Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Eumi K. Lee
Nominee to be United States District Judge for the Northern District of California

1. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach."**

   Response: I am not familiar with this statement or the context in which it was made, but I disagree with it. Judges are required to faithfully and impartially apply the law to the factual record and evidence in the case before them, without regard to any personal values. If confirmed as a district judge, I would faithfully and impartially apply binding precedent from the Supreme Court and Ninth Circuit to the facts of the cases before me.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's response was: "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not familiar with this statement or the context in which it was made, but I would not follow this approach. If confirmed as a district judge, I would faithfully and impartially apply binding precedent from the Supreme Court and Ninth Circuit to the facts of the cases before me.

3. **You were the sole author of a 2010 article titled "An Overview of Special Populations in California Prisons" in the *Hastings Race and Poverty Law Journal*. At your confirmation hearing, you told Senator Lee and Senator Kennedy that the article was a summary of a panel you moderated. On review of your article, however, you do not indicate that the article reflects the views of others, and the majority of the citations are to outside research.**

   a. **Was your statement to Senator Kennedy that your article just "summarized for the symposium edition the different arguments and issues raised [at the panel discussion]" an accurate statement?**

      Response: Yes, as I stated to Senators Lee and Kennedy at the hearing, the piece referenced in Question 3 arose from a symposium panel among subject-matter experts that I moderated over 13 years ago as a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Law Journal in 2010, and was the product of a two-day conference. The purpose of the piece was to summarize, including a factual review of, the issues and concerns raised by the expert panelists regarding three segments of the California prison population. As I explained in response to Senator Padilla's questions at the hearing, I was not and am not a subject-matter

expert concerning transgender individuals, immigrants, or women in California prisons.

If yes, please explain why your article does not state that it is simply a summary of the arguments made by others or attribute the conclusions to the panelists?

Response: The first footnote in the piece explains it "is the fruit of the California Corrections Crisis Conference, held March 19-20 in San Francisco, California." 7 Hastings Race & Poverty L. J. 223, 223 n.* (2010). The introduction goes on to explain that the piece is limited to three segments of the California prison population to reflect the scope of the panel involved. *See id.* at 224. Finally, the piece explains that, "[i]n discussing these populations, certain commonalities [and differences] arose" among the concerns expressed by the expert panelists, and those are the issues that the piece goes on to discuss. *Id.* Nonetheless, I could have made the point more clearly in the piece.

b. **Do you share the views you wrote in the article?**

Response: As I noted in response to Question 3(a), the purpose of the piece was not to express my views, but rather to provide a summary, including a factual review, of the views and concerns shared by the subject-matter experts on the panel. Beyond that, I am not able to comment on my views as these issues are a matter of public debate and are being actively litigated in the courts. As a sitting judge and judicial nominee, I am thus precluded from further comment as it may be viewed as prejudging a case that may come before me. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A)(6).

c. **Did you share the views you wrote at the time you wrote the article?**

Response: As I noted in response to Question 3(a), the purpose of the piece was not to express my views, but rather to provide a summary, including a factual review, of the views and concerns shared by the subject-matter experts on the panel. Beyond that, I am not able to comment on my views as these issues are a matter of public debate and are being actively litigated in the courts, including in California. As a sitting state court judge and judicial nominee, I am precluded from commenting on this issue, as it may be viewed as prejudging a case that may come before me. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A)(6).

d. **Did you determine the topics and questions to the panel?**

Response: No.

e. **Did you select the panelists? If not, who did?**

Response: No. To the best of my recollection, the student organizers from the Hastings Race & Poverty Law Journal selected the panelists.

4. **You wrote that transgender prisoners are "particularly vulnerable to sexual assault and rape" due to prison policies to determine housing assignments based on "biological attributes rather than their gender identification." Do you worry that placing biological males in female prisons makes women more vulnerable to sexual assault and rape?**

   Response: See my response to Question 3(a). Additionally, these issues are a matter of public debate and being actively litigated in the courts. As a sitting judge and judicial nominee, I am thus precluded from commenting on it. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A)(6).

