as a district court judge, in determining whether something is a question of fact or a question of law, I would faithfully apply binding Supreme Court and Second Circuit precedent.

9. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

Response: I understand criticism of judicial opinion to be an evaluation of the judge's opinion. Whereas depending upon the specific facts, "attacks" on a sitting judge or public officials could violate a number of state and federal statutes, including 18 U.S.C. § 115. I am not aware of any binding Supreme Court or Second Circuit precedent on this issue. If confirmed as a district court judge, I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the specific facts and circumstances of the case before me.

10. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

Response: If confirmed as a district court judge, the principle that would guide my approach to sentencing would be to faithfully follow the law and to apply the law in a fair and neutral matter to the facts and circumstances of every case. The law to be applied

includes binding Supreme Court and Second Circuit precedent, the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines. In 18 U.S.C. § 3553(a)(2), Congress articulated the four factors to be considered, but Congress did not indicate that any one factor is of greater importance than the others. *See* 18 U.S.C. § 3553(a)(2).

11. In what situation(s) does qualified immunity not apply to a law enforcement officer in New York?

Response: "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citations omitted.); *see also Francis v. Fiacco*, 942 F.3d 129, 145 (2019). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent.

12. Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.

Response: Title 18, United States Code, Section 1507, provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

13. Under Supreme Court precedent, is 18 U.S.C. § 1507, or a state statute modeled on § 1507, constitutional on its face?

Response: To my knowledge, the Supreme Court has not addressed a facial challenge to the constitutionality of 18 U.S.C. § 1507. As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to comment on the merits of a matter that may come before the courts. If confirmed as a district court judge, I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the specific facts and circumstances of the case before me.

14. What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?

Response: In *Cohen v. California*, 403 U.S. 150 (1971), the Supreme Court held that states can prohibit the use of "fighting words," defined as "those personally abusive

epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.* at 20.

15. What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?

Response: In *Virginia v. Black*, 538 U.S. 342 (2003), the Supreme Court held that where a speaker intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the speaker's statement does not constitute protected free speech under the true threats doctrine. *Id.* at 359.

16. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case and controversy impartially and with an open mind, to faithfully apply Supreme Court and Second Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented. I have not studied whether there is one decision, or one judge or justice that best represents this philosophy of judging in the last 50 years. This approach is consistent with the judicial oath and the Code of Conduct for United States Judges.

17. Please identify a Second Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: Please see my response to Question 16.

18. Please state the governing law for self-defense in New York and the Second Circuit.

Response: In a criminal case, New York and federal law recognizes an exculpatory defense of self-defense, subject to limitations addressed in statues and caselaw. *See, e.g.*, N.Y. Penal Law §§ 35.05, 35.15; *United States v. Thomas*, 34 F.3d 44, 47 (2d Cir. 1994). Under N.Y. Penal Law § 35.15, for example, "[a] person may not use deadly physical force upon another person . . . unless: (a) The actor reasonably believes that such other person is using or about to use deadly physical force . . . ."

19. Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:

a. Was *Brown v. Board of Education* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of*

Education was correctly decided, as the holding of this case is well settled law and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

b. Was *Loving v. Virginia* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Loving v. Virginia* was correctly decided, as the holding in this case is well settled law, and the issue of anti-miscegenation laws is not likely to come before me, if confirmed, or be relitigated in other courts.

c. Was *Griswold v. Connecticut* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Griswold v. Connecticut* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

d. Was *Roe v. Wade* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. *In Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Roe v. Wade*. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Planned Parenthood v. Casey*. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

f. Was *Gonzales v. Carhart* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Gonzales v. Carhart* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

g. Was *District of Columbia v. Heller* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *District of Columbia v. Heller* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *McDonald v. City of Chicago* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

k. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States

Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

20. How do you understand the difference, if any, between freedom of religion and freedom of worship?

Response: The right to free exercise of religion includes freedom of worship, but the Supreme Court has not limited the right solely to worship. The Supreme Court has stated that the Free Exercise Clause "protects religious exercises, whether communicative or not," and "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022) (quotation marks and citations omitted).

21. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the appropriate legal standard is whether the specific regulation of firearms is consistent with the "Nation's historical tradition." As explained in *Bruen*: "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961)).

22. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No, not to my knowledge.

23. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No, not to my knowledge.

24. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. 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.

Response: No.

c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No, not to my knowledge.

d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No, not to my knowledge.

25. The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."

a. Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with the Open Society Foundations?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with the Open Society Foundations?

Response: No, not to my knowledge.

26. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No, not to my knowledge.

27. Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: On approximately February 4, 2021, I submitted a judicial questionnaire to Senator Schumer's Judicial Screening Committee. On March 31, 2021, I interviewed with the Committee. On December 20, 2021, I interviewed with Senator Schumer. On June 13, 2022, I interviewed with attorneys from the White House Counsel's Office. Since June 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate. On January 3, 2023, my nomination was returned to the President pursuant to Rule XXXI, Paragraph 6 of the United States Senate. On January 23, 2023, my nomination was resubmitted to the Senate.

28. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

29. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf?? If so, what was the nature of those discussions?

Response: No.

30. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

31. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

32. During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

33. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

Response: Please see my response to Question 27.

34. Please explain, with particularity, the process whereby you answered these questions.

Response: On February 1, 2023, the Department of Justice Office of Legal Policy (OLP) forwarded me the Senate Judiciary Committee's questions. I drafted responses to the questions, researching issues as necessary, and shared my draft responses with OLP, which provided limited feedback. I then finalize my responses, and forwarded them to OLP for submission to the Senate Judiciary Committee.

Senator Mike Lee
Questions for the Record
Orelia Merchant, Nominee to the United States District Court for the Eastern District of New York

1. **How would you describe your judicial philosophy?**

   Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case and controversy impartially and with an open mind, to faithfully apply Supreme Court and Second Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented.

2. **What sources would you consult when deciding a case that turned on the interpretation of a federal statute?**

   Response: If confirmed as a district court judge, in deciding a case that turned on interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends here. If the text is ambiguous, I would consult sources authorized by the Supreme Court and Second Circuit precedent. This includes cases from other jurisdictions, as well as recognized canons of statutory construction, and where appropriate, persuasive authority. Lastly, I would consider the legislative history identified by the Supreme Court and Second Circuit precedent as reliable.

3. **What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?**

   Response: If confirmed as a district court judge, in deciding a case that turned on the interpretation of a constitutional provision, I would faithfully apply binding Supreme Court and Second Circuit precedent. Assuming that the matter was one of first impression and no interpretive precedent existed, I would start with the text of the Constitution and would further be guided in the method of interpretation directed by Supreme Court and Second Circuit precedent.

4. **What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?**

   Response: If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent. The Supreme Court has repeatedly held that when interpreting constitutional provisions, the inquiry must start with the text of the Constitution. The Supreme Court has applied the original public meaning in various contexts, notably regarding the interpretation of the Second Amendment. *See, e.g., District of Columbia v. Heller, 554 U.S. 570* (2008).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question 2. In addition, the Second Circuit has stated that "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms." *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (cited with approval in *Springfield hospital, Inc. v. Guzman*, 28 F.4th 403, 422 (2d Cir. 2022)).

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court has held that the ordinary public meaning of a text at the time of enactment is a primary consideration in determining the plain meaning of that text. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

6. What are the constitutional requirements for standing?

Response: To establish Article III standing, "a plaintiff must demonstrate: (1) that he or she suffered an injury in fact that is concrete, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that under the Necessary and Proper Clause, Congress has implied powers to carry out its enumerated powers in the Constitution.

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: If confirmed as a district court judge, I would apply all relevant Supreme Court and Second Circuit precedent to evaluate whether Congress has legitimately exercised its authority to carry out an enumerated or implied power, including *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. In *Glucksberg*, the Supreme Court recognized that these rights include the right to marry, to have children, to direct the education and upbringing of one's children and to marital privacy, among others. *Id.*

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The substantive due process rights outlined in Question 9 do not reflect my personal beliefs and are instead those rights recognized by the Supreme Court. If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent.

In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court held that there is not a constitutional right to an abortion. If confirmed, I would follow controlling Supreme Court precedent. Additionally, *Lochner* was rejected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and was effectively overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer controlling Supreme Court precedent.

12. What are the limits on Congress's power under the Commerce Clause?

Response: In *United States v. Morrison*, 529 U.S. 598, 618-19 (2000), the Supreme Court held that Congress, under the Commerce Clause, may regulate the channels of interstate commerce, persons or things in interstate commerce, and those activities that substantially affect interstate commerce.

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: In determining whether a particular group qualifies as a "suspect class," the Supreme Court has looked to several factors, including whether the group shares "traditional indicia of suspectedness," such as "immutable characteristics determined solely by the accident of birth" or whether the group is "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 374 n.14

(1974). Race, religion, alienage, and national origin have been deemed suspect classes. *Id.*

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: Checks and balances and separation of powers are foundational to the structure of the Constitution. The Constitution sets forth the three branches of government: legislative (Article I), executive (Article II) and judicial (Article III). Each branch has different powers and authority. The Framers developed this structure so each branch checks and limits the power of the others to ensure no single branch of government is all powerful. *See Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that, in the long term, structural protections against abuse of power critical to preserving liberty. The solution to governmental power and its perils was simple: divide it." (quotation marks and citation omitted)); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." (quotation marks and citations omitted)).

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent and the text of the Constitution itself to the facts of the case to determine whether a branch of government has exceeded its authority.

16. What role should empathy play in a judge's consideration of a case?

Response: A judge's personal views should not play a role in resolving a case. If confirmed as a district court judge, I will faithfully and impartially apply the relevant law and applicable rules to the facts of every case that I consider.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both outcomes are equally undesirable.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I do not know, nor have I considered what accounts for this increase. If confirmed as a district court judge, I would faithfully apply binding Supreme Court precedent, and fairly and impartially apply the law to the facts of every case that I consider.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: Judicial review refers to the principle that the "province and duty of the judicial department" is to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Black's Law Dictionary defines "judicial supremacy" as the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials are duty bound to follow the Constitution and are required to follow judicial decisions regarding the Constitution's meaning. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958). As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on the matter in which elected officials should balance the obligations of their office. If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent and fairly and impartially apply the law to the facts if presented with a case raising this question.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: If confirmed as a district court judge, my limited role would be to faithfully apply the law to the facts of the cases before me, not to enforce the law or to create laws.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to

speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A district court judge must apply binding precedent from the Supreme Court and the relevant appellate court.

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: In fashioning an appropriate sentence, district court judges must consider the factors outlined in 18 U.S.C. § 3553(a), including the "history and characteristics of the defendant." *Id.* at § 3553(a)(1). However, a defendant's race, sex, national origin, creed, religion, and socio-economic status are not relevant factors in the determination of a sentence. U.S.S.G. § 5H1.10.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?.

Response: I am not familiar with this statement from the Biden Administration nor am I aware of the context in which it was given. The term "equity" as defined by the Black's Law Dictionary includes "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law." Black's Law Dictionary (11th ed. 2019).

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law," and it defines "equality" as "[t]he quality, state, or conditional of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Fourteenth Amendment's plain text provides in part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In interpreting the Fourteenth Amendment's Equal Protection Clause, I would be guided by the text as well as Supreme Court and Second Circuit precedent.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." The term "systemic racism" appears to have different meanings to different people. If confirmed, I would ensure that every person who appears before me is treated equally, regardless of their race.

28. How do you define "critical race theory?"

Response: I do not have a personal definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Please see my response to Questions 27 and 28.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Orelia Eleta Merchant, nominated to be United States District Judge for the Eastern District of New York

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. Is racial discrimination wrong?

Response: Yes, racial discrimination is generally unlawful under the Constitution and laws of the United States. Various federal statutes prohibit racial discrimination in a variety of contexts such as housing, employment, and voting. Classifications by race are subject to strict scrutiny and only permissible when narrowly tailored to achieve a compelling government interest. If confirmed as a district court judge, I would apply binding Supreme Court and Second Circuit precedent to determine whether alleged instances of racial discrimination violate the law.

2. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted). Under the Code of Conduct for United States Judges, as a judicial nominee, it would be inappropriate for me to comment on whether I believe there are other specific unenumerated rights, not yet articulated by the Supreme Court. If confirmed as a district court judge, I would apply *Glucksberg* and any binding Supreme Court and Second Circuit precedent as to unenumerated Constitutional rights.

3. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: My philosophy is the role of a federal district court judge is to fairly and impartially decide cases or controversies, based on the facts before the court, and the binding precedent of the Supreme Court and the Court of Appeals for the circuit in which the court sits. If confirmed as a district court judge, I would commit to approaching each case with an open mind, carefully consider the submissions and arguments of the parties, neutrally apply the law to the facts, faithfully apply all binding Supreme Court and Second Circuit precent, and issue reasoned decisions on the justiciable issues presented. Throughout my career, I have read opinions of the Supreme Court to understand their importance and application, but without regard to the author or that justice's particular judicial philosophy. As such, I lack sufficient knowledge of each philosophy of the justices referenced in the question to respond.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted . . . the

canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). I do not characterize myself with any particular label. If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent and reach decisions based on the facts of the particular case and the application of the relevant law.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019). This dictionary also defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Id.* I do not characterize myself with any particular label. The Article V amendment process is the only way to change the text of the Constitution. If confirmed, I would follow binding Supreme Court and Second Circuit precedent and reach decisions based on the facts of the particular case and the application of the relevant law.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent, and it is unlikely that a constitutional issue will come before me with no applicable precedent. However, to the extent that happened, I would look to the text and the Supreme Court guidance as to the method of interpreting the text, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision.

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: If confirmed as a district court judge, when interpreting a constitutional or statutory provision, I would first look to the text and be guided by the plain language of the text and binding Supreme Court and Circuit precedent in deciding any case or controversy that may come before me, including precedent on when the public's current understanding may be relevant. Generally, the public's current understanding of the Constitution or statute is not relevant when determining their meaning. For example, the Supreme Court has held that in the Second Amendment context, current understandings of the Constitution that are "inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (emphasis and internal quotation omitted).

However, there have been instances where the Supreme Court has determined that "contemporary community standards" should be used in evaluating certain constitutional questions such as under the First Amendment. *See Miller v. California*, 413 U.S. 15 (1973).

8. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: The Article V amendment process is the only way to change the text of the Constitution. The Supreme Court has set forth the approach to interpreting the Constitution. If confirmed as s district court judge, I would apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?

Response: The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: The holding in *Brown v. Board of Education* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would be bound by, and would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of Education* was correctly decided, as the holding of this case is well settled law, and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: The Bail Reform Act of 1984, 18 U.S.C. §§3141, *et seq*., provides for the rebuttable presumption in favor of pretrial detention for certain enumerated drug offenses carrying a sentence of ten years or more, certain crimes involving acts of terrorism, certain crimes of violence, and certain crimes involving minors. Specifically, 18 U.S.C. §3142 (f)(1) lists the offenses or criteria that create a presumption in favor of pre-trial detention.

a. What are the policy rationales underlying such a presumption?

Response: I am not aware of Supreme Court or Second Circuit precedent articulating the policy rationale for the rebuttable presumption discussed above. If confirmed as a district court judge, I would apply the statute as written, which states that where the presumption applies and subject to rebuttal, courts should presume that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3).

13. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Yes. There are many restrictions inherent in the Constitution on government power over private institutions. For example, the Supreme Court has repeatedly outlined the limitations on Congress's Commerce Clause powers as well as the First Amendment rights of private companies. The Supreme Court has also repeatedly held that state laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. Further, the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) both apply strict scrutiny to federal and certain state actions alleged to substantially burden the free exercise of religion, even if the laws are neutral and generally applicable. *See also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). Laws are not neutral and

generally applicable if they target religious conduct or demonstrate hostility to religion. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Laws are also not neutral and generally applicable when they treat comparable secular conduct more favorably than religious conduct. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

14. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: Generally, no. Laws prohibiting religious discrimination include the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, and the Religious Land use and Institutionalized Persons Act. To engage in action that might burden religion, the government must comply with the requirement of these and other relevant federal, state and local laws. Governmental action that is not "neutral" or "generally applicable" would be permissible only if it survived strict scrutiny. *See Kennedy v. Bremerton School Distric*t, 142 S. Ct. 2407, 2421-2422 (2022). Laws or policies accompanied by "official expression of hostility" will be set aside "without further inquiry." *Id.* at 2433 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)). Further, to survive strict scrutiny review, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993) (internal quotation marks and citations omitted). If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent to cases before me that involve claims of religious discrimination.

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court held that the plaintiffs were entitled to a preliminary injunction enjoining the enforcement of certain New York COVID-19 restrictions that imposed capacity limits on religious activities. The Court found that the applicants met the requirement for a preliminary injunction: likelihood of success on the merits, irreparable harm, and public interest. *Id.* First, with respect to likelihood of success on the merits, the Court found "[t]he applicants have made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Id.* at 66 (internal quotations omitted). This conclusion was based on statements "viewed as targeting" religion and because the regulations "single out houses of worship for

especially harsh treatment." *Id.* Second, the Court found irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (internal quotations omitted). Finally, the court concluded that "it has not been shown that granting the applications will harm the public." *Id.*

16. Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom.*

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted emergency relief, enjoining certain California restrictions on religious gatherings during the pandemic. The Supreme Court found that the state treated "comparable secular activity more favorable than religious exercise" and as such was not neutral and generally applicable, triggering strict scrutiny. *Id.* at 1296. The Court held plaintiffs were likely to succeed on the merits of their claim under the Free Exercise Clause; plaintiffs were irreparably harmed; the order was not narrowly tailored; and the state had not shown that the public interest would be harmed by the injunction. *Tandon*, 141 S. Ct. 1249, 1297.

17. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

18. Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's initiation of an enforcement action against a cake shop owner who declined for religious reasons to make a wedding cake for a same-sex couple violated the Free Exercise Clause of the First Amendment. Examining the evidentiary record, the Supreme Court found that the Commission demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id.* at 1729.

19. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

Response: Yes, if the beliefs are sincerely held. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *Frazee v. Illinois Department of Employment*, 489 U.S. 829, 834 (1989). The Supreme Court has held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." *Id.* Whether the First Amendment protects a religious belief does not "turn upon a judicial perception of the particular belief or practice in question" and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to other in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715.

a. Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?

Response: Please see response to Question 19.

b. Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?

Response: Please see response to Question 19.

c. Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?

Response: I am not familiar with the position of the Catholic Church.

20. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), Catholic school teachers sued their employers alleging employment discrimination. The Supreme Court held that the "ministerial exception" protects religious institutions from certain discrimination claims, and that such institutions are permitted to "decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (*quoting Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 186 (2012)). In determining whether a case falls under the ministerial exception, the Court's inquiry looked to the functions performed by the employee in question. The Court found that even though the teachers were not "ministers" the specific role of the teachers was "educating young people in their faith, inculcating its teachings, and training them to live their faith," which the Court concluded was central to the school's mission. *Our Lady of Guadalupe*, 140 S. Ct. at 2064. As such, the ministerial exemption barred the teachers' employment discrimination suits.

21. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court applied strict scrutiny to the city's policy excluding a Catholic organization from its foster care program on account of the organization's refusal to certify same-sex couples as foster parents. The Court found the policy was not neutral and generally

applicable in light of certain opportunities for exceptions to the policy, granted at the government's discretion. *Id.* at 1879. The Court held that the city's stated interests of maximizing the number of foster families, of protecting the city from liability, and in the equal treatment of foster parents and foster children were not compelling interests that justified burdening the agency's free exercise rights. *Id.* at 1881–82.

22. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court invalidated Maine's nonsectarian requirement for its tuition assistance program for private secondary schools. Plaintiffs claimed that the exclusion of religious schools from the program that offered tuition assistance to private secular schools burdened their free exercise of religion. The Court applied strict scrutiny because it concluded that the requirement conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court held that the program violated the Free Exercise Clause of the First Amendment because the "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998. Relying on *Espinoza v. Montana Department of Revenue*, the Court held that "[a] State need not subsidize private education, but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 1997 (internal citation and quotation omitted).

23. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the First Amendment by terminating a high school football coach who engaged in personal prayer on the field at the conclusion of games. The Supreme Court determined that the school district's restriction of the coach's private speech and religious expression violated the Free Exercise Clause and the Free Speech Clause. With respect to the coach's Free Exercise Claim, the Court explained that there was no dispute that the coach's desire to pray was sincere, and the school district's prohibition on prayer targeted his religious conduct, rather than applying a neutral rule. Accordingly, strict scrutiny applied, and the Court concluded that the school district's prohibition on the coach's religious conduct was not narrowly tailored to achieve a compelling purpose. The Court further rejected the school district's argument that the Establishment Clause compelled the school district's policy, and further clarified that courts should determine whether a law or practice violates the Establishment Clause by looking at history and the understanding of the drafters of the Constitution.

24. Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.