5. **You have criticized "the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three strikes laws, as well as [California's] counterproductive parole system.'"**

   Response: Over 13 years ago, I moderated a panel regarding barriers to reentry in California while I was as a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Journal in 2010, and was the product of the same two-day conference on the California prisons and the then-ongoing litigation in *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009). The purpose of the piece was to summarize the issues and concerns raised by the expert panelists regarding barriers to reentry. I was not a subject-matter expert at the time, although I later focused as a clinical professor on clean slate and criminal records remedies beginning in approximately 2012.

   The quote in Question 5 is from a three-judge panel's decision in *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009). The full quote is as follows: "The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible *determinate sentencing* and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system." *Id.* at 1003 (emphasis added). The 2010 piece referenced the district court panel's observations regarding the causes of overcrowding in California prisons.

   a. **Do you believe California is too harsh on criminals?**

      Response: See my initial response to Question 5. This is a question for policymakers and stakeholders and is being actively litigated in the courts. As a sitting judge and judicial nominee, I am thus precluded from commenting on it. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A)(6).

b. **Do you believe that mandatory minimum sentences are ever appropriate?**

Response: See my response to Question 5(a). As a state court judge, I have presided over thousands of criminal hearings, including sentencing hearings. As a judge, I am duty bound to fully and faithfully apply the law, which I have done and will continue to do, without reservation. If confirmed, and in the event I preside over a sentencing for a crime that carries a mandatory minimum sentence, I will apply the sentence as directed by Congress.

6. **You have criticized federal immigration authorities for working with local and state law enforcement to detect illegal immigrants.**

Response: See my response to Question 3(a).

a. **Is it discriminatory to detain and deport persons that illegally entered into the United States?**

Response: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a sitting judge and a judicial nominee, to comment on an abstract legal issue or a hypothetical dispute that could be the subject of future litigation before me. As a judge, I am duty-bound to fully and faithfully follow the law, which I have done and will continue to do.

b. **You have also suggested that the "process of identifying potential noncitizens is laden with racial and ethnic bias." What do you mean by this?**

Response: See my response to Question 3(a). The quote in Question 6(b) referred to criticisms voiced by "[i]mmigrant and civil rights advocates" that prisoners' "appearance and last names are used as proxies for citizenship to determine who should be scrutinized." 7 Hastings Race & Poverty L. J. 223, 234 & n.56 (2010).

7. **As a student at Pomona University, you co-wrote a bizarre fictional article in The Student Life newspaper titled, *Beer Garden Utopia Recaptures Mythic Lunatic Past*.**

a. **Is this story based in any way on true events? If so, did you participate?**

Response: No.

b. **Please explain the meaning of the article?**

Response: In collecting responsive materials for my committee questionnaire, I requested all publications from my college library archives. This student

newspaper article is from 30 years ago and lists me as a co-author on the byline. However, I have no recollection of this article, and cannot explain its meaning other than its description which indicates that it is fictitious.

8. **In 2015 you discussed a "bamboo ceiling" for Asian Americans in the legal field.**

   a. **What is the "bamboo ceiling?"**

      Response: My understanding is that the term "bamboo ceiling" is an analogy to the term "glass ceiling" for women and focuses on societal barriers faced by Asian Americans.

   b. **Do the race-conscious admissions practices that disadvantaged Asian students addressed by the Supreme Court in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* contribute to a "bamboo ceiling"?**

      Response: *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* are binding precedent. But related controversies remain and will continue to be actively litigated in the courts. As a sitting state court judge and as a judicial nominee, it is not appropriate for me to comment on matters that are pending or impending before the courts. *See*, *e.g.*, Code of Conduct for United States Judges, Canon 3(A)(6).

9. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

   Response: Under 28 U.S.C. § 2255, a federal prisoner may file a motion for relief from the sentencing court on the grounds that (1) the "sentence was imposed in violation of the Constitution or laws of the United States," (2) the "court was without jurisdiction to impose such sentence," (3) the "sentence was in excess of the maximum authorized by law," or (4) the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Motions are subject to a one-year period of limitations (*id.*, §2255(f)), and any successive motion must be based on newly discovered evidence that would have resulted in acquittal or on a new and previously unavailable rule of constitutional law made retroactive by the Supreme Court. 28 U.S.C. § 2255(h).

10. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

    Response: In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina,* the Supreme Court held that the race-based admissions programs at Harvard College and University of North California violated the Equal Protection Clause of the Fourteenth

Amendment. 143 S. Ct. 2141 (2023). After determining that Petitioner Students for Fair Admissions ("SFFA") satisfied the standing requirements for organizational plaintiffs as articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Supreme Court concluded both programs failed strict scrutiny, reviewing the programs in light of the risks and limits set forth in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

11. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

If yes, please list each job or role where you participated in hiring decisions.

Response: As a law clerk to the Honorable Warren J. Ferguson, I participated in the initial screening of law clerk applications. As an associate at Thelen Reid & Priest, I participated in interviewing candidates for summer associate positions. As an associate at Keker & Van Nest, I participated in interviewing candidates for associate positions. I was not on the hiring or executive committees of either firm and did not participate in hiring meetings. At the Civil Justice Clinic (later Community Justice Clinics) at University of California, Hastings College of the Law, I participated in decisions to hire the clinical teaching fellows and clinical fellows for the Individual Representation Clinic. As a clinical faculty member, I participated in the interviewing of candidates for clinical teaching positions. As a state court judge, I had the lead role in hiring my recent summer extern.

12. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

Response: No.

13. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?**

Response: No.

14. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

Response: No, not to my knowledge.

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given.

Please state whether you played any part in the employer's decision to grant the preference.

15. **Under current Supreme Court and Ninth Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?**

    Response: Yes. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Mitchell v. Wash.*, 818 F.3d 436 (9th Cir. 2016).

16. **Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.**

    Response: In *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the Supreme Court held that the First Amendment Free Speech Clause prohibits states from compelling a website designer to create an expressive design that communicates a message with which she disagrees, specifically there, a website celebrating same-sex marriage.

17. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*." Is this a correct statement of the law?**

    Response: As a sitting judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. To the extent this question is asking whether *Barnette* remains good law, it is. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023).

18. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

    Response: If presented with this question as a district judge, I would apply the standards from binding precedent of the Supreme Court and Ninth Circuit. In *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015), the Supreme Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163 (citations omitted). *Reed* instructed that "the crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." *Id.* at 165. Only if the law is neutral on its face would I then turn to "the law's justification or purpose" to determine whether it is "content-based" because its adoption was animated by disagreement with the message conveyed. *Id.* at 166.

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

    Response: "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). As the Supreme Court held in *Counterman*, the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements," but "a mental state of recklessness is sufficient." *Id.* at 2111-12. Therefore, the government must show "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.*

20. **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: The Supreme Court has described a "basic" or "historical" fact as a question "of who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The distinction between a question of fact and a question of law is not always clear-cut, however, as there is no set "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). To distinguish between the two, courts ask whether the question requires "expound[ing] on the law, particularly by amplifying or elaborating on a broad legal standard." *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 966. If so, it is a legal question. *See id.* If, on the other hand, the question implicates "case-specific factual issues" that require the weighing of evidence and credibility judgments, it is a question of fact. *See id.* This distinction is important because, among other reasons, the characterization of a question as one of fact or law determines the standard of review that applies. *See id.* at 962.

21. **Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?**

    Response: Section 3553(a)(2) sets forth the four purposes – retribution, deterrence, incapacitation, and rehabilitation – a judge shall consider in sentencing. 18 U.S.C. § 3553(a)(2). The statute does not assign any purpose greater weight than the others. If confirmed, I will faithfully and impartially apply binding precedent from the Supreme Court and the Ninth Circuit. I will follow the factors set forth in Section 3553(a) and any relevant provisions of the United States Sentencing Guidelines. I will consider the presentence report prepared by the United States Probation Department; the presentencing memoranda and the arguments presented by the parties; and any other relevant materials (including, but not limited to, victim impact statements and the plea agreement if applicable).