Response: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), concerned the enforcement of regulations requiring Amish homes to have septic systems to dispose of "gray water," and religious objections to the enforcement of those regulations by petitioners under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Amish alleged that the modern septic requirements burdened their religious exercise by requiring them to use technology prohibited by their religion. The lower court rejected petitioners'' claim that enforcement of the regulations would violate RLUIPA. The Supreme Court granted the petition for certiorari, vacated the decision of the lower court, and remanded for further consideration in light of its decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote separately to "highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Mast*, 141 S. Ct. at 2430. In Justice Gorsuch's view, RLUIPA was misapplied by Fillmore County and the lower courts as to the issue of whether an Amish community was subject to the County's septic system mandate. Calling for the "more precise" application of strict scrutiny articulated in *Fulton v. Philadelphia*, Justice Gorsuch reasoned that the County and the lower courts erred by treating the County's general interest in regulating sanitation as compelling without reference to the impact of the County's septic mandate on the specific Amish community at issue. Justice Gorsuch's concurrence also noted that the lower courts failed to consider exemptions granted to other groups but denied to the Amish here. As such, Justice Gorsuch suggests that the framework should focus on whether the County has a compelling interest in denying an exception to the Amish, not whether the County's general interest in sanitation is sufficiently compelling standing alone. Specifically, Justice Gorsuch noted that the government "must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id.* at 2433.

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: If confirmed, I would decide such a case based on the record before the court, faithfully and impartially applying binding Supreme Court and Second Circuit precedent as to the interpretation and application of 18 U.S.C. § 1507. As a judicial nominee, and consistent with the Code of Conduct for United States Judges, it would be inappropriate for me to comment further on an issue that could come become the subject of litigation.

26. Would it be appropriate for the court to provide its employees trainings which

include the following:

a. One race or sex is inherently superior to another race or sex;

Response: No.

b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;

Response: No.

c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or

Response: No.

d. Meritocracy or related values such as work ethic are racist or sexist?

Response: No.

27. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: Yes.

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

29. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on the political decisions or whether such decisions are constitutional. Article II, Section 2, Clause 2 of the Constitution vests the authority to make political appointments with the President of the United States, upon advice and consent of the Senate. If confirmed as a district court judge and a case concerning the constitutionality of a specific appointment came before me, I would faithfully apply binding Supreme Court and Second Circuit precedent.

30. Is the criminal justice system systemically racist?

Response: Whether certain policies or practices within the United States criminal justice system are systemically racist is a question for policymakers. If confirmed as a district court judge, I would commit to treat all litigants fairly and impartially, and in

any case before me asserting claims of racial discrimination, I would carefully evaluate the specific legal claim asserted and the evidence in the record, and faithfully and impartially apply the binding Supreme Court and the Second Circuit precedent to the facts of the case.

31. President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: Whether or not the Supreme Court should be expanded is a question for policymakers to consider. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent regardless of its size or any proposal to modify its size.

32. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

33. What do you understand to be the original public meaning of the Second Amendment?

Response: My understanding of the original public meaning of the Second Amendment is that articulated by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court concluded that the original public meaning of the Second Amendment also affords the right to keep and bear arms for self-defense outside the home.

34. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the appropriate legal standard is whether the specific regulation of firearms is consistent with the "Nation's historical tradition." As explained in *Bruen*: "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961)).

35. Is the ability to own a firearm a personal civil right?

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment confers "an individual right to keep and bear arms." *Id.* at 595. *See also McDonald v. City of Chicago*, 561 U.S. 742 (2010).

36. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

Response: No. In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "the constitutional right to bear arms in public for self-defense is not a second class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 2156 (quoting *McDonald v. City of Chicago*, 561 U.S. 742 (2010)) (internal quotation marks omitted.)

37. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: No.

38. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: Article II of the Constitution provides that the Executive Branch shall "take care the laws be faithfully executed." The Supreme Court has further observed the "absolute discretion" to make prosecution decisions vested in the Executive Branch. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a judicial nominee, it is inappropriate for me to comment on prosecutorial decisions of the executive. If confirmed as a district court judge and confronted with an issue about executive power and discretion, I would review and apply relevant binding Supreme Court and Second Circuit precedent.

39. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: I understand prosecutorial discretion to refer to the authority of a prosecuting agency to make decisions as to whether to proceed with criminal charges against a defendant, and what charges to proceed on, in an individual case. I am not aware of the definition of a "substantive administrative rule change" outside the Administrative Procedure Act (APA) context. Such a rule change would be subject to requirements imposed by applicable law, which in the Eastern District of New York would include binding Supreme Court and Second Circuit precedent, as well as statutory law including the APA.

40. Does the President have the authority to abolish the death penalty?

Response: Under 18 U.S.C. § 3591, a defendant found guilty of an offense eligible for the death penalty "shall be sentenced to death if, after consideration of the factors set forth in [the Act] in the course of a hearing held pursuant to [the Act], it is determined that imposition of a sentence of death is justified, except that no person may be sentenced

to death who was less than 18 years of age at the time of the offense." The President cannot unilaterally abolish the death penalty. However, Article II of the Constitution vests the President with the authority to "grant reprieves and pardons for offenses against the United States," including cases in which the death penalty was imposed.

41. Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS.*

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control lacked the authority to impose a nationwide moratorium on evictions to protect tenants from COVID-19, and to slow the spread of disease. Finding that petitioners were likely to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium.

42. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, research the applicable law, and apply any binding Supreme Court and Second Circuit precedent.

43. Would it be improper for a government attorney to publicly announce that a member of the community committed civil offenses without having done a shred of investigatory work about the case?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented and apply relevant Supreme Court and Second Circuit precedent.

44. Were you aware of New York Attorney General Letitia James' statement that her office was going to sue Donald Trump before even doing a day of investigation into his conduct?

Response: I am not familiar with the above purported statement or the context in which it was made.

a. Should you be confirmed, would this be appropriate conduct by a government attorney appearing in your court?

Response: As a judicial nominee, under the Code of Conduct for United States Judges,

it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, apply the relevant law, and follow binding Supreme Court and Second Circuit precedent.

45. Were you aware of New York Attorney General Letitia James' statement the day after her election where she stated, "Oh, we're going to definitely sue him. We're going to be a real pain in the ass. He's going to know my name personally."?

Response: I am not familiar with the above purported statement or the context in which it was made.

46. Were you aware that Attorney General James, prior to her election, accused then-President Trump of criminal offenses—specifically obstruction of justice, defrauding Americans, and money laundering—and called him an illegitimate president?

Response: I am not familiar with the above purported statement or the context in which it was made.

47. Were Attorney General James's comments prejudging President Trump proper?

Response: I am not familiar with the above purported statement or the context in which it was made. What I can commit to you and the American people, is that if confirmed as a district court judge, I would not prejudge any litigant who came before me.

48. Were Attorney General James's comments prejudging President Trump ethical?

Response: I am not familiar with the above purported statement or the context in which it was made. What I can commit to you and the American people, is that if confirmed as a district court judge, I would not prejudge any litigant who came before me.

49. If you are confirmed as a district judge, and you learned that a prosecutor that practices in front of you has publicly stated their intent to prosecute or sue a member of the community, before engaging in any investigation, would that concern you?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to opine on issues that may become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, apply the relevant law, and follow binding Supreme Court and Second Circuit precedent.

50. Do judges need to undergo implicit bias training?

Response: I am not aware of whether implicit bias training is provided to federal district court judges. If confirmed as district court judge, I would commit to adhering to the judicial oath and the Code of Conduct for United States Judges and treat all who come

before me fairly and impartially.

51. Are there instances where a judge should not honor the judicial code of conduct?

Response: I cannot think of an instance.

a. If so, can you please identify all instances?

Response: Please see response to Question 51.

b. What justifies a departure from the judicial code of conduct?

Response: Please see response to Question 51.

Senator Josh Hawley
Questions for the Record

Orelia Merchant
Nominee, U.S. District Court for the Eastern District of New York

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    Response: I have not studied Justice Jackson's sentencing practices during her time as a district judge. If confirmed as a judge, in any criminal case that came before me, including cases involving child pornography, I would carefully review the record, Supreme Court and Second Circuit precedent, and the factors set forth in 18 U.S.C. § 3553(a), including whether a given sentencing enhancement is appropriate, before imposing an individualized sentence. While the sentencing guidelines are not mandatory, district judges should first begin by calculating the applicable guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    Response: Please see my response to Question 1a.

    c. **The enhancement for offenses involving the use of a computer**

    Response: Please see my response to Question 1a.

    d. **The enhancements for the number of images involved**

    Response: Please see my response to Question 1a.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

Response: The appropriate penalties for federal criminal offenses are decisions that rest with Congress. If confirmed as a district court judge, I would faithfully apply the law as written to each case that comes before me.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my response to Question 2a.

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: Please see my response to Question 2a.

3. Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."

a. Do you agree with that philosophy?

Response: I am not familiar with the above referenced statement or the context in which it made. My philosophy is that a district court judge should approach each case impartially and with an open mind, faithfully apply Supreme Court and relevant court of appeals precedent, and decide each case based on the application of law to the facts presented, not based on personal beliefs or values. If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent and faithfully apply the law to each case that came before me.

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

Response: Please see my response to Question 3a. As a judicial nominee, it would be inappropriate for me to opine on whether any particular statement violated the judicial oath.

4. Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

5. What is the standard for each kind of abstention in the court to which you have been nominated?

Response: Generally, abstention doctrines refer to instances in which a federal court may or must refuse to hear a case within its jurisdiction in order to avoid authority of a state court. There are several potentially applicable abstention doctrines in the Second Circuit, including *Pullman*, *Younger*, *Colorado River*, *Burford*, *Rooker-Feldman*, *Thibodaux* and *Brillhart/Wilton*.

The *Pullman* abstention doctrine directs federal courts "not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). *See also R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498-501 (1941). The Second Circuit has established a three-part test for *Pullman* abstention to apply: "(1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)).

The *Younger* abstention doctrine "forbid[s] federal courts [from] stay[ing] or enjoin[ing] pending state court" criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 41 (1971). Based on *Younger* and its progeny, the Second Circuit has articulated the following three-factor test for determining when a federal court should abstain from exercising jurisdiction: "(1) there is an ongoing state criminal proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the constitutional claims." *Schlagler v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999).

The *Colorado River* abstention doctrine applies when a parallel action is filed in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). In deciding whether to abstain, the Second Circuit has directed courts to consider whether: (1) "the controversy involves a res over which one of the courts has assumed jurisdiction"; (2) "the federal forum is less inconvenient than the other for the parties"; (3) "staying or dismissing the federal action will avoid piecemeal litigation"; (4) "proceedings have advanced more in one forum than in the other"; (5) "federal law provides the rule of decision"; and (6) "the state procedures are adequate to protect the plaintiff's federal rights." *Woodford v. Cmty. Action Agency of Greene Cty., Inc.*, 239 F.3d 517, 522 (2d Cir. 2001).

The *Burford* abstention doctrine applies when "a federal court sitting in equity" is asked to "interfere with the proceedings or orders of state administrative agencies" and where "timely and adequate state-court review is available." *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (construing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). The Second Circuit has identified three factors to consider when determining whether to abstain under *Burford*. Those factors are: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009).

The *Rooker-Feldman* abstention doctrine "bars federal district courts from hearing cases that in effect are appeals from state court judgments, because the Supreme Court is the only federal court with jurisdiction over such cases." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021). *See also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v.Feldman*, 460 U.S. 462 (1983). The Second Circuit has established a four-part test for *Rooker-Feldman* abstention: "(1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state- court judgment must have been rendered before the district court proceedings commenced." *Dorce*, 2 F.4th at 101 (cleaned up).

Under *Thibodaux* abstention, a district court may abstain from "deciding questions of state law otherwise within [its] jurisdiction" "where a difficult question of state law of substantial import is present." *Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-29 (1959)).

Lastly, under *Brillhart/Wilton* abstention, a district court may "dismiss declaratory judgment actions where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 104 (2d Cir. 2012) (internal quotations omitted). There are five factors that a court must consider: (1) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (2) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (3) "whether the proposed remedy is being used merely for procedural fencing or a race to res judicata"; (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (5) "whether there is a better or more effective remedy." *Id.*

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

Response: I have not served as counsel of record in opposition to a party's religious liberty claims. However, in an abundance of caution, I note that in my role as Chief Deputy Attorney General for State Counsel, I provide overall supervision of the litigation bureaus that handle the defense and representation of the State of New York, its agencies and officials, in state and federal trial courts. In any particular case, including matters involving religious liberty claims, my involvement may include, but not be limited to, review of papers, strategy consultation, and general guidance as needed. I do not maintain a list of my involvement on cases or categories of cases or actions taken on particular case.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

Response: Please see my response to Question 6.

7. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: When interpreting the Constitution, I would follow Supreme Court and Second Circuit precedent on the role of original public meaning of a constitutional provision. For example, the Supreme Court has applied the original public meaning when considering the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). If confirmed as a district court judge, I would follow Supreme Court and Second Circuit precedent in making this determination.

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent in making this determination. Consistent with Supreme Court and Second Circuit precedent, I would only consider legislative history when there is no applicable, binding precedent and when the text of the statute at issue is ambiguous. *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language.") (quotation marks and citations omitted); *Lee v. Bankers Tr. Co.*, 166 F.2d 540, 544 (2d Cir. 1999) ("Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.").

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court has held that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has found that other forms of legislative history are less persuasive. *See, e.g., id.* ("We have eschewed reliance on the passing comments of one Member, . . . and casual statements from the floor debates.") (internal citations omitted); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *United States v. Craft*, 535 U.S. 274, 285 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks and citation omitted).

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: I am unaware of any Supreme Court or Second Circuit precedent that stands for the proposition that it is appropriate to consult the laws of foreign nations when interpreting the Constitution. If confirmed as a district court judge, I would only do so if directed to do so by the Supreme Court or Second Circuit.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The Supreme Court recently reiterated that a petitioner must: (1) demonstrate that the method of execution presents a "substantial risk of serious harm," including "severe pain over and above death itself"; and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]" the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015).

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes. Please see my response to Question 9.

11. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: No. The Supreme Court in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), held that the respondent had no right post-conviction to access DNA evidence the prosecution had. The Second Circuit has likewise held that there is "no freestanding substantive due process right to DNA evidence." *Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: The Supreme Court held 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 v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). "Government 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 (citing *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). *See also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "A law is not generally applicable if it invites the government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (internal quotations omitted). *See also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Free Exercise Clause also creates a "ministerial exception" to employment discrimination laws, prohibiting courts from adjudicating "employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent on this issue.

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Supreme Court has held "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). The court's inquiry in determining the sincerity of a religious belief is to evaluate whether the belief asserted reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citations and quotations omitted).

The Supreme Court held that an individual's sincerely held religious beliefs are protected even if there is "disagreement among sect members" about the belief. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). The Court also stated: "we reject the notion that, to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. *See also Welsh v. United States*, 398 U.S. 333, 339 (1970) ("[S]incere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion.").

The Supreme Court and Second Circuit employ a subjective test to determine whether a religious belief is sincerely held. *Ford v. McGinnis*, 352 F.2d 582, 589 (2d Cir. 2003) (citing *Frazee*, 489 U.S. at 834). In the Second Circuit, a court's "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Id.* at 589-90 (*quoting Jolly v. Coughlin*, 76 F.3d. 468, 476 (2d Cir. 1996). If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent.

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects the right of an individual to own a firearm for the purpose of self-defense within the home.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: In this statement and his dissent, Justice Holmes expresses that the Constitution "is not intended to embody a particular economic theory ...." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a judicial nominee, it is inappropriate for me to comment or opine on whether I agree with a comment made by another judge.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: *Lochner* was abrogated by the Supreme Court and is no longer controlling law. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent regarding the Due Process clauses of the Fifth and Fourteenth Amendment.

18. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

Response: I am not aware of any Supreme Court opinions that have not been formally overruled that are no longer good law.

a. If so, what are they?

Response: Please see my response to Question 18a.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with Judge Hand's statement or the context in which it was made. If confirmed as a district court judge and a case came before me concerning monopolies, I would decide the case based on a careful review of the record and the applicable Supreme Court and Second Circuit precedent. To my knowledge, *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), has not been explicitly overruled, and if confirmed as a district court judge, I would be bound to apply its holding.

The Second Circuit has more recently stated in *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc.*, 651 F.2d 122, 129 (2d Cir. 1983) that "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." The Second Circuit, relying on Supreme Court precedent, has cautioned that market share percentages alone are not conclusive of determining monopoly power. *Id.* (citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). Instead, market share must be considered along with "additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand." *Id.*

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my response to Question 19a.

c. **What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a umerical answer or appropriate legal citation.**

Response: Please see my response to Question 19a.

20. Please describe your understanding of the "federal common law."

Response: In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that there is "no federal common law." *Id.* at 78. However, the Supreme Court has recognized "limited areas" in which "federal common law" may apply. *See Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (identifying "admiralty disputes and certain controversies between States").

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: A federal court interpreting a state's constitution would apply the substantive law of the state in question, and decide questions of state law as the highest court of the state has defined the scope of the relevant right. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). When interpreting a state constitutional provision, I would defer to the "views of the state's highest court with respect to state law" as directed by the Supreme Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed as a district court judge, I would interpret federal law consistent with Supreme Court and Second Circuit precedent.

a. **Do you believe that identical texts should be interpreted identically?**

Response: Please see my response to Question 21.

b. **Do you believe that the federal provision provides a floor but that the state provision provides greater protections?**

Response: Please see my response to Question 21.

22. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of Education* was correctly decided, as the holding of this case is well settled law, and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

23. Do federal courts have the legal authority to issue nationwide injunctions?

Response: I know of no precedent from the Supreme Court or Second Circuit that precludes federal courts from issuing nationwide injunctions.

a. If so, what is the source of that authority?

Response: The authority to issue injunctions is found in Federal Rule of Civil Procedure 65 and the courts' equitable powers. The Second Circuit in *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020) concluded that there is "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions" and "that such injunctions may be an appropriate remedy in certain circumstances." The Court further instructed district courts not to issue a nationwide injunction when the same issue is being litigated in multiple courts across the country. *Id.* To date, the Supreme Court has not held that "nationwide injunctions" are *per se* impermissible. If confirmed as a district court judge, I would faithfully and impartially follow the Supreme Court and Second Circuit precedent with respect to the scope of injunctive.

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: Please see my response to Questions 23 and 23a.

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Questions 23 and 23a.

25. What is your understanding of the role of federalism in our constitutional system?

Response: Federalism is defined in Black's Law Dictionary as "the legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state government." Black's Law Dictionary (11th ed. 2019). Under our federal constitutional system, the federal government possesses enumerated powers while other powers are reserved to the states or the people. In this way, liberty is enhanced and a healthy balance of power is achieved. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.") (internal quotations and citations omitted)).

26. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Please see my response to Question 5.

27. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: As a judicial nominee, it would be inappropriate for me to comment or opine on any issue which potentially could come before me.

28. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: Substantive due process is a concept derived from the Fifth and Fourteenth Amendments that protects certain unenumerated fundamental rights from government interference, notwithstanding procedural protections. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court explained that any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. The Supreme Court has recognized unenumerated rights, including among others, the right to marry, *see Loving v. Virginia*, 388 U.S.1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent in addressing issues concerning the scope of rights secured by the Constitution.

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Burdens on the First Amendment's right to free exercise of religion generally must satisfy strict scrutiny. Please see my responses to Questions 13, 14, and 15.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Supreme Court has stated that free exercise "embraces" both a "freedom of conscience and worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my response to Questions 13, 14, and 15. As the Second Circuit stated in *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007), "Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'"

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Supreme Court has held that the Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). RFRA prohibits "substantially burden[ing] a person's exercise of religion even if the burden results for a rule of general applicability unless the government demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 705 (2014) (quotation marks omitted).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with this statement or the context in which it was made. However, I read this statement to suggest that a judge should set aside his or her personal views when deciding cases, regardless of the judge's personal views as to what the outcome should be.

31. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: No, not to the best of my recollection.

a. If yes, please provide appropriate citations.

Response: Not applicable.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

33. Do you believe America is a systemically racist country?

Response: The role of a federal district court judge is to fairly and impartially adjudicate specific legal claims on a cases-by case basis adhering to the rule of law and equal justice under the law. If confirmed as a district court judge, in any case before me where a party asserted a racial discrimination claim in violation of federal law, I would carefully evaluate the specific legal claim asserted and the evidence in the record based on the binding Supreme Court and Second Circuit precedent. In each case that comes before me, I would work hard to treat all litigants fairly and impartially.

34. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

35. How did you handle the situation?

Response: As an attorney, I am duty bound to zealously advocate for my client's position, without regard to my personal views, within the bounds of the law. I have taken that obligation seriously throughout my career.

36. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

37. Which of the Federalist Papers has most shaped your views of the law?

Response: No specific Federalist Paper has most shaped my views of the law. If confirmed as a district court judge, my view of the law would be shaped by binding Supreme Court and Second Circuit precedent, which I would apply faithfully and impartially.

38. Do you believe that an unborn child is a human being?

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court expressly reserved the question of fetal personhood. As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment or opine on this issue as this question could potentially come before me.

39. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: To the best of my recollection, approximately thirty years ago, I testified in court as a witness. I do not have a record of that testimony and it is not available online as far as I am aware.

40. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade*, 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

41. Do you currently hold any shares in the following companies:

a. Apple?

Response: No, I do not hold any individual shares.

b. Amazon?

Response: No, I do not hold any individual shares.

c. Google?

Response: No, I do not hold any individual shares.

d. Facebook?

Response: No, I do not hold any individual shares.

e. Twitter?