22. **Please identify a Supreme Court decision from the last 50 years that you think is particularly well-reasoned and explain why.**

Response: As a sitting state court judge and a judicial nominee, it is not my place to comment on the quality of Supreme Court decisions. I faithfully apply binding precedent from the United States Supreme Court to the facts of the cases that come before me, and I would continue that practice if confirmed as a district judge.

23. **Please identify a Ninth Circuit judicial opinion from the last 50 years that you think is particularly well-reasoned and explain why.**

    Response: As a sitting state court judge and a judicial nominee, it is not my place to comment on the quality of Ninth Circuit decisions. If confirmed, I will faithfully apply binding precedent from the Ninth Circuit to the facts of the cases that come before me.

24. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

    Response: Section 1507 of Title 18 of the U.S. Code provides: "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 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." 18 U.S.C. § 1507.

25. **Is 18 U.S.C. § 1507 constitutional?**

    Response: If presented with this question as a district judge, I would apply binding precedent of the Supreme Court and Ninth Circuit. I am unaware of any such precedent expressly as to § 1507, but the Supreme Court has upheld as constitutional a state statute modeled after 18 U.S.C. § 1507. *See Cox v. Louisiana*, 379 U.S. 559, 564 (1965).

26. **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 state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent because it is possible that related issues may come before the courts. However, because it is unlikely that *de jure* racial segregation in schools would be reimposed in the United States, I may state my view that *Brown v. Board of Education* was correctly decided.

b. **Was *Loving v. Virginia* correctly decided?**

Response: Yes. As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent because it is possible that related issues may come before the courts. However, because it is unlikely that miscegenation laws would be reimposed in the United States, I may state my view that *Loving v. Virginia* was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Griswold v. Connecticut* is binding precedent, and I will apply it fully and faithfully.

d. **Was *Roe v. Wade* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. The Supreme Court's decision in *Roe v. Wade* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* is binding precedent, and I will apply it fully and faithfully.

e. **Was *Planned Parenthood v. Casey* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* is binding precedent, and I will apply it fully and faithfully.

f. **Was *Gonzales v. Carhart* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Gonzales v. Carhart* is binding precedent, and I will apply it fully and faithfully.

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

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme

Court to the matters that come before me. *District of Columbia v. Heller* is binding precedent, and I will apply it fully and faithfully.

h. **Was *McDonald v. City of Chicago* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *McDonald v. City of Chicago* is binding precedent, and I will apply it fully and faithfully.

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent, and I will apply it fully and faithfully.

j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *New York State Rifle & Pistol Association v. Bruen* is binding precedent, and I will apply it fully and faithfully.

k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Dobbs v. Jackson Women's Health* is binding precedent, and I will apply it fully and faithfully.

l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President*

& Fellows of Harvard College are binding precedent, and I will apply them fully and faithfully.

m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *303 Creative LLC v. Elenis* is binding precedent, and I will apply it fully and faithfully.

27. **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, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. It is then the government's burden to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* The Court emphasized that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated[,]" although "its meaning is fixed according to the understandings of those who ratified it." *Id.* at 2132 (citation omitted). The Court explained that "courts can use analogies to [] historical regulations" in determining whether modern regulations are constitutionally permissible. *Id.* at 2133. In doing so, the Supreme Court directed lower courts to evaluate "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified[.]" *Id.* at 2133 (citations omitted). If confirmed, I would faithfully apply the legal standard set forth in *Bruen*.

28. **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.

29. **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: To the best of my recollection, 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.

30. **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.

31. **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.

32. **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.