Response: No, I do not hold any individual shares.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: To the best of my recollection, I have not authored a brief that was filed in court without my name on the brief. Over the course of my career, I have proofread and/or suggested edits to briefs of my colleagues. In my role as Chief Deputy Attorney General for State Counsel, I provide overall supervision of seven statewide bureaus that handle representation of the State of New York, its agencies and officials in state and federal court on over 8,000 active matters. In this capacity, I routinely provide comments and/or suggested edits to briefs. The final work product ultimately belongs to the attorneys of record in a given matter, and I do not maintain a list of my involvement on cases or categories of cases or actions taken on particular case.

43. If so, please identify those cases with appropriate citation.

Response: Please see my response to Question 42.

44. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

45. If so, please describe the circumstances.

Response: Not applicable.

46. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: My understanding is that judicial nominees must answer all questions fully and truthfully to the best of their ability, consistent with their professional and ethical obligations.

Questions from Senator Thom Tillis
for Orelia Eleta Merchant
Nominee to be United States District Judge for the Eastern District of New York

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I do not consider judicial activism appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: The Code of Conduct for United States Judges requires judges to be impartial. It is both an expectation and a requirement.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No. A judge should fairly and impartially decide each case based on the facts and the applicable law.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes. A judge plays a significant, yet defined role in the justice system. The role of a judge is to faithfully interpret and impartially apply the relevant law to the facts of a case. Cases should be decided based on the facts and the law, not any personal views or desires of the judge or the public. Changes in the law and public policy are issues for the executive and legislative branches to consider.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

Response: If confirmed as a district court judge, I would follow all Second Circuit and Supreme Court binding precedent concerning Second Amendment rights, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: If confirmed as a district court judge, I would follow and apply Supreme Court and Second Circuit precedent on the Second Amendment, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: Qualified Immunity is a legal doctrine that "[P]rotects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the Supreme Court held that officers are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." If confirmed as a district court judge, I would faithfully follow all binding Supreme Court and Second Circuit precedent in any case involving a qualified immunity claim to determine if this standard has been met.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is inappropriate for me to comment or opine on Supreme Court or Second Circuit jurisprudence on this issue. Whether current qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question best left to policymakers to consider. If confirmed as a district court judge, I would faithfully and impartially apply all binding Second Circuit and Supreme Court precedent to any case involving a qualified immunity claim.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the

standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If confirmed as a district court judge, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, and would faithfully and impartially apply all applicable and binding precedent from the Supreme Court and Second Circuit, including *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); and *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), to the facts of the case before me.

13. **Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: The extent to which current patent law effectively incentivizes innovation is a question for policymakers to consider. If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent. As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If confirmed as a district court judge, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, and would faithfully and impartially apply all applicable and binding precedent from the Supreme Court and Second Circuit, including *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); and *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), to the facts of the case before me.

14. **Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.**

    a. **What experience do you have with copyright law?**

    Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving copyright law. If confirmed as a district court judge and a case were to come before me involving patent issues, I would carefully review the record and

the applicable law, and apply it so as to reach only the judiciable issues before the court.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving the Digital Millennium Copyright Act. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case involving the Digital Millennium Copyright Act.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving intermediary liability for online service providers. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case involving intermediary liability for online service providers.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving the intersection of free speech and intellectual property. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case involving the intersection of free speech and intellectual property.

15. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright**

Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If confirmed as a district court judge, when interpreting a statute, I would look to the statutory text, as the Supreme Court has directed. The text of the statute is the best evidence of congressional intent. If the text is unambiguous, the inquiry ends, and the legislative history would play no interpretive role. If the statutory text is ambiguous, I would next consult Supreme Court and Second Circuit precedent interpreting related or analogous statutory provisions, the canons of statutory construction, and persuasive authority from other courts addressing the same or similar issues. Finally, I would consider legislative history if necessary. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020); *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014).

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: If confirmed as a district court judge, I would review and apply binding Supreme Court and Second Circuit precedent regarding the appropriate level of deference to give an expert agency's analysis or advice, depending on the facts and circumstances of the case. *See e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to provide an opinion on a hypothetical issue that may come before me in the future. If confirmed as a district court judge, I would follow all binding Supreme Court precedent on copyright infringement issues,

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent. It is the role of policy makers to consider whether laws should be amended in light of contemporary conditions.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my response to Question 16a.

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: To the best of my knowledge, cases in the Eastern District of New York are randomly assigned to judges by the Clerk of the Court. *See* Local Rules of the Division of Business for the Eastern District of New York, Rule 2(b). Accordingly, the issue of "judge shopping" is not likely to be an issue in the Eastern District of New York. If confirmed as a district court judge, I would follow all binding Supreme Court and Second Circuit precedent regarding venue, as well as the rules of the United States District Courts and the local rules of the Eastern District of New York.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Please see my response to Question 17a.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No. If confirmed as a district court judge, I would not proactively take steps to attract any particular case or litigant.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Please see my response to Question 17c.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on an issue that could come before me.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on an issue that could come before me.

PRESIDENT
RAKIM BROOKS

CHAIR
PAULETTE MEYER

January 20, 2023

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee

Dear Chairman Durbin:

On behalf of the Alliance for Justice (AFJ), a national association representing over 150 public interest and civil rights organizations, I write to support the confirmation of Judge Charnelle Bjelkengren to the United States District Court for the Eastern District of Washington.

Throughout her career as a dedicated public servant, Judge Bjelkengren has worked extensively with state agencies and institutions, building a strong repertoire of administrative knowledge. She began her career as an Assistant Attorney General in the Washington State Office of the Attorney General in Spokane where she represented the Department of Licensing, the Employment Security Department, and the Department of Social and Health Services. From 2004 to 2013, Judge Bjelkengren was assigned to the Administrative Law Division and, as a judicial review coordinator in that division, she handled settlements, reviewed and edited briefs, and advised, mentored, and educated Assistant Attorney Generals across Washington state. As a result, she is deeply familiar with the issues impacting the Eastern District of Washington. After spending nearly fifteen years working as an attorney for the state, Judge Bjelkengren became an administrative law judge for the Washington State Office of Administrative Hearings in 2013.

Judge Bjelkengren's dedication to public service, her reputation as a skilled attorney, and her experience as an administrative law judge garnered her statewide recognition. As a result, when a vacancy opened on the Spokane County Superior Court, Governor Jay Inslee appointed her to the bench. This elevation made Judge Bjelkengren the first Black woman judge in Eastern Washington. Her experience presiding over hearings as both an administrative judge and a superior court judge makes her especially qualified for the federal bench, where her skills and knowledge regarding a wide range of legal subjects will serve her well.

Out of the courtroom, Judge Bjelkengren maintains close ties to her community in Washington. She is a member of the Washington State Superior Court Judges' Association where she serves on the Equality and Fairness Committee. Judge Bjelkengren is a member of the Spokane Chapter of the NAACP and a member of the Spokane Valley Kiwanis Club, which is a service organization founded to assist children in need.

Judge Bjelkengren has dedicated her legal career to public service as an Assistant Attorney General, an administrative law judge, and a superior court judge. She is a seasoned judge with experience in administrative, criminal, and civil matters and has deep ties to the Eastern District of Washington. Notably, if confirmed, Judge Bjelkengren would be the first woman of color to serve on the United States District Court for the Eastern District of Washington as well as the first Black woman to serve on a federal District Court in the state of Washington. For all of the reasons stated above, I urge you to confirm Judge Bjelkengren to the United States District Court for the Eastern District of Washington.

Sincerely,

Rakim H.D. Brooks

Rakim Brooks
President, Alliance for Justice

November 28, 2022

Senator Richard Durbin, Chairman
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

Senator Charles Grassley, Ranking Member
Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Re: *Support for Charnelle Bjelkengren as a United States District Court Judge*

Dear Chairman Durbin and Ranking Member Grassley:

I knew Charnelle Bjelkengren when she was an Assistant Attorney with the State of Washington assigned to the Spokane Division. The Division was responsible for nearly all legal matters in Eastern Washington. We had a case load of thousands spread out over 39 attorneys and a total staff of just over 110. Not only did I hire Charnelle, but I was also assigned to conduct the statewide Attorney General Academy for all new AAGs where Charnelle started her legal career. In all, I trained over 950 new hires over a three-day sequestered period in how to represent the State of Washington (boards, commissions, and agencies). It is easy to discover the diamonds in a group of 35 to 50 new hires. She was an outstanding participant, and I was lucky to have her in Spokane until I retired in 2009.

Her intellect is beyond reproach as is her honesty and work ethic. I recall her working her cases on weekends to keep up with her caseload which could be a daunting task. Just to be hired by the Office of the Attorney General meant that she needed to beat out hundreds of others. She always had a smile on her face and was well inculcated with her associate attorneys as well as her direct supervisor Maureen McGuire, me, and other professional staff. She had no hesitancy in contacting me for guidance or support when necessary. I found her to be an outstanding AAG and a delight to work with. Everyone loved her. Unfortunately, I have had little contact with her since retirement and living in Arizona part of the year, but others with whom I maintain contact also hold her in high regard.

Finally, the District Bench requires a person with wide litigation experience which Charnelle possess. I support her whole heartedly. Picking her for the bench should be an easy decision that will be widely respected. This is the kind of judicial officer that everyone will like with a warm personality and respect for all.

Laurence D. Briney
Senior Assistant Attorney General
Spokane Division Chief
Retired

TARI S. EITZEN
104 HOOHALE ST.
KIHEI, HI 96753

DECEMBER 4, 2022

Senator Richard Durbin
Senate Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington, DC 20510

Senator Charles Grassley, Ranking Member
Senate Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, DC 20510

Re: Support for Judge Charnelle Bjelkengren's Appointment to the Eastern District Of Washington Bench

Dear Chairman Durbin and Ranking Member Grassley,

I write this letter in my capacity as a retired member of the Spokane County Superior Court bench, in support of Judge Charnelle Bjelkengren's nomination to the United States District Court for the Eastern District of Washington. Judge Bjelkengren appeared before me numerous times when she was an attorney with the Washington State Office of the Attorney General. I have also had the opportunity to observe her in the Spokane legal community and the community at large over a period of years.

In all my interactions with Judge Bjelkengren I found her to be courteous, thoughtful, and possessed of high intelligence and a keen legal mind. In the courtroom she was always well-prepared, professional, and respectful to all participants, whether they be her client, or opposing counsel or party. As an attorney she enjoyed the highest of reputations, always met deadlines, and communicated effectively and efficiently with the Court and the Court's staff. She has a reputation for collegiality and a strong work ethic.

I believe her reputation among attorneys and the bench to be impeccable, and strongly encouraged Judge Bjelkengren to apply for appointment to the Spokane County Superior Court, believing she would make an outstanding judge. She has certainly lived up to that expectation. That bench has had a number of retirements in the past few years and Judge Bjelkengren, though a relatively new judge, has emerged as a thoughtful, measured leader.

Importantly, Judge Bjelkengren has a collaborative, patient and positive personality that lends itself to creating a collegial work atmosphere, and embodies the personality traits, ethics, and moral compass, as well as legal skills, that one hopes to find in a member of any bench. I wholeheartedly recommend Judge Bjelkengren for appointment to the District Court Bench in the Eastern District of Washington. This would be an appointment to be proud of and that would well serve the community and the country.

Sincerely,

Hon. Tari S. Eitzen, ret.
Spokane County Superior Court

Leitzen
104 Hoohale St
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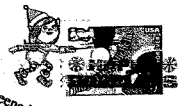

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Senator Richard Durbin
Senate Committee on the Judiciary
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Federal Bar Association -
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President
J. Stephen Roberts, Jr.

Vice President
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Second Year Trustee
Sawyer Margett

First Year Trustee
Bree Black Horse

January 20, 2023

Senator Richard J. Durbin, Chairman
Senate Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington, DC 20510

Senator Charles E. Grassley, Ranking Member
Senate Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, DC 20510

Re: Letter of Support for the Honorable Charnelle Bjelkengren as United States District Court Judge

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the Federal Bar Association of the Eastern District of Washington ("FBA-EDWA"), this letter supports Judge Charnelle Bjelkengren's appointment as District Court judge for the U.S. District Court for the Eastern District of Washington.

The FBA-EDWA is a nonprofit membership organization comprised primarily of enrolled licensed attorneys in the District. The FBA-EDWA Board of Directors has several primary functions, including acting as the main liaison between attorneys and the federal bench in the District, coordinating the District's civil legal aid pro bono program, administering donated funds for the District's Sobriety Treatment and Education Program, and hosting the annual District-wide conference. Various Board members also support the District and its bench in many other ways, not limited to assisting with the vetting and selection of magistrate and Article III judges.

We support Judge Bjelkengren's nomination to a District Court judgeship. Owing partly to her relatively recent appointment to the bench for Spokane County Superior Court in 2019, the majority of our Trustees do not have substantial experience practicing before Judge Bjelkengren. However, one of our Trustees, Asti Gallina of Riverside Law Group, recently tried a civil employment and partnership dissolution case before Judge Bjelkengren. We offer Ms. Gallina's impressions to aid this Committee in its analysis and endorse her impressions and recommendation.

As a former judicial law clerk to the Honorable Salvador Mendoza, Jr. (whose seat Judge Bjelkengren has been nominated to fill) and current practitioner in the Eastern District of Washington, Ms. Gallina is familiar with the rigorous demands required of a federal trial judge. In her experience practicing before Judge Bjelkengren, Ms. Gallina found her to be well prepared, diligent, thoughtful, and fair. Judge Bjelkengren capably ruled on numerous complicated issues, including a summary judgment motion presenting an issue of first impression regarding the construction and operation of Washington's partnership statute. Judge Bjelkengren thoroughly prepared for hearings and all other matters before her and carefully considered the arguments of both parties.

Equally important, Judge Bjelkengren displayed an exceptional judicial temperament. She treated counsel, the jurors, the witnesses and the parties with dignity and respect throughout the pre-trial proceedings and trial while maintaining control of the courtroom at all times. Judge Bjelkengren ensured that the parties had an opportunity to be heard and that they understood the rationale for her decisions.

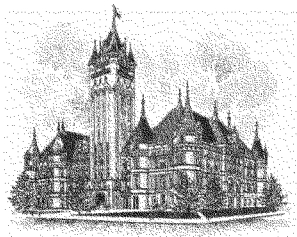
In sum, based on her experience trying a case before her, Ms. Gallina believes that Judge Bjelkengren's work ethic, legal savvy, and disposition will make her a fine addition to the judiciary for the United States District Court for the Eastern District of Washington. Accordingly, the FBA-EDWA supports Judge Bjelkengren's confirmation without reservation.

Should you have any further questions, please do not hesitate to contact either one of us below.

Respectfully,

J. Stephen Roberts, Jr.
President
FBA-EDWA, 2022-2023
Steve_Roberts@fd.org
509-624-7606

Asti M. Gallina
Ninth Circuit Lawyer Representative-EDWA, 2021-2024
amg@riverside-law.com
509-592-0108



SPOKANE COUNTY COURT HOUSE

SPOKANE COUNTY

TIMOTHY W. FITZGERALD
County Clerk
Clerk of the Superior Court

Senator Richard Durbin, Chairman
Senate Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington DC 20510

Senator Charles Grassley, Ranking Member
Senate Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, DC 20510

RE: Support for Superior Court Judge Charnelle Bjelkengren's Appointment to United States District Court Judge for the Eastern District of Washington.

Dear Chairman Durbin and Ranking Member Grassley,

I am honored to write this letter of support for the confirmation of Judge Charnelle Bjelkengren. In my capacity as the elected County Clerk and Clerk of the Superior Court of Spokane County I have immensely enjoyed working with Judge Bjelkengren. Although we serve in different branches of government, County Clerk is part of the local government executive branch, Judge Bjelkengren has always partnered with my office to ensure smooth and complete access to justice for the citizens of Spokane County. The legal system is comprehensive and intimidating. Judge Bjelkengren has repeatedly demonstrated respect, patience and fairness to all participants entering her courtroom.

Her knowledge of the Judicial process and steady temperament was essential in the trial courts. The trial court is the heartbeat of the legal system. It is in these courts where our true freedoms in the criminal justice system are protected. Jury trial, witnesses, due process, speedy and public trial, double jeopardy and right to counsel are fundamental constitutional rights that our trial court Judges uphold. Judge Bjelkengren takes this fundamental responsibility very seriously and she has established a solid reputation as a fair, knowledgeable, and impartial Judicial Officer. The simple fact that she is considered a trusted and fair judge by the public she serves is a testimonial to her qualifications for the Federal Bench.

In her capacity as a Superior Court Judge she handles felony level cases in eight different case types: criminal, civil, domestic (family law), guardianship/probate, adoption/paternity, civil commitment, dependency/truancy, and juvenile. Doing both jury trials and bench trials involving Pro Se (self-represented litigants) is a serious challenge. A challenge she efficiently and compassionately handles. Her

ability to rule on the law presented yet ensure the rights of the defendant and public safety concerns are equally addressed is the hallmark of a well prepared, thoughtful Judge.

From my position as the County Clerk running the day to day legal system, I get the pleasure to observe a truly ethical and dedicated Judicial Officer execute her oath of office and Judicial responsibilities with fairness and transparency. I fully endorse her confirmation to the U.S. District Court for the Eastern District of Washington.

Respectfully,

The Honorable Timothy W. Fitzgerald
Spokane County Clerk

Maureen McGuire
Attorney at Law
4126 S. Lloyd Rd
Spokane, WA 99223

November 28, 2022

Senator Dick Durbin
Chair, Committee on the Judiciary
Washington, D.C.

Senator Chuck Grassley
Ranking Member, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C.

Dear Chair Durbin and Ranking Member Grassley

It is my honor to submit this letter of support on behalf of Judge Charnelle Bjelkengren in support of her nomination for a federal judicial appointment to the United States District Court – Eastern District of Washington. I had the great privilege to work with and supervise Charnelle at the Washington State Attorney General's Office where she spent her formative years as an attorney and had a stellar 12-year career. As the former Spokane Interdivisional Section Chief for the Washington State Attorney General's Office (and now General Counsel for Gonzaga University), I supervised Charnelle from 2004 - 2009. During that time, she was the sole Assistant Attorney General in Spokane representing the Department of Licensing and Employment Security Division in multiple Eastern Washington counties as well as chief counsel for a state community college. It was a significant caseload which she handled with exceptional skill and competence.

Charnelle possesses keen intellectual ability, a strong work ethic and impeccable integrity. She rapidly attained expertise in the Licensing and Administrative Law Division resulting in her selection as the statewide judicial review coordinator. In this role she trained and mentored other Assistant Attorneys General statewide and was responsible for coordinating all unemployment benefits appeals and exercising quality control over appellate practice.

As her supervisor I had the opportunity to observe her work directly as well as conduct 360-degree evaluations of her performance that included feedback from clients, Judges, and colleagues. A highly respected attorney, she always received high praise and extremely positive feedback.

In addition to her strong legal skills, Charnelle possesses excellent interpersonal skills and is known for her kindness, compassion, and thoughtfulness. All of these attributes along with her positive attitude, strength of character, and fair mindedness contribute to her qualifications, enabling her to handle whatever issues may arise in her courtroom.

Based on her professional reputation, it came as no surprise in 2019 that Charnelle was appointed to the Spokane County Superior Court bench by Governor Jay Inslee. I had the honor of speaking at her investiture and would like to include here some of the words I shared because they hold true today:

. . . *I know she will do an outstanding job on the bench, just as she did at the Attorney General's Office, continuing to distinguish herself as a member of the Court. Her service as a Judge will be defined by her own standards of excellence and the same dedication to public service and kindness of heart that characterized her time at the Attorney General's Office.*

. . . *She will see to it that all persons who come before her are treated courteously, respectfully, and most importantly with fairness and justice. The decisions she renders will be grounded in the law and she will do what is necessary and right. I am confident she will serve the Court with great distinction and honor and that the best days of her legal career are yet to come.*

And Charnelle has lived up to those words. In her work as a Superior Court Judge, Charnelle quickly developed an excellent reputation and is known for her hard work, preparation, fairness, thoughtful decision-making and respectful treatment of all those involved in the legal process.

I give Charnelle my highest recommendation and am confident she will be an outstanding Federal judicial officer, given her strong record of success.

If you or any of your colleagues have any questions or would like additional information, I would be happy to follow up with you. Thank you for considering this letter.

Sincerely,

Maureen McGuire

Spokane, Washington

Phone: (509) 499-3904

Judge Kathleen M. O'Connor, retired
6219 West Shawnee Avenue
Spokane, WA 99208

December 2, 2022

Chair Dick Durbin
Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington, D.C. 20510

Ranking Member Chuck Grassley
Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, D.C. 20510

Re: Support for the appointment of Superior Court Judge Charnelle Bjelkengren to the Eastern District Of Washington Bench

Dear Chair Durbin and Ranking Member Grassley,

I write to support the appointment of Superior Court Judge Charnelle Bjelkengren to the position of United States District Court Judge for the Eastern District of Washington. I know you have received many letters attesting to Judge Bjelkengren's success in her previous employment as an Assistant Attorney General and Administrative Law Judge; her competence and ability to be a fair and impartial judge; and her work ethic as a Superior Court Judge on a very busy bench. I support those characterizations as well. However, as a retired trial court judge, I will focus on some other attributes of Judge Bjelkengren that I observed when she appeared in my courtroom.

A Federal District Court judge, like a Washington State Superior Court judge, is a trial court judge. These judges see a wide range of civil and criminal cases. Plaintiffs and defendants are as varied as you would expect in an area of mixed urban and agricultural and include several large Indian tribes as well. It is not uncommon for defendants to represent themselves (pro se) and Judge Bjelkengren had her share of these cases before me. She treated the defendants with respect and was not only civil to them, she did not "talk down" to them or emphasize her superior knowledge of the law. She was patient and did not object to a reasonable request a pro se defendant made while still representing her client to the best of her ability. Of course she ultimately prevailed in most of the cases but not by demeaning the defendant.

Judge Bjelkengren also brings diversity to the bench. I know how important it is for litigants to see a person on the bench who looks like them. When I was elected Superior Court judge in 1988 I was the first woman judge. Judge Bjelkengren was the first African-American judge appointed to the Spokane County Superior Court bench. Over time the Spokane County Superior Court bench changed for the better with more women and minorities bringing their views to judges meetings and working to implement new policies to improve court services in the community.

Judge Charnelle Bjelkengren is a part of that process. Please consent to her appointment, I am confident she has the qualifications and the qualities to make a difference as a Federal District Court judge.

Yours truly,

Superior Court Judge Kathleen M. O'Connor, retired

Michael C. Ormsby
5319 S. Pinebrook Court
Spokane, WA. 99206

January 31, 2023

The Honorable Dick Durbin
Chair, Judiciary Committee of the United States Senate

The Honorable Lindsey Graham
Ranking Member, Judiciary Committee of the United States Senate

Re: Charnell M. Bjelkengren Nomination
United States District Court, Eastern District of Washington

Dear Senators Durbin and Graham:

I am writing to you in support of the confirmation of Judge Charnell M. Bjelkengren to the District Court Bench in the Eastern District of Washington. As a former United States Attorney in this District (2010 to 2017) and as a practicing attorney in the District for the past forty one years, I feel that I have an idea of the nature and scope of this judgeship as well as its importance to those of us who live and practice in the District.

You and your colleagues have undoubtedly already received significant background and professional experience information about Judge Bjelkengren. I would like to focus on the importance of the work experience that she had prior to her service on the State Court Bench. In the State Attorney General's Office she practiced in a number of areas and the clients she worked with were in various locations here in Eastern Washington. The exposure to these practice areas is important, but so is the fact that she was in and is therefore familiar with other parts of the District. The Eastern District of Washington covers all of Eastern Washington, which is a very diverse area. It is largely rural with a broad economic base which includes agriculture and resource based industries. While there are some good sized cities, including Spokane, a large geographical area is rural and open space. The nature of the entire population in the District requires an exposure to and understanding of the nature of the District. This background knowledge of the District has been strengthened by Judge Bjelkengren's activities in the broad community and the local and state bar associations.

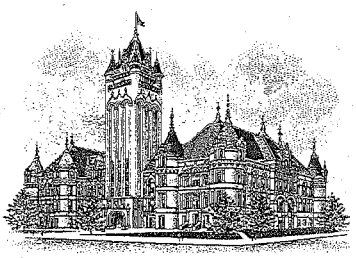
This District is blessed with a strong Bench. Judge Bjelkengren would continue this strength. In her service on the state court trial bench (Superior Court) she has presided to verdict on over 130 cases in the last three years. This is a significant workload and includes a wide range of cases. Judge Bjelkengren has developed the reputation of being able to analyze cases that present both factual and legal complexity very quickly.

She also comes to court prepared. I would respectfully urge that you and your colleagues favorably consider her confirmation to the District Court Bench.

Thank you for taking the time to read this letter and consider my perspective. Best wishes in your continued important work.

Respectfully;

Michael C. Ormsby
Former United States Attorney, Eastern District of Washington



Spokane County Court House

SUPERIOR COURT
FOR
SPOKANE COUNTY

January 19, 2023

Dear Members of the United States Senate Judiciary Committee,

The Spokane County Superior Court unanimously and enthusiastically submits this letter of support for our colleague, Judge Charnelle Bjelkengren, to fill the vacant judicial position at the United States Federal District Court Judge for the Eastern District of Washington state. We highly recommend that you confirm Judge Bjelkengren. We have worked closely with Judge Bjelkengren and know her work, character, and reputation. Based on our firsthand experiences, we collectively share firm confidence in Judge Bjelkengren's demonstrated abilities as an exceptionally well-qualified trial judge.

Simply put, Judge Bjelkengren has proven herself to be a very high-quality, hard-working, ethical, and incredibly competent trial judge who has served our local court system and community with distinction and without regard to partisanship.

Throughout her work history on our bench, Nominee Judge Bjelkengren has consistently demonstrated integrity, as well as skillful capacity for competence in complex and diverse legal matters. She proficiently and efficiently managed a high-volume workload while ensuring fundamental fairness and justice. Judge Bjelkengren exhibited appropriate judicial temperament. She is highly intelligent and follows the law without fear or favor. She consistently displayed an exceptional work ethic and embodied ethical behavior. Judge Bjelkengren's work showed a fundamental understanding of the nonpartisan role of the judicial branch. If confirmed by the Senate, the citizens and Federal Judicial institution will be very well served.

Judge Bjelkengren joined the Spokane County Superior Court bench in May 2019. She has since served as one of its twelve elected Judges. Before becoming a Superior Court Judge, the nominee served as an Administrative Law Judge based in Eastern Washington. Judge Bjelkengren's exceptional reputation working in that capacity paved the way for her gubernatorial appointment to Superior Court, which is the highest trial court level within the State. As a court of general jurisdiction, Spokane Superior Court handles diverse cases in a varied areas of law with an exceptionally high volume of case assignments. While working as a Superior Court judge, Nominee Judge Bjelkengren has demonstrated an ability to quickly master various areas of complex law. She frequently and regularly served as a trial judge in numerous criminal and civil trials. Judge Bjelkengren has been tasked with high-volume docket assignments. She has competently handled all her work assignments, which included to name some illustrative case types: felony criminal jury and bench trials, motions, pleas, sentencings; complex civil jury trials and motions, which frequently involved significant amounts in controversy; numerous family law trials and motions;

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Spokane, Washington 99260-0350
TEL: (509) 477-5790 FAX: (509) 477-5714

guardianships; probate matters (e.g., wills and trusts); juvenile law; unlawful detainer bench trials (e.g., landlord/tenant disputes); dependency cases; adoptions; and domestic violence protection hearings. In addition, Judge Bjelkengren's judicial duties have included presiding in an appellate capacity for decisions from lower trial courts and state administrative agencies.

As she carried out her judicial duties and civic work related to the court system, Judge Bjelkengren quickly earned her well-deserved community-wide reputation for fairness, legal competence, and leadership. Judge Bjelkengren is dedicated to upholding the law, and committed to protecting and maintaining the integrity of the judicial institution while understanding and adhering to its nonpartisan, constitutionally prescribed role. Judge Bjelkengren enjoys an excellent reputation in Eastern Washington. She is respected by its legal community, including both prosecution and the criminal defense bar, as well as the civil bar, law enforcement, and the community at large.

Judge Bjelkengren has practical leadership skills and abilities. In addition to her consistent successes in managing her voluminous and complex court-work assignments, Judge Bjelkengren has also excelled in carrying out the administrative responsibilities of the Superior Court. She has worked collaboratively and effectively alongside her judicial colleagues to help to improve and manage our local justice system. Whenever a judicial colleague requests assistance, Judge Bjelkengren readily volunteers to assist her coworkers, including taking on additional work from other judicial departments. Judge Bjelkengren also frequently volunteered and currently serves on multiple committees related to our State Superior Court Judge's Association (SCJA) and local county bar. In short, Judge Bjelkengren is known and respected as a leader within Eastern Washington's community.

This letter represents the unanimous support from every judicial colleague working on the same bench as Nominee Judge Bjelkengren. We are confident that she will serve the people of the United States as an excellent Federal District Court Judge. We respectfully urge the United States Senate to confirm her nomination. We thank the members of the United States Senate Judiciary Committee for considering this letter of support and for your public service to this great nation.

Respectfully submitted,

All Judges of the Spokane County Superior Court

1116 West Broadway Avenue
Spokane, Washington 99210-0350
TEL: (509) 477-5790 FAX: (509) 477-5714

Judge Annette S. Plese
Superior Court Judge

Judge John O. Cooney
Superior Court Judge

Judge Raymond F. Clary
Superior Court Judge

Judge Michelle D. Szambelan
Superior Court Judge

Judge Julie McKay
Superior Court Judge

Judge Rachelle Anderson
Superior Court Judge

Judge Michael P. Price
Superior Court Judge

Judge Tony D. Hazel
Superior Court Judge

Judge Jacquelyn High-Edward
Superior Court Judge

Judge Maria Polin
Superior Court Judge

Judge Timothy B. Fennessy
Superior Court Judge

1116 West Broadway Avenue
Spokane, Washington 99210-0350
TEL: (509) 477-5790 FAX: (509) 477-5714

Christopher J. Thomas
Div. Ch. Administrative Law Judge (Retired)
3942 North 19th Street
Coeur d'Alene, ID 83815
208) 292-8598
CJT.13@me.com

November 21, 2022

Chair Dick Durbin
Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington, D.C., 20510

Ranking Member Chuck Grassley
Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, D.C., 20510

Re: Letter in Support of Judge Charnelle Bjelkengren's Appointment To the U.S. District Court for The Eastern District of Washington

Dear Chair Durbin and Ranking Member Grassley,

I write in my personal capacity to wholeheartedly support Judge Charnelle Bjelkengren for the position of United States District Court Judge for the Eastern District of Washington. Before retiring from the Washington State Office of Administrative Hearings as Division Chief Administrative Law Judge, I was privileged to interview, hire, supervise and work alongside Judge Bjelkengren during her tenure as Administrative Law Judge and subsequently as Senior Administrative Law Judge.

I've had many opportunities to observe Judge Bjelkengren's hearings and how she interacted with others. She always demonstrated the highest level of professionalism. Judge Bjelkengren has conducted thousands of hearings covering an array of legal issues. She has a command of the law. Her written orders were thoughtful, timely and well-crafted. When dealing with complex legal matters and emotionally charged hearing participants, Judge Bjelkengren showed the highest level of respect for those appearing before her and for the legal process. She was prepared. She was fair minded and impartial. By all measures, she was a standard-bearer with a truly gifted legal mind.

Judge Bjelkengren collaborated effectively with her coworkers and with state and federal agencies. Her intelligence, keen insights and willingness to put in countless hours to solve problems, to come up with innovative solutions underscore her genuine dedication to public service.

Judge Bjelkengren holds herself to the highest ethical standards. Her compass never deviated from true North. In her role as a Senior Administrative Law Judge, she enjoyed the respect and admiration from the judges she supervised, and from staff. Judge Bjelkengren proved that that she was caring, thoughtful, trustworthy and empathetic. Indeed, it is an honor to know Judge Bjelkengren and to have been her supervisor.

I believe that Judge Bjelkengren's even temperament and considerable legal skills will prove to be an indispensable asset to the judiciary. In addition, she has shown herself to be committed to the communities that she has lived and practiced in. She was active in various associations, educational forums, speaking/teaching in schools sharing her knowledge of and love for the law while encouraging others to consider legal-related careers.

With this letter, I enthusiastically recommend Judge Bjelkengren's appointment to the District Court Bench in the Eastern District of Washington. If you, or your colleagues, have any questions or would like additional information, I would be happy to talk with you. Thank you for considering this information.

Respectfully,

Christopher J. Thomas

December 4, 2022

Senator Richard Durbin, Chair
Senate Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington, DC 20510

Senator Charles Grassley, Ranking Member
Senate Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington, DC 20510

RE: Confirmation of Charnelle Bjelkengren as a District Judge for the Eastern District of Washington

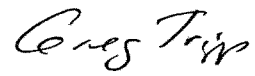
I am writing to enthusiastically support the confirmation of Charnelle Bjelkengren as a District Judge for the Eastern District of Washington. My experience with her may be a unique one. After 22 years as an attorney and another 20 years as a Spokane County District Court Judge I retired and applied for a part time position as an Administrative Law Judge with the Washington Office of Administrative Hearings.

As an Administrative Law Judge the nominee interviewed, hired, trained and supervised me. The cases I adjudicated were appeals from denial of unemployment benefits. This can be a surprisingly complex area of the law. My training involved observing her hold hearings, her observing me hold hearings and critiquing my findings and decisions. I enjoyed working with and for her.

I found her to be smart, hardworking, knowledgeable and thorough. She was courteous and able to communicate with claimants who were mostly unrepresented. She was objective, thoughtful, fair, and followed the law. Her pleasant personality and collegiality lends itself well to being a judge.

In my experience as a lawyer and later as a judge hearing many cases I can say that she is outstanding as a person and as a judge. Apparently our Governor also came to the same conclusion as he appointed her to the Spokane County Superior Court. Litigants will have the same confidence in her.

Very truly yours,



Gregory J. Tripp
P.O. Box 8668
Spokane, Washington 99203
(509) 838-8850
gregory.tripp@earthlink.net

4712 E. 36th Ct.
Spokane, WA 99223

December 9, 2022

Chair Dick Durbin
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C.

Ranking Member Chuck Grassley
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C.

Dear Chair Durbin and Ranking Member Grassley,

I write in my personal capacity to endorse Charnelle Bjelkengren for the position of United States District Court Judge for the Eastern District of Washington. I worked with Charnelle when she served as an Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), where I also serve as an Administrative Law Judge.

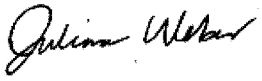
While at OAH, Charnelle worked as a line Judge on multiple caseloads, primarily on the Unemployment Insurance caseload. Charnelle exemplified excellent judicial demeanor in all of her hearings and always produced a well-written, and legally sound orders in each case. Given Charnelle's background at the Washington State Court of Appeals, she has excellent legal research and writing skills, which she utilized not only in her own cases, but in mentoring and training many ALJs during her tenure at OAH. Charnelle quickly worked her way up to a leadership role as a Senior ALJ, where she supervised a number of ALJs. Charnelle was my supervisor for a time, and she always led with strength, compassion and knowledge. I always knew that she had an open-door policy and that when I went to her for guidance on cases she had the answer or she knew just how to find the answer. Charnelle also took the lead in many OAH workgroups and committees, while supervising and maintaining her own caseload. She worked with ALJs, management and various stakeholders across Washington State to ensure the quality of our hearings, our written work product and to ensure that OAH was always providing the best service to the citizens of Washington.

I have also had some opportunity to observe Charnelle in her work since she left OAH for the Washington Superior Court Bench. She has an excellent reputation with her peers, the

lawyers that appear before her and the public as a hardworking and fair-minded member of the judiciary.

I strongly recommend Charnelle for the appointment to the District Court Bench in the Eastern District of Washington. If you, any of your colleagues, or your staff have any questions or would like additional information, I would be happy to talk with you further. Thank you for considering this information.

Very Truly Yours,



Juliana K. Weber
Phone: (509) 720-6824

SPOKANE COUNTY BAR ASSOCIATION

1116 W Broadway Ave,
4th Floor Annex
Spokane, WA 99260
Service@SpokaneBar.org

January 20, 2023

Senator Richard Durbin, Chairman
Senate Committee on the Judiciary
Hart Senate Office Building, SH-711
Washington DC 20510

Senator Charles Grassley, Ranking Member
Senate Committee on the Judiciary
Hart Senate Office Building, SH-135
Washington DC 20510

Re: Support for Judge Charnelle Bjelkengren's Appointment to the Eastern District of Washington Bench

Dear Chairman Durbin and Ranking Member Grassley,

We write this letter in our personal capacities in support of Judge Charnelle Bjelkengren's Appointment to the United States District Court for the Eastern District of Washington. Our recommendation is that Judge Bjelkengren be confirmed is without qualification; she will be a fantastic Article III judge.

We are the President and the Young Lawyers President of the Spokane County Bar Association. The Spokane County Bar Association is a local bar association for attorneys practicing in Spokane County. Spokane is the largest city and County in the Eastern District of Washington. We have over 900 members throughout Spokane and the surrounding counties. This board is also tasked with governing the Spokane County Volunteer Lawyers Program, which serves the community through pro bono legal services.

In her time serving on the bench in Spokane County Superior Court, Judge Bjelkengren quickly earned a reputation of respect for the judicial process and the ability to be respectful to counsel and litigants and to treat participants with dignity and fairness. She volunteered her free time to sit on our local Standing Advisory Committee for our Volunteer Lawyer Committee, the strategic team dedicated to ensuring that the Spokane Volunteer Lawyers program runs smoothly and maintains its reputation and funding. She was also an active member in the SCBA's Diversity Section, and instrumental in bringing Spokane County's Systemic Racism Continuing Learning Education Seminar into being, a program that the Washington State Bar Association used as a springboard to further equality education in our state. Judge Bjelkengren has demonstrated exemplary care and compassion for the community and for the judicial process.

We have both practiced before Judge Bjelkengren and we are both impressed with her ability to learn new areas of law quickly and give reasoned and well thought decisions. When we presented this letter to members of the Spokane County Bar Association Board of Trustees for submission, one of the board members joked "If we don't recommend her, can we have her back in the Superior Court?" This statement, while intended as a joke, speaks volumes about the

SPOKANE COUNTY BAR ASSOCIATION

1116 W Broadway Ave,
4th Floor Annex
Spokane, WA 99260
Service@SpokaneBar.org

reputation Judge Bjelkengren has in our community. We are excited to see her move on to a career better suited to her abilities, but sad to see her go as an exceptionally well qualified judicial officer. The Eastern District of Washington will be blessed to have her.

In short, Judge Bjelkengren displays the qualities that we hope for in a judicial officer in the Eastern District of Washington. Ms. Puryear and I are delighted to be able to support Judge Bjelkengren's confirmation.

Sincerely,

Kenneth Zigler, President of the Spokane County Bar Association
(Go Zags!)

Joanna Puryear
Joanna Puryear (Jan 20, 2023 13:36 PST)

Joanna Puryear, President of Young Lawyers Section of Spokane County Bar Association
(Go Cougs!)

Evansville Police Department

15 N.W. Martin Luther King, Jr. Blvd.
Evansville, Indiana 47708
TX 812-436-7896 • TDD 812-436-7975 • FAX 812-435-6175 • E-MAIL info@evansvillepolice.com

Billy Bolin
Chief of Police

January 12, 2023

The Honorable Richard J. Durbin
Chair, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Graham:

I am writing this letter of support for Judge Matthew Brookman's nomination to the U.S. District Court for the Southern District of Indiana. I'm in my 12th year as the Chief of Police for the Evansville, IN Police Department (27 years as an officer). I have known Judge Brookman from his time serving as an Assistant United States Attorney for the Southern District of Indiana.

When the Evansville Police Department started the Southwestern Indiana Law Enforcement Academy in 2005, then Assistant United States Attorney Brookman created the legal curriculum for the academy and continued as our legal advisor through 2011. He was also very well regarded by our officers who served on Federal Task Forces.

In 2016, Matthew Brookman was appointed United States Magistrate Judge for the Southern District of Indiana. His reputation within our office and department remains very strong. He is known as an honest man who isn't afraid to give his opinion in mediation hearings. It isn't uncommon for him to tell our chain of command when he sees issues with how we handled something, but he does so in a manner that isn't condescending or overbearing.

When I learned Judge Brookman was being nominated for this appointment, my first thought was there isn't a better person for the job. It is my honor to write this nomination letter for a person I know to be both highly qualified and well respected within the law enforcement community. I would ask the committee to support this nomination of Judge Brookman to the U.S. District Court.

Respectfully,
Billy Bolin
Chief of Police, Evansville, Indiana

FOH&L LLP
Foster • O'Daniel Hambidge & Lynch
ATTORNEYS AT LAW

Mark A. Foster
Conor O'Daniel
Timothy J. Hambidge
Shaunda Lynch

Barbara Alvey, *Paralegal*
Patti Thompson, *Legal Assistant*
Stephanie Stucki, *Legal Assistant*
Baylee Townsend, *Legal Assistant*

January 24, 2023

The Honorable Richard J. Durbin, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Nomination of Honorable Matthew P. Brookman

To Whom it May Concern,

We are writing this letter in support of the Honorable Matthew P. Brookman who is nominated for the position of United States District Judge for the Southern District of Indiana. We have all been CJA panel attorneys for several years and have practiced with Mr. Brookman. We have tried cases against him when he was an assistant United States Attorney and have appeared before him in his current position as Magistrate Judge.

We can say without hesitation that Mr. Brookman would make an excellent United States District Court Judge. When he was an Assistant United States Attorney, he was always honest and fair. As Magistrate Judge, he is impartial and considers all arguments from both sides prior to making any decision.

Again, we wholeheartedly support Mr. Brookman's nomination as Unites States District Judge for the Southern District of Indiana.