33. **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: Both Senator Dianne Feinstein and Senator Alex Padilla have established judicial evaluation committees for screening and recommending candidates for the federal judiciary in California. On July 26, 2022, I submitted an application to the State Chair for Senator Padilla's Judicial Evaluation Commission for consideration for nomination for the Northern District of California. On February 28, 2023, I received a request from the Northern District Committee of Senator Padilla's Judicial Evaluation Commission to schedule an interview. I interviewed with members of the Committee on March 24, 2023. On April 13, 2023, I interviewed with the State Chair of Senator Padilla's Judicial Evaluation Commission. On April 21, 2023, I interviewed with members of Senator Padilla's Senate Judiciary Committee staff. Senator Padilla interviewed me on April 25, 2023. I was interviewed by attorneys from the White House Counsel's Office on May 2, 2023. On May 4, 2023, I interviewed with the State Chair of Senator Feinstein's Judicial Advisory Committee. Since May 5, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 27, 2023, my nomination was submitted to the Senate.

34. **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.

35. **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.

36. **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.

37. **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.

38. **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.

39. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**

    a. If yes,
        i. Who?
        ii. What advice did they give?
        iii. Did they suggest that you omit or include any particular case or type of case in your questionnaire?

        Response: Yes. In preparing for my nomination, I discussed my committee questionnaire with several officials from the Office of Legal Policy. These discussions focused principally on ensuring that I was capturing all responsive materials and that the cases I included from my time as a judge and as a practicing attorney reflected the breadth and depth of my experience. One of these discussions concerned inclusion of the amicus brief from *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), in my list of significant litigated matters in question 17. I ultimately made the determination that, because this case was already reflected in question 16e of the questionnaire, it could be replaced by another case highlighting other litigation experience.

40. **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 attorneys from the White House Counsel's Office on May 2, 2023. Since then, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office regarding my nomination and the confirmation process.

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

Response: I received these questions on September 13, 2023. I conducted legal research and drafted my responses. I submitted my draft responses to the Office of Legal Policy at the Department of Justice on September 14, 2023. I received limited feedback. I then finalized and submitted my answers.

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

Questions for the Record for Eumi Lee, nominated to be United States District Judge for the Northern District of California

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.

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: As a sitting state court judge and as a judicial nominee, it is not appropriate for me to comment on matters that could come before me as it may be viewed as prejudging a case. *See* Code of Conduct for United States Judges, Canon 3(A). In *Washington v. Gluckberg*, 521 U.S. 702 (1997), the Supreme Court held that the test for unenumerated rights is whether they 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." *Id.* at 720-21 (internal quotation marks and citations omitted). If confirmed, I would fully and faithfully apply the *Glucksberg* test and any other binding Supreme Court and Ninth Circuit precedent to a case involving unenumerated rights in the Constitution.

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 judicial philosophy is to fully and faithfully apply the law in an impartial manner in every case. This requires that I understand the limited role of the judiciary and approach each case with humility and an open mind. I diligently review the factual record and the written submissions of the parties, research the law and binding precedent, and faithfully and impartially apply the law to the limited issue(s) that are properly before me. At hearings, I listen to the parties' arguments, recognizing the importance of the case to each litigant and issue a decision (whether oral or written) that follows binding precedent and can be understood by the lawyers and laypersons alike. I have not studied the judicial philosophies of all the Justices on the Warren, Burger, Rehnquist, and Roberts Courts to determine which Justice's philosophy is most analogous.

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 follows: "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., 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. — Also termed *doctrine of original public meaning*; *original-meaning doctrine*; *original public meaning.* 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." Black's Law Dictionary (11th ed. 2019) (emphasis in original). The

Supreme Court has taken an originalist approach in interpreting certain constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully apply binding Supreme Court and Ninth Circuit precedent and will follow the interpretative methods of analysis set forth by the Supreme Court and Ninth Circuit.

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 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." Black's Law Dictionary (11th ed. 2019). I am not aware of any case in which the Supreme Court has directed lower courts to use living constitutionalism as an interpretive method. If confirmed, I will fully and faithfully apply binding Supreme Court and Ninth Circuit precedent and will follow the interpretative methods of analysis set forth by the Supreme Court and Ninth Circuit.