Sincerely,

FOSTER, O'DANIEL, HAMBIDGE & LYNCH

Mark A. Foster, Partner

Conor O'Daniel, Partner

Shaunda Lynch, Partner

MAF/mr

FOH&L LLP
Foster • O'Daniel Hambidge & Lynch
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January 24, 2023

The Honorable Lindsey O. Graham, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Nomination of Honorable Matthew P. Brookman

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We are writing this letter in support of the Honorable Matthew P. Brookman who is nominated for the position of United States District Judge for the Southern District of Indiana. We have all been CJA panel attorneys for several years and have practiced with Mr. Brookman. We have tried cases against him when he was an assistant United States Attorney and have appeared before him in his current position as Magistrate Judge.

We can say without hesitation that Mr. Brookman would make an excellent United States District Court Judge. When he was an Assistant United States Attorney, he was always honest and fair. As Magistrate Judge, he is impartial and considers all arguments from both sides prior to making any decision.

Again, we wholeheartedly support Mr. Brookman's nomination as Unites States District Judge for the Southern District of Indiana.

Sincerely,

FOSTER, O'DANIEL, HAMBIDGE & LYNCH

Mark A. Foster, Partner

Conor O'Daniel, Partner

Shaunda Lynch, Partner

MAF/mr

January 13, 2023

The Honorable Richard J. Durbin
Chair, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of the Hon. Matthew P. Brookman to the U.S. District Court

Dear Senator Durbin and Senator Graham:

The Evansville Bar Association was founded in 1911 with the purpose of furthering the study and development of law as a science, the elevation and the standing and dignity of the profession, and the establishment of a law library. We currently have over 550 attorney and paralegal members. We have a distinguished Board of Directors and are fortunate to call Magistrate Matthew Brookman a Board Member. I write this letter to submit the Bar Association's strong support of his nomination and confirmation for Article III status in the Southern District of Indiana, Evansville Division.

Judge Brookman's reputation as an Assistant United States Attorney for the Department of Justice, and his reputation as a Magistrate operating out of Evansville and Indianapolis is beyond reproach. He is the past Chief of the Drug and Violent Crime Unit for the United States Attorney's Office in the Southern District of Indiana. He is always well prepared, fair, and extremely knowledgeable in his practice. I speak for all attorneys who appear before him in telling you that we have been treated fair and received well-reasoned judgments from him. On a personal level, my clients have always felt they were treated in a fair and equitable fashion and, frankly, that justice was done.

Judge Brookman has a fantastic reputation off the bench. He is actively engaged in the leadership of the legal community in the Evansville area and also is involved with many organizations outside the legal community. He is looked at as a respected leader in the Bar Association but at the same time an approachable colleague who has a surprisingly openness to

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EVANSVILLE BAR ASSOCIATION

volunteer when the time comes. He served as an adjunct professor at the University of Evansville and has taught at the University of Southern Indiana. He also taught at the United States Department of Justice National Advocacy Center and the Southwest Indiana Law Enforcement Academy.

The Evansville Bar Association strongly and with much pride, supports Judge Brookman's nomination to the Southern District of Indiana, Evansville Division. We collectively believe that he will continue to serve our legal community and country in the highest regard.

Sincerely,

Joseph H. Langerak, IV
2023 President, Evansville Bar Association

January 20, 2023

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: Nomination of Matthew Brookman for the United States District Court for the Southern District of Indiana

Dear Chairman Durbin and Ranking Member Graham:

We are former United States Attorneys for the Southern District of Indiana. We have been appointed by Presidents from both political parties and have had extensive experience in the federal criminal and civil justice system. We come together to wholeheartedly support the confirmation of Matthew Brookman to the United States District Court for the Southern District of Indiana.

We believe that Magistrate Judge Matthew Brookman is extremely well suited and prepared to fill the vacancy that will occur when Judge Richard L. Young assumes senior status. Judge Brookman has earned an excellent reputation serving as Magistrate Judge for the Southern District of Indiana since 2016. He has handled complex matters as well as matters in the ordinary course of criminal and civil litigation. He has been a tremendous asset to the talented bench in the Southern District of Indiana due to his work ethic, his demeanor, his reputation for fairness and objectivity and his willingness to take on challenging tasks.

Our knowledge of Judge Brookman stems from his many years of experience as an Assistant United States Attorney for the Southern District of Indiana from 2002 to 2016. Judge Brookman graduated in 1990 from DePauw University in Greencastle, Indiana. He obtained his law degree from the Washington University School of Law in May 1993. After spending the early part of his career in private practice and with the Office of the Prosecuting Attorney of Jefferson County, Missouri, Judge Brookman joined the Office of the United States Attorney for the Western District of Missouri in 1999 as a Special Assistant United States Attorney (SAUSA). Judge Brookman's work as a SAUSA in the Western District of helped him secure the coveted position as an Assistant United States Attorney (AUSA) for the Southern District of Indiana. Judge Brookman was hired as a SAUSA by the Western District of Missouri during the Clinton Administration, by the Southern District of Indiana as an AUSA during the Bush administration and remained in the United States Attorney's Office throughout the entirety of the Obama administration. While in the Southern District of Indiana, Judge Brookman practiced as an AUSA in the Criminal Division beginning in 2002 and led the United States Attorney's Office Drug and Violent Crime Unit as Chief and the Evansville, Indiana Branch of the United States Attorney's Office as Branch Manager from 2011 until he assumed the bench in 2016.

Judge Brookman was extremely well liked by his colleagues in the United States Attorney's Office and was well respected by the judges before whom he appeared. His work ethic, amiable personality, and dedication to the rule of law and justice were greatly admired. His career led him from a general drug and violent crime caseload to a more specialized organized crime portfolio and included management of lawyers and support staff. We believe that his background and experience in the courtroom, working with federal agencies, lawyers and support staff will prove invaluable to the district court bench.

Judge Brookman leads with compassion and a sincere belief in the rule of law. These qualities were recognized in 2010 when Judge Brookman received the Director's Award from United States Attorney General Eric Holder for superior performance as an Assistant United States Attorney, for his work on the United States v. Jarvis Brown, et al. case, a quadruple homicide prosecution.

The qualifications that Judge Brookman has exhibited throughout his legal career will greatly benefit the Court. Those qualifications include his tremendous work ethic; his commitment to the rule of law and justice; his focus on ethics and integrity; his varied background as an attorney and judge; and finally his kind and caring demeanor for all. Based upon all that we have shared, we strongly urge the confirmation of Matthew Brookman to the United States District Court for the Southern District of Indiana.

Sincerely,

Joshua J. Minkler
United States Attorney for the Southern District of Indiana (2015-2020)

Joseph H. Hogsett
United States Attorney for the Southern District of Indiana (2010-2014)
Mayor of Indianapolis (2016 to present)

Susan W. Brooks
United States Attorney for the Southern District of Indiana. (2001-2007)
Former Member of United States House of Representatives (2013-2021)

Ricardo Solano Jr.
President

Victor A. Afanador
President-Elect

Susan M. Leming
First Vice President

Rebekah Conroy
Second Vice President

Anthony J. DiMarino, III
Secretary

Amy Walker Wagner
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January 12, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nominations of Michael Farbiarz and Judge Robert Kirsch to the United States District Court of the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

I write on behalf of the Association of the Federal Bar of New Jersey ("AFBNJ")[1] in unwavering support of the nominations of Michael Farbiarz and the Honorable Robert Kirsch to the United States District Court for the District of New Jersey.

Both Mr. Farbiarz and Judge Kirsch are extremely qualified to serve as United States District Court judges. Each has superb intellectual ability, impeccable integrity, extensive experience in public service, the appropriate temperament for a member of the judiciary, and unquestionable work ethic. The Association is confident that each nominee will serve the citizens of New Jersey well.

Accordingly, we strongly urge their confirmation in the upcoming Senate Judiciary Committee hearings. Thank you in advance for your attention to this important issue.

Sincerely,

Ricardo Solano Jr.
President

cc: Honorable Cory A. Booker
Honorable Robert Menendez

[1] Established in 1789, the District of New Jersey is the oldest and largest undivided district court in the nation. For the past 50 years, the AFBNJ has served as the voice of the federal bar in New Jersey, supporting both the Court and the attorneys who practice here by offering educational, training and social events throughout the year and connecting the federal bench and bar to address issues of court administration and federal practice. The Association has over 800 members representing the federal litigants who continue to be adversely impacted by the judicial backlog created by these vacancies. Over the past five decades, our Association has been led by several distinguished attorneys who later became federal judges, including Judges Frederick B. Lacey, Lawrence A. Whipple, and Herbert J. Stern. With over a dozen active federal judges serving on our Advisory Board, and given our longstanding history supporting the bench and bar, we are in a unique position to help maintain and advocate for the high standards of our judiciary.

Mark S. DeMarco
Attorney At Law
3867 East Tremont Avenue
Bronx, New York 10465
718 239 7070
Fax 718-239-2141
MSDLaw@aol.com

January 18, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Michael E. Farbiarz to the United States District Court of the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

Michael E. Farbiarz would be an extraordinary United States District Judge and I write to respectfully urge the United States Senate to confirm him with bipartisan support.

I first met Mr. Farbiarz roughly 14 years ago, when we found ourselves as adversaries in the case of *United States v. Oussama Kassir*, Southern District of New York Indictment Number 04 Cr. 356 (JFK). At the time, I was representing Mr. Kassir, who was charged with providing material support to al-Qaeda, and Mr. Farbiarz was prosecuting Mr. Kassir as an Assistant United States Attorney.

While litigation often brings out the worst in adversaries, Mr. Farbiarz and I avoided falling prey to that trap primarily because of the manner and ethics by which Michael prosecuted his case. Indeed, during heated pretrial proceedings, extensive plea negotiations, a combative four-week trial, a contentious sentencing hearing and direct appeal, Mr. Farbiarz proved himself to be an incredibly talented trial attorney and oral advocate, with a seasoned courtroom presence and demeanor, and an unrivaled knowledge and understanding of the law.

Most importantly, however, during all stages of the proceedings, Mr. Farbiarz established himself to be the most decent and ethical prosecutor against whom I have practiced in my thirty plus years as a prosecutor and defense attorney. He possesses an innate sense of fairness and civility that has governed his relationships with allies and adversaries equally.

As a result of his integrity, we became friends despite any differences. And as an attorney who has practiced in New York City for more than 30 years, I can attest to the high esteem in which the criminal defense bar in this city holds him.

Accordingly, Michael Farbiarz is perfectly suited for the federal bench and is one of the most qualified people that any President could possibly have nominated. It is an honor to provide this letter on his behalf and I am available to further discuss his qualifications, if needed.

Thank you for the opportunity to write on his behalf.

Respectfully submitted,

Mark S. DeMarco

Mark S. DeMarco

cc: Honorable U.S. Senator Cory A. Booker

January 20, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Michael E. Farbiarz to the United States District Court for the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

We respectfully submit this letter in strong support of the nomination of Michael E. Farbiarz to the United States District Court for the District of New Jersey. We are all former prosecutors from the U.S. Attorney's Office for the Southern District of New York, and worked with Mr. Farbiarz while he was an Assistant U.S. Attorney ("AUSA") in that office. As an AUSA for 10 years, Mr. Farbiarz developed a sterling reputation in the office and the bar as an excellent trial and appellate lawyer, a balanced and fair-minded prosecutor, and a public servant of very strong moral character and integrity. We are confident that he would be an outstanding judge.

Mr. Farbiarz had a storied career as an AUSA in the Southern District of New York. As a leader of the office's national security unit for almost five years, Mr. Farbiarz investigated, prosecuted and supervised some of the most important and sensitive terrorism, counter-intelligence, arms trafficking, export control, sanctions, and money laundering investigations and prosecutions in the country. Among the many historic cases in which Mr. Farbiarz was the lead prosecutor were (1) *United States v. Ahmed Ghailani* (related to the 1998 truck bombings by al Qaeda operatives of the U.S. embassies in Kenya and Tanzania, resulting in 224 fatalities and thousands of injuries); (2) *United States v. Metsos, et al.* (the prosecution of a ring of deep-cover Russian agents operating for years in the United States and covertly acting under the direction of Russian intelligence); and (3) *United States v. Muse* (arising from the pirate attack against the Maersk Alabama in the Indian Ocean, and the hostage taking of the ship's captain). Through his extensive national security experience, Mr. Farbiarz developed deep expertise in federal terrorism and counter-intelligence laws, and deftly interfaced with the highest levels of federal law enforcement and the intelligence community.

Mr. Farbiarz was an exemplary AUSA with a legendary work ethic. Some of us remember him staying up in his office without sleep for almost 50 straight hours during the intense manhunt (and ultimate capture) of the Times Square bomber in May 2010. He directed dozens of law enforcement agents across the country in the most intense phase of this vital investigation following an attempted terrorist attack in the heart of Manhattan. Throughout his tenure as an AUSA, his rigor and relentless commitment to justice inspired prosecutors and agents who worked with him to do better. And as a battle-tested trial lawyer who supervised complex prosecutions, Mr. Farbiarz understood first-hand how trials and hearings should be conducted and how to manage a courtroom effectively. Based on his extraordinarily distinguished record,

Mr. Farbiarz received the Attorney General's Exceptional Service Award (the single highest annual honor in the Department of Justice), the FBI Director's Award for Outstanding Counter-Intelligence Investigation, and the Attorney General's Distinguished Service Award.

Beyond his decorated record as a prosecutor, Mr. Farbiarz had a strong reputation for integrity in the U.S. Attorney's Office, and within the defense bar and bench. He was widely regarded as fair, ethical, open-minded, and collegial, treating all parties (prosecutors, defense counsel, agents, witnesses, victims, and judges) with respect and dignity. All of these qualities will make him an excellent and even-handed judge.

After his outstanding tenure as a federal prosecutor, Mr. Farbiarz continued his career of public service. Since 2016, he has served as the General Counsel of the Port Authority of New York and New Jersey, overseeing a legal department of 120 people in connection with a very broad portfolio of litigation, transactional, and regulatory matters.

We respectfully submit that Mr. Farbiarz will be an outstanding District Judge and a credit to the federal bench. Thank you for considering this letter.

Sincerely,

Justin Anderson
Anirudh Bansal
Jillian Berman
Jeffrey Brown
Eric Bruce
Sean Buckley
Jenna Dabbs
Lev Dassin
Adam Fee
Michael Ferrara
Christopher Garcia
Nicholas Goldin
Katherine Goldstein
Ilan Graff
Samidh Guha
Randall Jackson
Boyd Johnson
Edward Kim
Jonathan Kolodner
Glen Kopp
Paul Krieger
Christopher LaVigne
Joshua Levine
Nicholas Lewin

Jessica Masella
Sharon McCarthy
Ian McGinley
Glen McGorty
Brendan McGuire
Stephen Miller
Benjamin Naftalis
Edward O'Callaghan
Mark Racanelli
Rebecca Ricigliano
Anjan Sahni
Harry Sandick
Eric Snyder
Daniel Stein
Jocelyn Strauber
Vincent Tortorella
Alexander Willscher
Christine Wong
Richard Zabel
Lisa Zornberg

CC: Honorable U.S. Senator Cory A. Booker

NEW JERSEY STATE BAR ASSOCIATION

JERALYN L. LAWRENCE, PRESIDENT
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January 13, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Michael Farbiarz to the United States District Court of the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

The New Jersey State Bar Association commends the nomination of Michael Farbiarz to serve on the U.S. District Court of the District of New Jersey.

As a leader of the New Jersey legal community, he is a distinguished choice to fill a vacancy on the New Jersey federal bench, which has been operating in a state of emergency for several years. His nomination will help ensure members of the public are able to resolve their disputes in a timely fashion by a person with a strong background in addressing complex legal questions.

He brings to the position the knowledge of a seasoned practitioner who has overseen counter terrorism prosecutions and provided guidance as general counsel of the Port Authority of New York and New Jersey. Once confirmed, he will unquestionably continue to be an asset to the U.S. District Court and people of our state.

Respectfully,

Jeralyn L. Lawrence, Esq.
President

CC: Honorable U.S. Senator Cory A. Booker

PORT AUTHORITY NY NJ
AIR LAND RAIL SEA

January 20, 2023

Senator Richard Durbin
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Senator Charles Grassley
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the Port Authority of New York & New Jersey, we write to express our enthusiastic support for the nomination of Michael Farbiarz to serve as a judge on the United States District Court of New Jersey.

The Port Authority of New York & New Jersey was created in 1921 by a compact between the states of New York and New Jersey which was approved by the United States Congress. The agency is responsible for a vast transportation network of air, land, rail and sea assets as well as the 9th largest police force in the country. As it was originally envisioned, the Port Authority stands today as a self-supporting entity without power to tax and does not rely on tax revenue from either state nor from any local jurisdiction. Its focus remains on facilitating travel for millions of Americans each year and helping to shape the country's largest metropolitan region.

Since 2016, Michael Farbiarz has served brilliantly as the Port Authority's General Counsel. In that role, he oversees the agency's Legal Department and provides guidance to the 12-member Board of Commissioners and to the Executive Director which guide the agency's long-term and day-to-day operations respectively. The very nature of the agency's portfolio necessitates that its General Counsel possess a keen understanding of a diverse body of law and, throughout his tenure with the Port Authority, Mr. Farbiarz has proven himself to be one of the most brilliant and distinguished officials the agency has seen in its history.

The role of a judge, as laid out in Article III of the Constitution, is one of the most significant and expansive positions created by our founding document. We rely upon judges to be impartial arbiters of the law yet we also understand the practical implications of their rulings. Mr. Farbiarz's education comes from the most widely regarded legal institutions but his

PORT AUTHORITY NY NJ
AIR LAND RAIL SEA

professional experience speaks to that of an individual who has lived in the real world and fully understands the delicate interplay between the law and those who must abide by it.

Though he would never say it, the residents of the States of New York and New Jersey owe Mr. Farbiarz a massive debt. The choices he has made, and those he has helped facilitate, have played a crucial role in protecting lives, fostering commerce, and improving critical infrastructure in our nation's most populous region. Mr. Farbiarz's departure will be an enormous loss for the Port Authority. His service on the federal bench will be an enormous gain for the people of New Jersey and for the entire Judicial Branch.

Kevin O'Toole, Chairman

Jeffrey H. Lynford, Vice Chairman

Steven M. Cohen, Commissioner

Leecia Eve, Commissioner

Daniel J. Horwitz, Commissioner

Gary LaBarbera, Commissioner

Dana M. Martinotti, Commissioner

Kevin P. McCabe, Commissioner

Rossana Rosado, Commissioner

Michelle E. Richardson, Commissioner

QUIJANO, ENNIS & SIDERIS
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Peter Enrique Quijano
Nancy Lee Ennis
Anna N. Sideris

January 18, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Judicial Nominee Michael E. Farbiarz, Esq.

Dear Senators Durbin and Grassley.

With respect and enthusiasm, I write in support of the nomination of Michael E. Farbiarz as United States District Judge for the District of New Jersey. As a criminal defense attorney who has practiced primarily in the Southern and Eastern Districts of New York for more than thirty years, I have had the good fortune to encounter Mr. Farbiarz on a number of important federal cases. I first came to know Mr. Farbiarz when he was an Assistant United States Attorney for the Southern District of New York, and the Chief of the Terrorism for that Office. In our respective capacities, we both were the lead attorneys in U.S. v. Ahmend Khalfan Ghailani, 98 Cr. 1023 (LAK); he appeared for the Government, while I represented the defendant. The case was extremely complex and demanding. My client, Ahmed Ghailani, was charged with two simultaneous al-Qaeda bombings of the United States Embassies in Tanzania and Kenya in 1998, which resulted in two hundred thirty-eight deaths. The trial, which commenced before the Honorable Lewis A. Kaplan, U.S.D.J., in the autumn of 2010, required mastery of extensive scientific and physical evidence. Further, it was necessary to manage, prepare and present an array of witnesses from Africa and other foreign locations, as well as from various governmental agencies. While Mr. Farbiarz aggressively prosecuted the government's case, he consistently maintained his even-handed and reasonable demeanor. Indeed, I found Michael to be among the most effective of the federal adversaries I have encountered. Throughout this exacting trial, I was able to rely upon Mr. Farbiarz's decency, honesty and ethical conduct.

Subsequently, Mr. Farbiarz and I also served as opposing counsel on other matters in the Southern District of New York. Repeatedly, I had an opportunity to observe his keen legal mind and his extensive preparation. As a result of these experiences, I can readily attest to the Committee that Mr. Farbiarz possesses the intellect, experience, legal acumen, work ethic, and character which would make him a highly regarded federal judge. Given his fundamental fairness, it would be a pleasure to all litigants to appear before Judge Farbiarz.

Accordingly, I wholeheartedly urge the confirmation of Michael E. Farbiarz as a United States District Judge for the District of New Jersey. By his appointment, the Bench, Attorneys, Litigants and the Public will be more than well-served. In short, he is a superbly skilled lawyer, an accomplished legal scholar and a genuinely good person.

Respectfully submitted,

Peter Enrique Quijano

Peter Enrique Quijano

cc: Honorable U.S. Senator Corey A. Booker

KLINGEMAN CERIMELE
ATTORNEYS

100 Southgate Parkway
Suite 150
Morristown, NJ 07960

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January 4, 2023

The Honorable Richard Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: Nomination of Robert A. Kirsch to the
United States District Court for the District of New Jersey

Dear Chairman Durbin, Ranking Member Grassley, and Incoming Ranking Member Graham:

We are members in good standing of the New Jersey bar and that of the United States District Court for the District of New Jersey. We are trial lawyers with long experience as criminal defense counsel in federal and state cases in New Jersey. We write in strong support of the nomination of Robert A. Kirsch to the United States District Court for the District of New Jersey.