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 the Supreme Court or Ninth Circuit has instructed that lower courts look to the original public meaning of a particular constitutional provision, I would follow that approach. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will faithfully follow binding Supreme Court and Ninth Circuit precedent when interpreting the Constitution, including precedent regarding the role of the original meaning of a constitutional 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, I will faithfully follow binding Supreme Court and Ninth Circuit precedent when interpreting the Constitution or a statute, including binding precedent regarding the method of constitutional and statutory interpretation. *See, e.g., N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *Bostock v. Clayton Cty.*, 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."); *Ashcroft v. Am. Civ. Lib. Union,* 535 U.S. 564, 574-75 (2002) (discussing the use of "contemporary community standards" in assessing obscenity under the First Amendment).

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

Response: No. As the Supreme Court explained in *New York State Rifle & Pistol Ass'n*

v. Bruen, 142 S. Ct. 2111 (2022), the meaning of the Constitution "is fixed according to the understandings of those who ratified it[.]" *Id.* at 2132. The Court further explained that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.*

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I will apply it fully and faithfully.

a. **Was it correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Dobbs v. Jackson Women's Health* is binding precedent, and I will apply it fully and faithfully.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: *New York State Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I will apply it fully and faithfully.

a. **Was it correctly decided?**

Response: As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *New York State Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I will apply it fully and faithfully.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: *Brown v. Board of Education* is binding precedent, and I will apply it fully and faithfully.

a. **Was it correctly decided?**

Response: Yes. As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent because it is possible that related issues may come before the courts. However, because it is unlikely that *de jure* racial segregation in schools would be reimposed in the United States, I may state my view 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: Under the Bail Reform Act of 1984, a rebuttable presumption in favor of pretrial detention arises when a person has been charged with one or more of the offenses listed in 18 U.S.C. § 3142(e)(2) and (e)(3). These include certain offenses involving drug trafficking, firearms, terrorism, slavery or human trafficking, and minor victims, as well as cases involving certain repeat offenders.

a. **What are the policy rationales underlying such a presumption?**

Response: The presumption reflects Congress' determination that a defendant's arrest for certain offenses suggests "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1). The presumption in favor of pretrial detention reflects Congress' determination that a person accused of certain crimes present a greater flight risk or danger to the community. *Id.* § 3142(f).

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. By way of example, the Supreme Court has held that a state may not compel a small business operated by an observant owner to create expressive speech that would violate her sincerely held religious belief. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321-22 (2023).

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court reaffirmed that states have a duty "not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731. Any time a law or regulation "treat[s] *any* comparable secular activity more favorably than religious exercise," strict scrutiny is triggered. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis in original). To satisfy strict scrutiny, the state must carry its burden of showing that the challenged law or regulation "further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Id.* at 1298 (citation omitted).

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 Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), several religious entities sought injunctive relief from an executive order issued by the New York governor that imposed very severe restrictions on attendance at religious worship services in areas classified as "red" or "orange" zones during the COVID-19 pandemic. *Id.* at 65-66. In a *per curiam* opinion, the Supreme Court held the applicants were entitled to a preliminary injunction pending appeal because (1) they showed they were likely to prevail on their First Amendment free exercise claims, given that secular businesses were not subject to the same restrictions (*id.* at 66); (2) the loss of First Amendment freedom constitutes an irreparable injury (*id.* at 67); and (3) the government had not shown the relief would harm the public as it did not claim attendance at the applicants' worship services had resulted in the spread of disease. *See id.* at 68.

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 held in a *per curiam* opinion that religious congregants were entitled to injunctive relief from California's COVID-19-related restrictions pending appeal. There, California's COVID restrictions were not "neutral and generally applicable" because they treated "comparable secular activity more favorably than religious exercise." *Id.* at 1296. The Supreme Court further concluded that the applicants were "likely to succeed on the merits of their free exercise claim," that the challenged restrictions caused irreparable harm, and that the state had not shown that "public health would be imperiled" by employing less restrictive measures. *Id.* at 1297. And even if the government later withdrew or modified the COVID restrictions during the litigation, the Court held that would not necessarily moot the case so long as the applicants remain under a "constant threat" that government officials would reinstate the challenged restrictions. *Id.* (citation 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 School Dist.*, 142 S. Ct. 2407 (2022).