Judge Kirsch currently serves as a Judge of the Union County (New Jersey) Superior Court and previously served the Department of Justice as an Assistant United States Attorney in both civil and criminal cases. His credentials are impeccable. Beyond his resume, however, our experience with and personal knowledge of Judge Kirsch convinces us that he possesses the judgment, temperament, and character to be a worthy addition to the federal bench. His tenure will be marked by distinction that will justify the confidence of the President in nominating him and the support of you and your colleagues who favor his confirmation. As criminal defense counsel, we look forward to appearing before Judge Kirsch knowing that he will exercise fairness to both prosecution and defense in equal measure.

Consequently, we request that the Committee and full Senate promptly review and

confirm his nomination.

Thank you for your thoughtful consideration.

Respectfully,

Hassan Abdellah
Christopher Adams
Wanda Aiken
Steven Altman
Frank Arleo
John Azzarello
Michael Baldassare
Alan Dexter Bowman
Raymond M. Brown
Ernesto Cerimele
Michael Critchley
Alfred DeCotiis
Timothy Donohue
Mariellen Dugan
David Fassett
Joseph Ferrante
Lorraine Gauli-Rufo
Darren Gelber
Peter Harvey
Anthony Iacullo
Henry E. Klingeman
Gerald Krovatin
Lawrence Lustberg
John Lynch
Kevin Marino
Raymond Morasse
Brian Neary
Michael Pedicini
Christopher Porrino
Joseph Rotella
Dana Scarillo
Charles Sciarra
Rubin M. Sinins
Justin Walder
John Whipple

Ricardo Solano Jr.
President

Victor A. Afanador
President-Elect

Susan M. Leming
First Vice President

Rebekah Conroy
Second Vice President

Anthony J. DiMarino, III
Secretary

Amy Walker Wagner
Treasurer

Elizabeth J. Sher
Immediate Past President

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January 12, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nominations of Michael Farbiarz and Judge Robert Kirsch to the United States District Court of the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

I write on behalf of the Association of the Federal Bar of New Jersey ("AFBNJ")[1] in unwavering support of the nominations of Michael Farbiarz and the Honorable Robert Kirsch to the United States District Court for the District of New Jersey.

Both Mr. Farbiarz and Judge Kirsch are extremely qualified to serve as United States District Court judges. Each has superb intellectual ability, impeccable integrity, extensive experience in public service, the appropriate temperament for a member of the judiciary, and unquestionable work ethic. The Association is confident that each nominee will serve the citizens of New Jersey well.

Accordingly, we strongly urge their confirmation in the upcoming Senate Judiciary Committee hearings. Thank you in advance for your attention to this important issue.

Sincerely,

Ricardo Solano Jr.
President

cc: Honorable Cory A. Booker
Honorable Robert Menendez

[1] Established in 1789, the District of New Jersey is the oldest and largest undivided district court in the nation. For the past 50 years, the AFBNJ has served as the voice of the federal bar in New Jersey, supporting both the Court and the attorneys who practice here by offering educational, training and social events throughout the year and connecting the federal bench and bar to address issues of court administration and federal practice. The Association has over 800 members representing the federal litigants who continue to be adversely impacted by the judicial backlog created by these vacancies. Over the past five decades, our Association has been led by several distinguished attorneys who later became federal judges, including Judges Frederick B. Lacey, Lawrence A. Whipple, and Herbert J. Stern. With over a dozen active federal judges serving on our Advisory Board, and given our longstanding history supporting the bench and bar, we are in a unique position to help maintain and advocate for the high standards of our judiciary.

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Brooke M. Barnett, Esq.

January 11, 2023

Via Email

The Honorable Richard J. Durbin
Chairman
Committee of the Judiciary
United States Senate
Washington, DC 20515

The Honorable Charles E. Grassley
Ranking Member
Committee of the Judiciary
United States Senate
Washington, DC 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee of the Judiciary
United States Senate
Washington, DC 20515

Re: The Honorable Robert Kirsch, J.S.C. nomination to the United States District Court for the District of New Jersey

Dear Senators:

It is my honor to write this letter in enthusiastic support of the nomination of Judge Robert Kirsch to the United States District Court for the District of New Jersey. Judge Kirsch has not only been a dear friend of mine for many years, but he has also been a great mentor during the time he has served as a Superior Court Judge in Union County, New Jersey.

Judge Kirsch's unwavering dedication to the practice of law will serve the United States Court of Appeals, and the court system overall well. I have had the privilege to see Judge Kirsch's impact on the citizens of Union County New Jersey, both on and off the bench.

During my seventeen years of practicing, I have been fortunate enough to appear before Judge Kirsch on a monthly basis, in which I have advocated for clients at every phase of the trial process, including, but not limited to, arraignments, guilty pleas, sentences, pre-trial motions, trials and post-conviction relief hearings. As a result of his relentless leadership and brilliant legal mind, I have embraced the lessons and guidance that he gave me as a young attorney and it's this wisdom that I have carried with me throughout my career. I know Judge Kirsch holds all of the key qualities you may be seeking in the next Judge for the United States District Court for the District of New Jersey.

Judge Kirsch will bring extensive legal experience from his work as a United States Attorney, and most recently and currently as a Superior Court Judge in the criminal Division in Union County, New Jersey.

Although Judge Kirsch's professional accolades are impressive and admirable, it is his ability to be human that I believe makes his approach to justice unique. Judge Kirsch has demonstrated not only his ability to be fair, but he is not afraid to make a decision. He demonstrates no favoritism and has an impeccable ability to cut straight to the issues. However, no matter where Judge Kirsch falls on any particular issue, he treats every accused with dignity. An example of this is where I tried a case before Judge Kirsch. Even after the defendant was convicted and should have been remanded into custody, Judge Kirsch believed in giving my client the opportunity to be with his family to get his orders in a row. This is just one example of many where Judge Kirsch has demonstrated his commitment to humanity and his belief that everybody deserves to be treated with fairness and respect.

Considering the importance of the judicial system especially in the United States District Court, it is critical that this position be filled by someone with experience, judgment, personal commitment, and the passion necessary to succeed in this role. I strongly and respectfully urge the Senate to vote in favor of Judge Kirsch's nomination to the United States District Court for the District of New Jersey. I thank you for taking the time to read and consider this letter.

Respectfully,

/s/ Brooke M. Barnett
Brooke Barnett, Esq.

Biancamano Law, LLC
42A North 20th Street
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Phone: (201) 913-0109
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January 5, 2022

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: Nomination of Robert A. Kirsch
to the District Court for the District of New Jersey

Dear Chairman Durbin and Ranking Members Grassley and Graham:

It is with great pleasure and enthusiasm that I respectfully submit this letter in support of the nomination of Robert A. Kirsch to the District Court for the District of New Jersey. As a former Assistant Federal Public Defender, and now, as a defense attorney in private practice, a member of the Criminal Justice Act Panel, and a Trustee of the Association of Criminal Defense Lawyers of New Jersey, I can unequivocally endorse Judge Kirsch as having the requisite professionalism, objectivity, and legal acumen to make him an excellent addition to the federal bench here in the District of New Jersey.

I have known Judge Kirsch for more than 20 years beginning with his tenure as an Assistant United States Attorney working in both the civil and criminal divisions. During that time, I was

working as an Assistant Federal Public Defender representing indigent clients charged with federal crimes, and often found myself standing toe to toe with Judge Kirsch. In many cases, the Judge and I were adversaries on issues of fact and law, yet despite our sometimes diametrically opposed views I always found Judge Kirsch to be an extremely intelligent, ethical, hardworking prosecutor, dedicated to the administration of justice. In addition to those qualities, he was open to dialogue, respectful of different viewpoints, and always fair. It was Judge Kirsch's sense of fairness and professionalism during his time in the United States Attorney's Office that quickly earned him the respect of the Federal Defender's Office, as well as respect amongst the Federal Criminal Defense Bar in the District of New Jersey. I submit that Judge Kirsch's sense of fairness, objectivity, and the universal respect he has from the bar in this state will serve him well as a District Court Judge here in New Jersey.

Following his time in the United States Attorney's Office Judge Kirsch became a Superior Court Judge in the Union Vicinage. Having since moved into private practice myself and with my office in Union County I have appeared before his Honor and have had the pleasure of seeing Judge Kirsch's transition from prosecutor to arbiter first-hand. Unsurprisingly it is something that has come naturally to him. True to all his professional success, Judge Kirsch's success as a Superior Court Judge has been a function of his fundamental characteristics – honesty, integrity, fairness, objectivity, and knowledge of the law. The consistency with which Judge Kirsch has exhibited these qualities both as a prosecutor, and more recently on the Superior Court bench, coupled with his vast experience on both sides, make him the ideal fit to be a District Court Judge.

Beyond his unmatched qualifications to join the bench in the District of New Jersey from a career standpoint, I believe Judge Kirsch's life outside of work warrants the same degree of recognition and consideration. I know Judge Kirsch to be a dedicated husband and proud father. In addition to the collegial and professional qualities he possesses that make him ideal for a position on the District Court, equally important are the personal qualities he brings to the position as an incredibly humble, genuine, and gracious individual.

If confirmed as a District Court Judge for the District of New Jersey I can say with the utmost certainty that Judge Kirsch will achieve and succeed as he has done throughout his career by way of the same consistently exhibited qualities that have garnered him the admiration of so many. Beyond my respect for Judge Kirsch, I have borne witness to the respect that so many others in our District have for him including the Federal Defender family, innumerable colleagues from all walks, members of law enforcement, and other Judges. As such, beyond being more than qualified for the position, Judge Robert Kirsch is sure to be an incredibly well-received as a judge in this district – and I certainly look forward to appearing before his Honor in the very near future.

Thank you for your time and thoughtful consideration of this letter in support of the nomination of the Honorable Robert A. Kirsch to the District Court for the District of New Jersey.

Respectfully submitted,

Stacy A. Biancamano

Stacy A. Biancamano

McElroy Deutsch

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January 5, 2023

Phillip_Brest@judiciary-dem.senate.gov
Brendan_Chestnut@judiciary-rep.senate.gov

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
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The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senators,

It is my understanding that the Honorable Robert Kirsch is being considered for the position of United States District Judge for the District of New Jersey. Please accept this letter as my whole hearted endorsement of Judge Kirsch for that position.

I previously served as a United States Magistrate Judge in New Jersey from 1993 to 2000, and then as a United States District Judge from 2000 to 2014, at which time I retired from the bench. During much of this time, Robert, then serving as an Assistant United States Attorney, appeared before me on numerous occasions.

The vast majority of AUSA's who appeared in my Court and who I came to know are fine attorneys demonstrating honesty and integrity. I found Judge Kirsch to be at the very top of the list. He treated his colleagues, the Court and his adversaries with honesty and civility in

every matter he handled. He consistently demonstrated fairness and evenhandedness on behalf of the government while vigorously pursuing both Civil and Criminal matters on behalf of the government. He will ensure that all those who appear before him will be treated fairly irrespective of their background or their station in life.

In addition to his integrity and high ethical standards, he also was an outstanding litigator. He was always prepared and demonstrated his skills and knowledge of the law. In my 21 years on the bench, I cannot think of a more professional or better prepared attorney who appeared in my Court.

I believe the Federal Judiciary, the State of New Jersey and the citizens of the United States will be served well if Judge Kirsch is given the opportunity to serve as Judge of the United States District Court. I cannot think of a finer candidate or a finer person. I highly recommend him for your consideration.

Respectfully submitted,

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Dennis M. Cavanaugh

Dennis M. Cavanaugh, USDJ (Ret.)

DMC/js

January 9, 2023

By Email: Phillip_Brest@judiciary-dem.senate.gov;
Brendan_Chestnut@judiciary-rep.senate.gov

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
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The Honorable Lindsey Graham
Incoming Ranking Member
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Re: The Honorable Robert Kirsch, J.S.C.
Judicial Nominee to the United States District Court
for the District of New Jersey

Dear Chairman Durbin, Ranking Member Grassley and Incoming Ranking Member Graham:

The undersigned have served as United States Attorney and as Assistant United States Attorneys for the District of New Jersey, as well as being experienced defense counsel in white collar criminal matters. Over the many years of our practice in New Jersey we have come to observe the Honorable Robert Kirsch, initially when he was an Assistant United States Attorney, and later as a Superior Court Judge sitting in Union County, New Jersey.

We interacted with Judge Kirsch when he led the investigation and prosecution of Medi-Hut, a publicly traded health care company, and its senior officials in a $100 million securities fraud case. At the time, it may have been the largest stock fraud case in the United States. Medi-Hut was a small cap stock traded on the NASDAQ Exchange. Medi-Hut distributed medical devices as well as brand-name and generic over the counter and prescription drugs. Medi-Hut's corporate officers, including its chief executive officer, chief financial officer and its chief operating officer all participated in a scheme involving sham transactions which inflated revenue by creating false and inflated accounts receivable. Judge Kirsch's attention to detail and understanding of accounting principles enabled him to simplify the overwhelming evidence and

convinced each of the defendants to plead guilty. Judge Kirsch's excellent work in marshalling the evidence compelled each defendant to negotiate a plea agreement to limit their exposure to incarceration rather than risk being found guilty after a trial and facing severe punishment. The guilty pleas included conspiracy to commit securities fraud and making false statements to the SEC.

Judge Kirsch conducted the negotiations on behalf of the United States with the highest degree of professionalism, protecting the government's vital interests but in a manner that was respectful of counsel and while taking into account our clients' acknowledgment of guilt and remorse.

As a member of the Superior Court of the State of New Jersey, Judge Kirsch has demonstrated that he is even-handed, calm, studious, a hard worker exemplifying the best in our state court. Judge Kirsch is respectful of all litigants and their counsel. He has impeccable judgment and his judicial temperament is laudable. We heartily recommend Judge Kirsch for your consideration to promptly confirm the President's nomination of him to the United States District Court for the District of New Jersey.

We are available to respond to any questions your staff may have.

Thank you for your generous consideration of Judge Kirsch.

Respectfully,

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January 11th, 2023

To: The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

From: Roberto J. Espinosa, Esq.
Attorney Admitted in both
New Jersey and North Carolina
946 Rayhon Ter.
Rahway, NJ 07065

Dear Senate Judiciary Committee,

I write this letter with great pleasure and excitement for the nomination of the Hon. Robert Kirsch, to the federal bench. Judge Kirsch is an amazing individual, judge, attorney and human being. It is no surprise to me that he is being nominated to the Federal bench. President Biden couldn't have made a better pick. When I was an intern for the Public Defender's Office back in 2011, I met Judge Kirsch for the first time when he was the newly assigned Juvenile Judge. I remember being in his courtroom and I was sitting in the benches observing my colleagues, when he turned to me and asked me what case I had on the docket that day. I was caught a bit off guard and responded with, "Nothing Your Honor, I'm just an intern." He responded back, "Don't say that you are not just an intern, you are way more than that." "Being an intern is going to be one of the most valuable experiences for you and one that you won't forget for the rest of your law career." He was the only Judge that made me feel important that summer as an intern. He acknowledged me when he really didn't have to and I always bring this example up, because Judge Kirsch treats everyone with respect, love and professionalism. Every client that I represented in front of Judge Kirsch as a public defender and as a private attorney has been treated with dignity, respect and looked at more than just a criminal. He is a Judge that I can say looks beyond the crime that a person has committed and really treats defendants as human beings. Don't get me wrong, when the time comes to be tough on crime, Judge Kirsch is not afraid. He can be a tough sentencer, but he is always reasonable under the circumstances.

He spends countless hours after work working on opinions. He takes work with him on vacation and he's constantly thinking about the next case.

I've seen clients cuss at Judge Kirsch, disrespect him, interrupt him while talking and every time he's kept his composure and never took anything personal. When there are triable issues, he acknowledges them. He holds conferences with defense attorneys and prosecutors and he challenges both parties on their proofs. I've witnessed Judge Kirsch confront a prosecutor for being unreasonable on a plea deal. I have also seen Judge Kirsch tell a prosecutor that they should really reevaluate their case, because the proofs just are not there. Vice versa, I've been challenged by Judge Kirsch on certain occasions where I thought that I had a great defense. Only to realize after a status conference, that I needed to reevaluate. The interactions that I've witnessed come from experience that many Judge's don't have. Maybe Judge Kirsch gained that experience from being a federal prosecutor and seeing how federal judges work their caseloads in the federal system or maybe Judge Kirsch simply knows how different attorneys think. He knows how to deal with attorneys that never back down from an argument and others that are too unconfrontational in court. I've seen Judge Kirsch offer guidance and advice to new attorneys and take advice himself from seasoned attorneys. He truly has a kind heart and the State bench is going to be short an amazing Judge.

Judge Kirsch is also very punctual in the courtroom. I absolutely loved that about him when I was a public defender. He always started on time and always finished early. He always got his work done and was always rewarded with more cases by the assignment Judge. I've tried about 8 criminal cases in front of Judge Kirsch. The way he conducts jury selection has always been fair and efficient and his trials are always pleasant. What I mean by pleasant, Judge Kirsch is not the type of Judge to take sides. He doesn't prosecute or defend from the bench and he lets both parties simply try their cases. His written opinions are always very knowledgeable, informative, professional and well detailed. I've seen him feel strongly about a certain ruling and then change his position after receiving great legal briefs. He is truly an amazing judge and I am so sad to see him leave the State bench for the federal. I am very happy for Judge Kirsch, but he is going to be deeply missed.

Aside from what is written above, I would like to say that I truly love Judge Kirsch as a person. Judge Kirsch is the type of person that even outside of work he is not shy to say hello, he is not shy to speak his mind and he has a great sense of humor. He doesn't take things personal and he does all these things while still maintaining a level of professionalism. If I ever have the opportunity to become a Judge one day, I would want to be a Judge like the Honorable Robert Kirsch. He's thoughtful, considerate, understanding and polite to both private attorneys and government attorneys alike. He always makes it a priority, no matter the issue, to always speak highly of attorneys on the record in front of their clients. Not once, have I seen him bad mouth an attorney in front of their client and that is not something I can say about every Judge I have encountered in my law career.

Judge Kirsch is fair, respectful and intelligent. He amazes me with the level of dedication he puts into his work and the passion he has for his profession. He has a big heart for people and a mindset focused on justice and fairness. I can truly write pages about Judge Kirsch. Again, I interned for the public defender's office in 2011 when I first met Judge Kirsch and I am

going into the tenth year of my legal career. Nine out of those ten years starting from 2013, I appeared before Judge Kirsch on many occasions. I've had private attorney cases before him as well as public defender cases. I've experienced Judge Kirsch as an attorney probably more than most attorneys can say. I truly don't have anything negative to say about Judge Kirsch and I hope he gets affirmed on the nomination.

Thank you for your time, consideration and for allowing me the opportunity to express my opinion about the Hon. Robert Kirsch.

Very Truly Yours,

Roberto J. Espinosa
Roberto J. Espinosa, Esq.

January 12, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: Nomination of Robert Kirsch to the U.S. District Court for the District of New Jersey

Dear Chairman Durbin, Ranking Member Grassley, and Incoming Ranking Member Graham:

As former colleagues and/or supervisors of Judge Robert Kirsch at the United States Department of Justice in Washington, D.C., we write to convey our strong support for his nomination to the United States District Court for the District of New Jersey. We worked with Judge Kirsch in the Civil Division's Commercial Litigation Branch (Fraud Section). Having known Judge Kirsch since the 1990s and having worked with him extensively in what was then a small tight-knit office, we are well positioned to speak to his outstanding aptitude for the law, his unassailable character, and his strong work ethic.

In the Fraud Section, Judge Kirsch handled numerous complex False Claims Act cases on behalf of the United States, and he did so with exacting attention to detail and a consistent level of success. He was, and remains today, extremely well regarded by all of us for his high degree of integrity and his devotion to the pursuit of justice.

Judge Kirsch's temperament is similarly strong. He was uniquely collegial at DOJ, demonstrating an uncommon ability to collaborate with his peers. Though his job was to serve as an advocate on behalf of the United States, he also maintained an open mind to reasonable arguments by defendants and treated private counsel with civility and respect.

Based on the foregoing, we believe Judge Kirsch has the temperament and ability to make an exceptional addition to the federal bench and strongly endorse his nomination. We have no doubt whatsoever that he will carry out his duties on the District Court for the District of New Jersey with utmost distinction.