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's enforcement action against a cake shop owner who declined to make a wedding cake for a same-sex couple due to religious objections violated the First Amendment Free Exercise Clause.

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. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that that "[i]t is not for the Court to say that the religious beliefs of

the plaintiffs are mistaken or unreasonable." *Id.* at 686. The Court previously explained that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Review Bd. of Ind. Employ. Sec. Div*., 450 U.S. 707, 714 (1981)).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the "Court's 'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction.'" *Id.* at 725 (quoting *Thomas v. Review Bd. of Ind. Employ. Sec. Div*., 450 U.S. 707, 716 (1981)).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the "Court's 'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction.'" *Id.* at 725 (quoting *Thomas v. Review Bd. of Ind. Employ. Sec. Div*., 450 U.S. 707, 716 (1981)).

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

Response: I am not familiar with the official position of the Catholic Church concerning 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 Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception" under the First Amendment religion clauses precluded courts from adjudicating the Catholic school teachers' employment-discrimination claims. *Id.* at 2055. The Court reasoned that, even though the teachers did not have the formal title of "minister," the "selection and supervision of the teachers upon whom [religious] schools rely to do this work lie at the core of their mission." *Id.* Thus, the Supreme Court concluded, "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.*

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, Pa.*, 141 S. Ct. 1868 (2021), the Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services ("CSS") for foster care, unless same-sex couples were allowed to serve as foster parents, violated the First Amendment's Free Exercise Clause. *Id.* at 1882. The Court reasoned that the city's non-discrimination policy was not generally applicable because it had permitted certain discretionary exceptions, and the city was unable to meet its burden to show a compelling interest in denying such an exception to CSS. *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 as next friend of O. C. v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violated the First Amendment's Free Exercise Clause. The Court cited precedent holding that the Free Exercise Clause forbids states from withholding a public benefit from otherwise eligible recipients solely due to their religious character. *Id.* at 1997. Consistent with those prior precedents, the Court concluded that Maine could not choose to subsidize some private schools but not others simply due to their religious exercise. *See id.* at 2002.

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 Sch. Dist.*, 142 S. Ct. 2407 (2022), the Court held that a school district's firing of a high school football coach for kneeling at midfield after games to offer a quiet prayer of thanks violated the First Amendment's Free Exercise and Free Speech Clauses. *Id.* at 2416. The Court reasoned that the district's policies were neither neutral nor generally applicable; by its own admission, the district prohibited the plaintiff's conduct because of its religious character and allowed other on-duty employees to engage in personal secular conduct. *Id.* at 2423.

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 Cnty., Minnesota*, 141 S. Ct. 2430 (2021), the Supreme Court vacated a state court judgment rejecting an Amish community's claim for relief from a county ordinance concerning gray water disposal under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and remanded for further proceedings in light of *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876 (2021). Justice Gorsuch penned a separate concurrence to highlight issues for the lower courts' consideration, emphasizing that the strict scrutiny analysis must be "precise," and the exemptions

afforded other groups should be carefully considered. 141 S. Ct. at 2432. In the end analysis, Justice Gorsuch stressed that "neither the Amish nor anyone else should have to choose between their farms and their faith." *Id.* at 2434.

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: As a sitting judge and judicial nominee, I am generally precluded from expressing an opinion regarding an issue that could come before me. *See* Code of Conduct for United States Judges, Canon 3(A). If I am confirmed, I would fully and faithfully apply any binding Supreme Court and Ninth Circuit precedent to any such issue that is properly raised in a case pending 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.

    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: The President has the power, "by and with the advice and consent of the Senate," to make appointments to political positions. U.S. Const. art. II, § 2, cl. 2. As a judicial nominee, it is inappropriate for me to comment or prejudge this issue. *See* Code of Conduct for United States Judges, Canon 3(A). If confirmed and if such an issue were to come before me, I would fully and faithfully apply binding Supreme Court and Ninth Circuit.