Sincerely,

Steve Altman
Mediator and Adjunct Professor, Georgetown Law School
Assistant Director (last position), U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1976-2003

Joyce R. Branda
Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, 2012-2017
Director (last position), U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1982-2012

Dara A. Corrigan
Deputy Administrator and Director of the Center for Program Integrity, Centers for Medicare and Medicaid Services
Deputy Inspector General (with 12-month tenure as Acting Inspector General), Department of Health and Human Services, 2003-2004
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1991-1994

Scott Dahl
Global Head of Investigations, SAP
Inspector General, U.S. Department of Labor, 2013-2020
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1992-1997

Lucy Eldridge
Legal Recruiter, Berman & Beebe
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1991-1997

Laurence Freedman
Member, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo
Assistant Director (last position), U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1991-2004

Stephen J. Gripkey
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1992-1998

Mitch Lazris
Partner, Hogan Lovells
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1992-1996

Harold Malkin
Partner, Morgan, Lewis & Bockius LLP
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1988-1994

Mark D. Polston
Partner, King & Spalding
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1989-1993

Cynthia Schnedar
Principal, Regulatory Compliance, Greenleaf Health, Inc.
Deputy Inspector General (with 15-month tenure as Acting Inspector General), U.S. Department of Justice, 2009-2014
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1989-1994

Paul D. Scott
Principal, Law Offices of Paul D. Scott, P.C.
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1989-1995

Phil Shaikun
Vice President and Associate General Counsel, Financial Industry Regulatory Authority
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1991-1998

Michael C. Theis
Partner, Hogan Lovells
Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (Fraud Section), 1988-1997

January 13, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Chairman Durbin, Ranking Member Grassley, and Incoming Ranking Member Graham:

We write to express our strong and enthusiastic support for the nomination of New Jersey Superior Court Judge Robert A. Kirsch to the United States District Court for the District of New Jersey.

We have each had the privilege of serving as federal prosecutors in the United States Attorney's Office for the District of New Jersey during Judge Kirsch's nearly 13 years of honorable and distinguished service in that Office. As a result of our overall experience within the U.S. Attorney's Office, as well as our subsequent work in the public and private sectors since, we know Judge Kirsch as both a federal prosecutor and state court judge. Informed by that experience, and by our understanding of the qualities that make a great jurist, we unreservedly endorse Judge Kirsch for the federal bench.

Judge Kirsch's work ethic, preparation, intellect, and legal abilities are superb. As a federal prosecutor, Judge Kirsch prosecuted a wide variety of federal crimes and made some of his most important contributions by leading a number of significant white-collar investigations and trials. Likewise, during his dozen or so years on the state bench, Judge Kirsch has deftly presided over difficult cases, including lengthy trials of some of the most heart-wrenching murders and violent crimes in the State. As important as his legal acumen, Judge Kirsch's conduct as a judge bespeaks humanity for the parties, victims, and other stakeholders affected by his rulings. He has a well-earned reputation for fairness, with a toughness tempered by compassion.

For these reasons and others, we wholeheartedly support the President's nomination of Judge Kirsch and respectfully recommend that he be confirmed as the next United States District Judge in the District of New Jersey.

Respectfully submitted,

Marc A. Agnifilo, Esq.	Jill Andersen, Esq.	John A. Azzarello, Esq. Founding Partner Whipple Azzarello LLC
Harvey Bartle IV, Esq.	Jerome A. Ballarotto, Esq. Ballarotto Law	Matthew E. Beck, Esq. Member Chiesa Shahinian & Giantomasi PC
David A. Bocian, Esq. Partner Kessler Topaz Meltzer Check LLP	Matthew Boxer, Esq. Partner Lowenstein Sandler	Thomas R. Calcagni, Esq. Senior Partner Calcagni Kanefsky LLP
Jeffrey S. Chiesa, Esq. Member Chiesa Shahinian & Giantomasi PC	Mariellen Dugan, Esq. Partner Calcagni Kanefsky LLP	Kimberly A. Guadagno, Esq. Partner Connell Foley LLP
Michael A. Guadagno, Esq.	John J. Hoffman, Esq.	Brian R. Howe, Esq.
Jenny R. Kramer, Esq. Partner Alston & Bird	Anthony J. LaBruna, Jr., Esq.	Bruce A. Levy, Esq. Partner Hartmann Doherty Rosa Berman & Bulbulia LLC
Erez Liebermann, Esq. Partner Debevoise & Plimpton LLP	Adam S. Lurie, Esq. Partner Linklaters	Anthony J. Mahajan, Esq. Partner Frier Levitt

Michael Martinez, Esq.
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Scott B. McBride, Esq.
Partner
Lowenstein Sandler LLP

Charles B. McKenna, Esq.
Partner
Riker Danzig LLP

Vaughn L. McKoy, Esq.
Partner
Connell Foley LLP

Eric W. Moran, Esq.
Partner
Epstein Becker & Green

Sandra L. Moser, Esq.
Partner
Morgan Lewis & Bockius LLP

Carolyn A. Murray, Esq.

Maureen Nakly, Esq.

Lynn A. Neils, Esq.
Partner
Foley Hoag

Aidan P. O'Connor, Esq.
Partner
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Kevin M. O'Dowd, Esq.
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Hope S. Olds, Esq.

Carlos F. Ortiz, Esq.
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Grace H. Park, Esq.

Scott A. Resnik, Esq.
Partner
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Patrick L. Rocco, Esq.
Partner
Fleischman Bonner & Rocco LLP

Alberto Rivas, Esq.

Richard J. Schechter, Esq.

Jeffrey D. Smith, Esq.
Partner
DeCotiis, FitzPatrick, Cole & Giblin, LLP

Jose Sierra
Chief Legal Officer
Burst, USA Inc.

Ricardo Solano Jr., Esq.
Executive Vice President/Chief Legal Officer
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Robert G. Stahl, Esq.
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Susan J. Steele, Esq.

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Ballard Spahr LLP

Joan Thomas, Esq.
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Eric A. Tunis, Esq.
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Lee D. Vartan, Esq.
Member
Chiesa Shahinian & Giantomasi PC

Serina Vash, Esq.
Partner
Herman Jones LLP

Kevin G. Walsh, Esq.
Director
Gibbons P.C.

Gail Zweig, Esq.
Director
NYU Law Public Interest Law Center

January 11, 2023

The Honorable Richard J. Durbin
Chairman
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The Honorable Charles E. Grassley
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United States Senate
Washington, DC 20515

Re: Letter of Support for Robert Kirsch's Confirmation to the United States District Court for the District of New Jersey

Dear Chairman Durbin, Ranking Member Grassley, and Incoming Ranking Member Graham:

We are lawyers with diverse backgrounds, views, and experiences who have each had the honor of serving as a law clerk to Judge Robert Kirsch on the New Jersey Superior Court for Union County. Among our ranks are partners and associates in private practice, state prosecutors, public interest lawyers, and federal agency attorneys, some of whom have served as law clerks to federal district court judges, state appellate judges, and state supreme court justices.

We write to express our proud and enthusiastic support for Judge Kirsch's confirmation to the United States District Court for the District of New Jersey. We are united in our unreserved esteem for him as a profoundly dedicated jurist whose character, intellect, and entire career of public service make him eminently qualified to serve as a federal district court judge.

In his capacity as a state judge in Union County, New Jersey, Judge Kirsch has consistently demonstrated his devotion to the faithful interpretation of the law and careful consideration of the facts in every case and opinion. Prior to his current role in the Criminal Division, Judge Kirsch served in both the Family and Civil Divisions, where he presided over custody and child abuse matters, post-divorce disputes, juvenile court matters, and complex civil litigation. Each of these judicial roles has drawn on his intellectual rigor, wisdom, and principles of fairness. Throughout his time on the bench, Judge Kirsch has diligently applied the law equally to all those appearing before him and has sought to ensure that every litigant has felt heard by the justice system. This commitment is on display in every decision he has issued. In each opinion, he carefully explains his legal reasoning in a way that all litigants may understand why the result was merited in their case.

Judge Kirsch's professional background is complemented by his charisma and warmth. His enthusiasm for his work and love for people shine through everything he does. Judge Kirsch creates a palpable atmosphere of mutual respect and genuine concern for others that is felt by all

who step into his courtroom—from litigants to observers in the gallery, and regardless of background or circumstances.

By virtue of his breadth of exceptional legal knowledge and experience, he was viewed as a "go-to" by his judicial colleagues for his advice and counsel. Rather routinely, other judges in the courthouse would stop by chambers or would call him on the telephone when they were confronted with a difficult legal issue, knowing he would provide them with a reasoned, deliberative perspective.

Moreover, his work ethic is unrivaled. It is impossible to overstate the judge's dedication. Keeping early hours and staying "until the work is done," Judge Kirsch devoted significant personal time to ensuring the thorough, thoughtful, and timely resolution of motions and cases, all while balancing an active and vibrant life with his wife, Beth, and his two children, Jackson and Nedd. Whenever talking about his children, who were in elementary school when he first took the bench, he would beam with pride, regaling us with hilarious tales of their good-natured mischief. With a big smile, he called them his "instantaneous ego equalizers." His chambers are plastered with pictures of his wife, kids, parents, siblings, and his many, many friends.

Judge Kirsch has made a lasting impact on our lives, and we have richly benefitted from his mentorship. From the moment he hired us, he consistently expressed his unbridled enthusiasm for us as his clerks and his absolute confidence that we would excel. He regularly checked in on each of us to see how we were doing and always made the time and effort to offer a timely word of encouragement or invaluable advice with his signature warmth and humor.

To us, however, Judge Kirsch was more than a professional mentor. He welcomed us into his "family." As the years have passed, we have been beyond fortunate to be invited to Judge Kirsch's home for holidays and to have him preside over our weddings, hold our newborns, and counsel us through our most important professional milestones and difficult personal issues—a divorce, a sick relative, or a death in the family. He has modeled for us what it looks like to be a scrupulous and hard-working member of the legal community as well as an incredibly devoted mentor, family member, and friend.

In sum, we are honored to have clerked for Judge Kirsch. His wealth of experience, legal acumen, and personality will make him an exceptional judge on the United States District Court for the District of New Jersey.

We offer our unconditional support for his nomination and urge you to confirm him.

Respectfully,

Catherine Bushong	Clayton Harvey	Christopher St. Martin
Heather Crimmins	Jamie Picard Keesing	Emily Tabak
Greg D'Agincourt	Edward Percarpio	Kevin White
Robert Glenn	Sarah Shore	

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OF COUNSEL
VIELKA VELAZQUEZ
NOELLE VAN BAAREN
ISAAC WRIGHT
DAWN SANFILIPPO

†ALSO ADMITTED IN NY

January 5, 2023

The Honorable Richard J. Durbin, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: **Robert Kirsch, Judge Superior Court of New Jersey**

Dear Honorable Senators:

I have known Judge Robert Kirsch, for over fifteen (15) years. Our initial introduction to one another began sometime in 2007 or so. Judge Kirsch was employed as an Assistant United States Attorney and was responsible for prosecuting what amounted to an international narcotics smuggling case involving three (3) separate Defendants. I ended up representing one of the Defendants because of concerns that individual had with one of the attorneys who had been representing him as well as one of the Co-Defendants. Oddly enough, information that was shared with then AUSA Kirsch, would later ring true as the lawyer for

the Co-Defendant was later accused and convicted of conspiring to commit murder and sentenced to life in prison.

It was during the pendency of the case that I learned who Robert Kirsch was and is. Despite the fact that we were adversaries, he was always courteous, not only to me but also to my client. Judge Kirsch was also very knowledgeable of the case, the law and the impact the charges could have on all of the Defendants. I also found Judge Kirsch to be very practical and very affable.

Later, after Judge Kirsch was confirmed to the New Jersey Superior Court, I had the occasion of appearing before him in a number of cases. I found Judge Kirsch to be the same even tempered, very measured, affable person he had been prior to his ascension to the bench.

Our interactions and experiences in the law, would grow into a great friendship that the two of us share to this day. Judge Kirsch and I have had conversations about the law, the importance of family, sports, the entertainment world, race relations and the hope that we both share for more unity and respect for one another.

Judge Kirsch is the type of person who is fair and open minded. He is knowledgeable of the law and when the circumstances warrant is not afraid to make rulings even if the rulings are not popular. He is always and has always been about the rule of law. It is what makes him more than suitable for consideration to the federal bench.

Some years ago, my mother suffered a significant medical event where she was hospitalized and in rehab for sone period of time. It was Judge Kirsch who one day out of the blue called me to visit with me and my Mom (almost an hour from where he resides). The visit was not planned, nor was it something I invited him to do. It was his way of showing concern without having any fanfare or desire for accolades. That is the type of person, Judge Robert Kirsch is and why I think he would make an excellent District Court Judge.

It is therefore without any hesitation or reservation that I support in every possible positive way, Judge Kirsch's consideration for a seat on the United States District Court of New Jersey.

If you have any questions regarding this matter, please feel free to contact this office.

Respectfully submitted,

HUNT, HAMLIN & RIDLEY

RAYMOND L. HAMLIN
Founding Partner

Joseph A. Hayden, Jr.
Member of the Firm
jahayden@pashmanstein.com
Direct: 201-639-2004

PashmanStein WalderHayden
A Professional Corporation

January 4, 2023

Via Email:
Phillip_Brest@judiciary-dem.senate.gov
Brendan_Chestnut@judiciary-rep.senate.gov

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

RE: HONORABLE ROBERT KIRSCH

Dear Senators Durbin, Grassley and Graham:

I write in support of the nomination of Superior Court Judge Robert Kirsch to be a United States District Court Judge for the District of New Jersey. By way of personal background, I have practiced law for 53 years in New Jersey and tried criminal cases in State and Federal Court for well over 50 years. Although I was a prosecutor for three years, for the remainder of my practice I have been a proud criminal defense attorney. I was the founder and first president of the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) in 1985, and I was elected president of the Association of the Federal Bar of New Jersey in 1995. I have received the Justice William J. Brennan Award from the Association of the Federal Bar of New Jersey, as well as the Lawrence A. Whipple Award for Professional Excellence from the ACDL-NJ in recognition of my achievements as a criminal defense lawyer and litigator.

I first became aware of Judge Kirsch when he was an Assistant United States Attorney from the District of New Jersey. He had the reputation as a tough but fair prosecutor, and a skilled litigator. A number of federal judges have mentioned to me how effective Judge Kirsch was in court.

When he became a State Court Judge he was originally assigned to the juvenile division in Union County, and I was immediately impressed from comments made about him by other defense lawyers as to how fair and understanding he was to counsel and litigants. More importantly, as a juvenile judge he worked hard to impose creative sentences which might derail young people from further involvement in the criminal justice system. I am personally aware of numerous instances where he was able to convince sports figures to show up at the juvenile detention facility and address the young people about avoiding recidivisms.

When he was transferred from juvenile to the criminal division, with a short stint in the civil division, he showed great managerial skills because he moved more cases to trial or resolution than any other judge in Union County. But he did this while remaining lawyer friendly (to both sides) and open-minded to any personal emergency of an attorney.

Beyond his conduct on the bench, I have been most impressed by Judge Kirsch's desire to be informed and involved in social justice issues. I am on the Board of Trustees and very active with Integrity House which is a therapeutic rehab. For over six years I have brought recovering alcoholics and addicts to speak at Integrity House four times a year. Judge Kirsch has been in attendance at most of these programs (which occur on Sunday mornings) for at least the past five years, because he desires to learn more about alcoholism and addiction so that he can be a better Judge. Judge Kirsch occasionally brings his spouse and/or children to the speaker programs to give them further insight into the challenging world of addiction and recovery. I do not know of any other judge who has been willing to take such steps to broaden their outlook on social justice issues, while continuing to adhere to the Rule of Law and binding precedent.

I hope this information is helpful, it comes from the heart.

Respectfully Yours,

JOSEPH A. HAYDEN, JR.
Enc.

The Rt. Reverend Reginald T. Jackson
Presiding Bishop

THE SIXTH EPISCOPAL DISTRICT
AME CHURCH
GEORGIA

EPISCOPAL OFFICE
250 Williams Street, Suite 2115
Atlanta, GA 30303

January 5, 2023

The Honorable Richard J. Durbin
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senator Durbin:

Trust you are well and that your work is progressing. Best wishes to you in the year ahead.

I am writing to express my support and urge the confirmation of the Honorable Judge Robert Kirsch as a Federal Judge for the New Jersey District. It has been my blessing and joy to know Judge Kirsch for the last ten years. We were introduced to each other by a mutual friend, who happened to be a prominent criminal defense lawyer in New Jersey. We have gone on to become very close friends. I was assigned by the General Conference of the AME Church to South Africa in 2012 and to Georgia in 2016, and our friendship has only become closer. He has a lovely wife and is the father of two children.

Judge Kirsch has served on the Superior Court of New Jersey for thirteen years in all three court divisions, Family, Civil and Criminal. He has proven himself to be a remarkable judge. For a number of years Judge Kirsch served as the only judge in Union County, handling Juvenile Delinquency. In that role he created a juvenile re-entry program which involved providing programming and services to juveniles in every detention center in New Jersey. Before becoming a Superior Court Judge, he spent more than 15 years as a lawyer for the United States at the Department of Justice in Washington, D.C. and more than a decade as a federal prosecutor in New Jersey. He has served as a judge and prosecutor for more than 40 years.

The Federal Bench will be better because Judge Robert Kirsch is on it. Members of the bench, defense lawyers, and those who come before him attest that Judge Kirsch displays fairness, decency and humility. I give him my highest recommendation.

If you have any questions please do not hesitate to contact me.

All the best.

Sincerely,

Reginald T. Jackson
Bishop

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John C. Lifland, USDJ-retired
565 Via Veneto, #101
Naples, FL 34108

January 9, 2023

The Honorable Richard J. Durbin, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senator Durbin:

I write to support the confirmation of New Jersey Superior Court Judge Robert Kirsch as a Judge of the United States District Court for the District of New Jersey.

I served on that court for 19 years, and in the course of that service I had many opportunities to observe then-Assistant United States Attorney Kirsch in the performance of his duties as an Assistant United States Attorney. He was always prepared, knowledgeable and fair. One case stands out in my recollection of Judge Kirsch's performance as an Assistant United States Attorney. It was a serious securities fraud prosecution, where, it turned out, the evidence was strong against the defendant. Nonetheless, the defendant insisted on representing himself. Judge Kirsch could have acquiesced, taken advantage of the defendant's lack of legal knowledge and experience, and easily convinced a jury to convict. However, from the outset of my pre-trial involvement, Judge Kirsch made it clear to the defendant and to me (in on-the-record pre-trial conferences) that it was in the defendant's best interests to have representation by counsel, and urged him to reconsider his desire to represent himself. This, to me, was an example of Judge Kirsch's innate fairness, in refusing to secure a conviction by taking advantage of the imbalance between an unrepresented defendant and a seasoned

prosecutor with all the resources of the United States Department of Justice behind him. As it turned out, the defendant relented, I appointed experienced Criminal Justice Act counsel for him, and he ultimately entered a guilty plea and was sentenced appropriately.

After I retired from the district court Judge Kirsch and I became good friends through the fortunate circumstance of having mutual friends. I supported his appointment to the Superior Court of New Jersey, and have been happy to discuss some of his decisions on that court with him. Those discussions, as I expected, revealed Judge Kirsch to be a dedicated, knowledgeable, industrious and fair judge. His judicial temperament is exemplary; he is not self-absorbed or inconsiderate to those appearing before him. Judge Kirsch will, if confirmed, be a credit to the federal court system. I heartily support his confirmation.

John C. Lifland, USDJ-ret.

James E. McGreevey
25 Garrison Avenue, Jersey City, New Jersey 07306

The Honorable Richard J. Durbin
The Honorable Charles E. Grassley
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Chairman Durbin and Senator Grassley,

Thank you at the outset for your consideration of this letter. I write this letter in support of the nomination of Judge Robert Kirsch for U.S. District Court.

It has been quite some time since I've been an Assistant Prosecutor, yet, as a former Governor, I have always valued those persons who sincerely and authentically strive for justice within our criminal justice system. Robert Kirsch is such an individual. He is unique. Aside from the theater of debate on so many criminal justice issues, there are those jurists who sincerely and doggedly yearn to do justice every day.

As Executive Director of the New Jersey Reentry Corporation (NJRC), this agency is dedicated to providing critically-needed reentry services to the 17,593 persons enrolled, who have returned from prison, jail, addiction treatment, and all too often on veterans returning from combat. We have a relatively straightforward task and that is to support individuals as they return home to a healthy, law-abiding life.

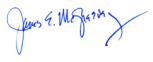
Judge Kirsch has been exemplary. He has called our office to place veterans who were in desperate need of addiction services, mothers who needed a safe place for their children, and elderly persons who needed a safe and secure place in which to die.

It is often said that justice is blind. Judge Kirsch truly embodies this axiom with a sense of measured, common-sense compassion. I have spent Saturdays and Sundays with Judge Kirsch at addiction treatment centers, as he listens to young men and women describing their ordeal from the hell of fentanyl to hopeful recovery. He has served food at St. John's Pantry in Newark to the homeless. There are not many people of whatever stripe who do this. Judge Kirsch clearly did it by virtue of his personal values and desire to better understand and know those that suffer from diseases of despair.

Judge Kirsch unequivocally understands the importance of public safety as a bedrock of our criminal justice system. Yet, he also values the possibilities of transformation, indeed salvation, for those persons yearning for a Second Chance.

With humility, I offer these words in ardent support of Judge Kirsch. My only criticism of Judge Kirsch is that he is not Irish.

With all good wishes,



James E. McGreevey

NEW JERSEY STATE BAR ASSOCIATION

JERALYN L. LAWRENCE, PRESIDENT
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January 13, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Judge Robert Kirsch to the United States District Court of the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

The New Jersey State Bar Association commends the nomination of state Superior Court Judge Robert Kirsch to serve on the U.S. District Court of the District of New Jersey.

As a distinguished leader of the New Jersey legal community, he is a strong choice to fill a vacancy on the New Jersey federal bench, which has been operating in a state of emergency for several years. His nomination will help ensure members of the public are able to resolve their disputes in a timely fashion.

He is a candidate with a strong background in addressing complex legal questions, having served the people of the state of New Jersey facing family and civil matters in the state Superior Court. He also brings the vast knowledge gained from his time as an assistant U.S. Attorney in New Jersey, as well as working in the Department of Justice in Washington.

Once confirmed, he will unquestionably continue to be an asset to the U.S. District Court and people of our state.

Respectfully,

Jeralyn L. Lawrence, Esq.
President

CC: Honorable U.S. Senator Cory A. Booker

FEDERAL PUBLIC DEFENDER

DISTRICT OF NEW JERSEY

K. ANTHONY THOMAS, FEDERAL PUBLIC DEFENDER

1002 BROAD STREET • NEWARK, NEW JERSEY 07102 • (973) 645-6347

January 12, 2023

Via Electronic Mail Only:

Phillip_Brest@judiciary-dem.senate.gov
Brendan_Chestnut@judiciary-rep.senate.gov

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

RE: Judge Robert Kirsch's Judicial Nomination

Letter of Support

Dear Chairman Dubin and Ranking Members Grassley and Graham:

I know Robert Kirsch as a friend, former adversary, and respected New Jersey Superior Court Judge. I write with great enthusiasm in support of his nomination to the United States District Court for the District of New Jersey. Judge Kirsch would be an exceptional addition to the Federal bench.

Nearly twenty-five years ago, Judge Kirsch and I crossed paths in the same Court for which he has been nominated. Judge Kirsch (just "Bobby" then) was as an Assistant United States Attorney ("AUSA"), and I was a new Assistant Federal Public Defender. Throughout his time as an AUSA, Judge Kirsch always acted honorably, even-handedly, and with the utmost integrity in representing the United States of America. Knowing Judge Kirsch was on the other side of the aisle was refreshing because I knew I would be facing a respectful listener that

believed in equal justice under the law rather than victory at all costs. This was and remains an outstanding quality about Judge Kirsch.

Judge Kirsch exhibited the same characteristics once he transitioned to the judiciary. For example, he was instrumental in establishing a statewide juvenile reentry program and demonstrated support for Integrity House, a nonprofit organization dedicated to providing thousands of individuals with therapeutic substance abuse treatment. These efforts demonstrate a nuanced approach to criminal justice, which will be critical to serving as a federal judge.

For these reasons, I believe Judge Kirsch will be a valuable addition to the federal bench of the District of New Jersey, where I continue to serve indigent defendants in my capacity as the District's Federal Public Defender.

Please do not hesitate in contacting me should you have any questions.

Very truly yours,

K. Anthony Thomas
Federal Public Defender

Phillip_Brest@judiciary-dem.senate.gov
Brendan_Chestnut@judiciary-rep.senate.gov

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey Graham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

January 9, 2023

Dear Senators Durbin, Grassley and Graham,

I am writing to you in support of Judge Robert Kirsch for his nomination to be a United States District Court Judge.

My name is Deandre Weathersby. This is probably not a typical letter that you receive. I am not a lawyer, or a judge. I'm 28 years-old and I would like to tell you about the Robert that I know.

I grew up in Chicago, after high school I attended Knox college where I earned my Bachelor of Science and majored in Environmental Science. During the summers instead of going back to Chicago I spent my summers at a camp on Lake Winnipesaukee in New Hampshire. It was an escape from the violence of the inner city of Chicago. I lost two brothers, one to gun violence, one to a heart attack. They were both in their mid-twenties and I wanted to make sure I would have a life after my 20's.

During summers at camp I got close to a few of the kids and one in particular who spoke to me about what we wanted out of life, and that was Jackson Kirsch. The summer after my graduation from college, Jackson was visiting the camp and I mentioned to Jackson how I wanted to build a life away from my home.

Jackson, being his dad's son, mentioned "My dad could help". I didn't know Robert but when Jackson said that to me, I wasn't sure if it was actually possible for many reasons. Later that day Jackson handed me his phone and said "speak to my dad". Robert didn't know who I was but he was very welcoming. That was the start of our relationship and our bond. He believes in his

son's judgement so much that he would even take into consideration opening his home to a stranger. We spoke in August, 2017 by November, I was moving in.

In February 2018 I started work at the NJDEP as an environmental specialist trainee and currently am there as a specialist.

I have Robert in my corner, he has offered me personal growth and career advice not in the way most people would. He has led by example - with family, how to treat your family even the family that you weren't born with. How to cater to relationships with people whether at work or from your personal life. Robert took me under his wing as more than as a son and more than a mentee but in every aspect of my life.

After opening his home to me, it was clear he wanted the best for me in everything I was involved in, work, social, career, financial guidance, and wanted me to have a good life. To me Robert is not the kind of person to dictate and delegate, he has taken me to do things as a family such as going to the salvation army to donate our time and when he tells us stories, I saw the joy in his eyes. That for me, was my realization that this man is more than just a father, more than just a judge and more than a pilar to the community, he is an all around outstanding human being. Robert doesn't do the things he does for others to boost his own ego but he does it to affect the outcome of the person's life, that was the real prize, not for being noticed for helping out. His real gift comes from wanting the people around him to succeed and make the best out of what is in front of them.

I lived with Robert and the Kirsch family for two and a half years and I never once felt like an outsider. He doesn't know it yet but I am planning on moving back in.

Sincerely,

Deandre Weathersby

Sent: Wednesday, January 11, 2023 10:56 AM
Subject: Judge Robert Kirsch

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable LindseyGraham
Incoming Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senators,

I write in support of Judge Robert Kirsch's potential nomination to the Federal Bench in the District of New Jersey.

Judge Robert Kirsch clerked for me from 1991-1993. I have been sitting as a Federal District Judge since 1985 and looking back, Judge Kirsch distinguished himself as one of my very best law clerks. Judge Kirsch is innately intelligent, well organized, very articulate and an excellent writer. He is highly self-motivated, industrious, has an excellent work ethic and has excellent communication skills. Judge Kirsch exercises good, prudential judgement. Having clerked for me and having served as an Assistant United States Attorney in the United States Attorney's Office for the District of New Jersey for twelve years, he has a working knowledge of the Federal Rules of Evidence, as well as the Federal Rules of Civil and Criminal Procedure. Judge Kirsch is known to me to be a person who is concerned with fairness, integrity and expertise. He is a man of outstanding moral character and

courage. He cares deeply about justice as well as injustice.

It is my pleasure to recommend most enthusiastically in the highest terms and without reservation Judge Robert Kirsch to be a United States District Court Judge for the District of New Jersey. If you have any questions please do not hesitate to contact me at 904-417-0381.

Sincerely,
William J. Zloch
Senior United States District Judge

PRESIDENT
RAKIM BROOKS

CHAIR
PAULETTE MEYER

January 20, 2023

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee

Dear Chairman Durbin:

On behalf of the Alliance for Justice (AFJ), a national association representing over 150 public interest and civil rights organizations, I write to support the confirmation of Orelia Merchant to the United States District Court for the Eastern District of New York.

Ms. Merchant has spent her entire professional career in public service, demonstrating a commitment to solving problems with fairness and efficiency. She began her career as an Assistant Regional Counsel for the United States Environmental Protection Agency ("EPA") in Chicago, Illinois, where she worked on behalf of the agency to enforce environmental protections and uphold the rule of law. For example, she represented the EPA in holding an oil refining company accountable for failing to properly dispose of hazardous waste. When Ms. Merchant served as an Assistant U.S. Attorney in the Civil Division of the Eastern District of New York, she worked diligently to serve her community and demonstrated a commitment to swift justice when feasible. For example, in 2014, Ms. Merchant was instrumental in achieving favorable results for homeowners affected by Hurricane Sandy who had improperly been denied insurance coverage for damages suffered as a result of the storm. From 2016 to 2019, Ms. Merchant served as an Executive Assistant U.S. Attorney in the Civil Division, serving New Yorkers in the Eastern District. Finally, since 2019, Ms. Merchant has served as Chief Deputy Attorney General for State Counsel, a member of the New York State Attorney General's executive leadership team, oversees more than 8,000 active cases, and manages 450 employees, including 250 attorneys, in prosecution and defense of cases in state and federal court on behalf of the state.

Her impressive career trajectory is not the only indicator of the expertise, respect, and trust she has gained through the years. Ms. Merchant has been formally honored for her exemplary service throughout her career. In 2016, she received of the U.S. Department of Justice, Executive Office for United States Attorneys Director's Award for Superior Performance as an Assistant United States Attorney. Additionally, she received commendations for Outstanding Work on Employment Law Matters from the U.S. Probation Department of the Eastern District of New York in 2002, 2019, 2011, and 2015. In 2013, she received the U.S. attorney's Office of the Eastern District of New York's Community Service Award.

Ms. Merchant's public service record, decades of complex civil and criminal litigation experience, and her deep ties to the Eastern District of New York make her highly qualified for a federal judgeship. For these reasons, I urge you to confirm Ms. Merchant to the United States District Court for the Eastern District of New York.

Sincerely,

Rakim H.D. Brooks

Rakim Brooks
President, Alliance for Justice

January 24, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey O. Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Chairman Durbin, Ranking Member Grassley, and Ranking Member Graham:

Re: Nomination of Orelia E. Merchant to the United States District Court for the Eastern District of New York

I enthusiastically write to give my full support of the confirmation of Orelia E. Merchant as a judge on the United States District Court for the Eastern District of New York (EDNY). I believe that Ms. Merchant's superior intellect, her exceptional skills as a lawyer and servant leader, her solid moral character and reputation for integrity make her well qualified to serve as a judge on that court.

I have known Ms. Merchant for more than twenty years. She is a multi-talented and experienced attorney who served with distinction in the U.S. Attorney's Office for the EDNY (the Office) from February 2002 to 2019. During her tenure in the Office, as an AUSA in the Civil Division, Ms. Merchant successfully managed a diverse, demanding, and complex caseload. She investigated and developed numerous affirmative cases and litigated numerous high exposure defensive cases. Her practice areas included employment discrimination, environmental, health care fraud, mortgage fraud, or, including medical malpractice, prisoner litigation and constitutional challenges, and program litigation. She also deftly handled asset forfeiture, bankruptcy, immigration, and social security cases. Prior to joining the Office, Ms. Merchant served as a Special Assistant United States Attorney assigned to both the Criminal and Civil Divisions of the U.S. Attorney's Office for the Eastern District of Louisiana, where she prosecuted and defended the interests of the government in a variety of practice areas.

In January 2016, during my tenure as U.S. Attorney, I appointed Ms. Merchant as an Executive Assistant United States Attorney with oversight over the Civil and Administrative Divisions of

the Office. Ms. Merchant was a vital member of the Office's Executive Division. Indeed, over the course of my tenure, Ms. Merchant became an invaluable advisor who provided me with wise counsel with regard to a variety of significant cases and matters handled by the Office, and on non-litigation matters impacting the Office's operation.

Ms. Merchant significantly impacted the operation of the Civil Division by providing management direction and oversight of the Division's representation of federal government's interest in nearly 1,000 active cases and matters. Notably, I also chose Ms. Merchant to represent the Office in high level meetings in some of our most significant civil matters, including settlement discussions and negotiations related to complex residential mortgage backed securities fraud investigations of several large banks.

In addition, Ms. Merchant was largely responsible for managing the day-to-day administrative operations of the Office. Quickly coming up to speed on relevant Department of Justice guidelines, procedures and policies, Ms. Merchant effectively managed everything from the balancing and management of the Office's budget, to overseeing personnel matters, to overhauling the Offices technology resources for approximately 200 attorneys and 150 support staff members.

Ms. Merchant clearly possesses a strong work ethic and exceptional organizational skills. She has mastered the ability to manage the demands of a varied workload. Those skills will serve her particularly well on the bench in the EDNY, where the court's civil docket alone is particularly heavy, varied and demanding. Indeed, currently each active member of the EDNY district court carries a civil docket of upwards to 600 or more cases at present. I believe she will conduct herself on the bench as she has during the last two decades I have observed her practice law. She will diligently, thoughtfully, and thoroughly arm herself with all of the relevant facts and appropriately apply the law and all applicable precedent before rendering a decision. She will exhibit fairness and impartiality with respect to all parties before her. She will quickly become a highly regarded and well respected jurist and judicial colleague.

In sum, Ms. Merchant will be an outstanding member of the EDNY bench, and I offer my full, complete, and highest recommendation.

Should you have any questions or wish to discuss Ms. Merchant further, I can be reached at (646) 709-4688.

Respectfully,

Robert L. Capers
Former United States Attorney for the Eastern District of New York (2015-2017)

TULANE LAW SCHOOL
TULANE ENVIRONMENTAL LAW CLINIC

January 24, 2023

The Honorable Richard Durbin, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Grassley, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Lindsey O. Graham, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Re: Nomination of Orelia Merchant to the United States District Court for the Eastern District of New York

Dear Chairman Durbin and Ranking Members Grassley and Graham,

I write to provide my enthusiastic support for the nomination of Orelia Merchant to serve as a judge for the United States District Court for the Eastern District of New York. Ms. Merchant's vast and varied experience in her decades of public service practice – beginning in the clinic I now direct – renders her highly qualified to serve as a U.S. District Court judge.

I first met Ms. Merchant when she was a third-year law student here at the Tulane Environmental Law Clinic in 1997-1998. Ms. Merchant spent that year under my supervision representing a local grassroots group in Cancer Alley and its regional and national partners in multifaceted legal proceedings challenging the permitting of a massive polyvinyl chloride complex in an historic Black community already overburdened with pollution. Then and now, our clinic serves the dual role of educating law students in being effective, ethical, and loyal advocates while expanding access to the legal system for ordinary individuals and communities unable to afford to hire an attorney. During her time as a student attorney, Ms. Merchant demonstrated and mastered the skills, judgment, professionalism, and work ethic we hope to see in our students as they prepare to enter the legal profession. The Shintech matter was high profile, as it pitted the local community against powerful entities. Thus our work was demanding and under constant scrutiny. Yet even as a law student Ms. Merchant consistently rose to the occasion, staunchly and consistently adhering to her oath as student attorney to be "useful through my clinical education in the service of justice."

I have followed Ms. Merchant's legal career since her graduation. Her wide and deep experience representing agencies and state officials in both a defense and prosecution capacity provide her a strong background to serve as a federal judge. As a practitioner with many years of experience litigating in federal court, and as a former state prosecutor, I have litigated before many judges. In addition to legal knowledge and experience, fairness is a hallmark of any good judge. Ms. Merchant's temperament and years of experience on both sides of litigation uniquely qualify her not only as knowledgeable, but fair.

In sum, I am proud to have played even a small role in Ms. Merchant's impressive career, and even more gratified to be in a position to recommend her for a U.S. District Court judgeship. I am confident that, if confirmed, she will bring honor to the position for many years to come. Thank you.

Respectfully,

Lisa W. Jordan
Clinical Professor of Law and Director,
Tulane Environmental Law Clinic

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Standing Committee on the Federal Judiciary

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January 24, 2023

Via Email
The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Via Email
The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Judge Charnelle Bjelkengren to the United States District Court for the Eastern District of Washington

Dear Chairman Durbin and Ranking Member Grassley:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Judge Charnelle Bjelkengren, who has been nominated by the President to the United States District Court for the Eastern District of Washington. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. The Standing Committee is of the unanimous opinion that Judge Bjelkengren is **"Qualified"** to serve on the United States District Court for the Eastern District of Washington. The Standing Committee's rating means that, under our guidelines, Judge Bjelkengren satisfies the Standing Committee's very high standards with respect to integrity, professional competence, and judicial temperament and is qualified to perform all the duties and responsibilities required of a federal judge.

Very truly yours,

Hon. Ann Claire Williams (Ret.)
Chair, Standing Committee on the Federal Judiciary

cc: Stuart F. Delery, Assistant to the President and Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (*via email*)
Judge Charnelle Bjelkengren (*via email*)
ABA Standing Committee on the Federal Judiciary (*via email*)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (*via email*)

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Standing Committee on the Federal Judiciary

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January 24, 2023

Via Email
The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Via Email
The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Magistrate Judge Matthew P. Brookman to the United States District Court for the Southern District of Indiana

Dear Chairman Durbin and Ranking Member Grassley:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Magistrate Judge Matthew P. Brookman, who has been nominated by the President to the United States District Court for the Southern District of Indiana. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. The Standing Committee is of the unanimous opinion that Magistrate Judge Brookman is **"Well Qualified"** to serve on the United States District Court for the Southern District of Indiana.

Very truly yours,

Hon. Ann Claire Williams (Ret.)
Chair, Standing Committee
on the Federal Judiciary

cc: Stuart F. Delery, Assistant to the President and Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (*via email*)
Magistrate Judge Matthew P. Brookman (*via email*)
ABA Standing Committee on the Federal Judiciary (*via email*)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (*via email*)

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January 24, 2023

Via Email

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Via Email

The Honorable Charles Grassley
Ranking Member
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United States Senate
Washington, DC 20510

Re: *Nomination of Michael E. Farbiarz to the United State District Court for the District of New Jersey*

Dear Chairman Durbin and Ranking Member Grassley:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Michael E. Farbiarz, who has been nominated by the President to the United States District for the District of New Jersey. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence and judicial temperament. The Standing Committee is of the unanimous opinion that Mr. Farbiarz is **"Well Qualified"** to serve on the United States District Court for the District of New Jersey. Judge Ann Claire Williams (Ret.), the Chair of the Standing Committee, was recused from this evaluation.

Very truly yours,

David L. Brown
Vice Chair, Standing Committee on the Federal Judiciary

cc: Dana Remus, White House Counsel (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (via email)
Michael E. Farbiarz
ABA Standing Committee on the Federal Judiciary (via email)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary Staff Counsel (via email)
Allison Lundy (via email)

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January 24, 2023

Via Email
The Honorable Dick Durbin
Chairman
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United States Senate
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Via Email
The Honorable Chuck Grassley
Ranking Member
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United States Senate
Washington, DC 20510

Re: Nomination of Judge Robert Kirsch to the United States District Court for the District of New Jersey

Dear Chairman Durbin and Ranking Member Grassley:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Judge Robert Kirsch, who has been nominated by the President to the United States District Court for the District of New Jersey. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. The Standing Committee is of the unanimous opinion that Judge Kirsch is **"Well Qualified"** to serve on the United States District Court for the District of New Jersey.

Very truly yours,

Hon. Ann Claire Williams (Ret.)
Chair, Standing Committee
on the Federal Judiciary

cc: Stuart F. Delery, Assistant to the President and Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (*via email*)
Judge Robert Kirsch (*via email*)
ABA Standing Committee on the Federal Judiciary (*via email*)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (*via email*)

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January 24, 2023

Via Email
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Chairman
Committee on the Judiciary
United States Senate
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Via Email
The Honorable Chuck Grassley
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Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Orelia Eleta Merchant to the United States District Court for the Eastern District of New York

Dear Chairman Durbin and Ranking Member Grassley:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Orelia Eleta Merchant, who has been nominated by the President to the United States District Court for the Eastern District of New York. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. A substantial majority of the Standing Committee is of the opinion that Ms. Merchant is **"Qualified,"** and a minority determined that she is "**Not Qualified**" to serve on the United States District Court for the Eastern District of New York. The Standing Committee's rating means that, under our guidelines, Ms. Merchant satisfies the Standing Committee's very high standards with respect to integrity, professional competence, and judicial temperament and is qualified to perform all the duties and responsibilities required of a federal judge. The majority rating represents the Standing Committee's official rating.

Very truly yours,

Hon. Ann Claire Williams (Ret.)
Chair, Standing Committee on the Federal Judiciary

cc: Stuart F. Delery, Assistant to the President and Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (*via email*)
Orelia Eleta Merchant (*via email*)
ABA Standing Committee on the Federal Judiciary (*via email*)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (*via email*)

Introductory Remarks for the Record
Senator Maria Cantwell
Senate Judiciary Committee Nominations Hearing
January 25, 2023
Nominee: Charnelle Bjelkengren for the U.S. District Court for the Eastern District of Washington

Chair Durbin and Ranking Member Grassley, it is a privilege to be here today to urge my colleagues to advance Charnelle Bjelkengren's nomination to serve as a judge on the U.S. District Court for the Eastern District of Washington.

Judge Bjelkengren is highly qualified and has experience serving on the bench. She currently serves on the Spokane County Superior Court, where she became the first female African American judge in Eastern Washington. Judge Bjelkengren previously served as senior administrative law judge in the Spokane Valley Office of Administrative Hearings.

In addition to her extensive judicial experience, Judge Bjelkengren is passionate about the district in which she will serve. A graduate of Gonzaga University School of Law, she fell in love with the Spokane area during her studies and has spent her entire judicial career in Washington state.

Not only has Judge Bjelkengren dedicated herself to upholding the rule of law, but she also has devoted herself to enriching her community throughout her career.

She is a member of the local NAACP chapter, serves on the SCBA Diversity Section Carl Maxey Scholarship subcommittee to financially support law students of diverse backgrounds, and is engaged in multiple committees focused on diversity and eradicating racism.

A highly-qualified and dedicated nominee, Judge Bjelkengren would make a great addition to the federal bench.

I urge my colleagues to support her nomination to serve Eastern Washington.

○