30. **If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?**

Response: The Supreme Court has held that disparate impact claims are cognizable under certain federal anti-discrimination laws. *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534, 539 (2015). I am not aware of any Supreme Court or Ninth Circuit precedent that address subconscious racial discrimination. If this issue came before me as a district court judge, I would fully and faithfully apply binding Supreme Court and Ninth Circuit precedent to the facts before me.

31. **Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: The appropriate number of Supreme Court justices is a question for policymakers. If confirmed, I will be bound by Supreme Court precedent regardless of the number of justices on the Court at the time.

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 has held that the original public meaning of the Second Amendment guarantees the right of law-abiding citizens to possess a handgun in the home for self-defense and to public carry for self-defense. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully apply binding Supreme Court and Ninth Circuit precedent regarding 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*?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the government may not prohibit law-abiding citizens from possessing firearms in their homes for self-defense. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that the Second Amendment applies outside the home and that the New York's "proper cause" licensing provision violated the Fourteenth Amendment by preventing citizens from exercising their Second Amendment rights. *Id.* at 2156. The Court held that, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct[,]" and thus the government bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. If confirmed, I will fully and faithfully apply binding Supreme Court and Ninth Circuit precedent regarding the Second Amendment.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570, 602 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

36. **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." *N.Y. State Rifle & Pistol Ass'n 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: No. The Supreme Court explained that the Second Amendment "standard accords with how we protect other constitutional rights." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

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 power is vested in the President; it further provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In *Wayte v. United States*, 470 U.S. 598 (1985), the Supreme Court recognized that the executive branch retains broad discretion as to enforcement decisions. *Id.* at 607. As a sitting state court judge and as a judicial nominee, it is not appropriate for me to opine on this issue as it may come before me, and it may be viewed as prejudging a case. *See* Code of Conduct for United States Judges, Canon 3(A). If confirmed, I will fully and faithfully apply binding Supreme Court and

Ninth Circuit precedent if confronted with such an issue.

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

Response: Black's Law Dictionary defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Black's Law Dictionary (11th ed. 2019). The same source defines "administrative rule" as "[a]n officially promulgated agency regulation that has the force of law[,]" and defines administrative "rulemaking" as "[t]he process used by an administrative agency to formulate, amend, or repeal a rule or regulation. *Id*.

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

Response: No. Congress has authorized the federal death penalty for certain criminal offenses. *See* 18 U.S.C. § 3591. The President cannot unilaterally abolish federal statutes. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

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 Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam), the Supreme Court vacated the district court's stay pending appeal of its judgment, which found unlawful the Centers for Disease Control and Prevention's ("CDC") nationwide eviction moratorium of certain tenants based on COVID-19 concerns. The district court had concluded that the CDC lacked statutory authority to impose a nationwide eviction moratorium. *See id.* at 2487. The Supreme Court held that "the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority." *Id.* at 2486. The Supreme Court emphasized that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* at 2489 (internal marks omitted and citation omitted). The Supreme Court also explained that the moratorium put the applicants "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery," *id.* at 2489, and that the equities favored vacating the stay. *Id.* at 2490.

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 sitting state court judge and a judicial nominee, it would be inappropriate for me to discuss a hypothetical issue that could be raised during litigation as it may be viewed as prejudging a case. *See* Code of Conduct for United States Judges, Canon 3(A). If confirmed, and if a case involving this issue comes before me, I would carefully review the facts of the case and fully and faithfully apply the relevant law and any binding precedent.

43. **You criticized the housing of transgender by their biological sex, arguing that harm against transgender prisoners was chiefly the result of "the prison system rel[ying] heavily on a dichotomous, sex-based means of classification. Prisoners are classified by their biological attributes rather than their gender identification."**

a. **Do you think it is a better policy to house prisoners based on their gender self-identification?**

Response: As I stated at the hearing, the piece arose from a symposium panel discussion among subject-matter experts that I moderated over 13 years ago when I was a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Law Journal in 2010, and was the product of a two-day conference. The purpose of the piece was to summarize, including a factual review of, the issues and concerns raised by the expert panelists regarding three segments of the California prison population. As I explained in response to Senator Padilla's questions, I was not and am not a subject-matter expert concerning transgender individuals, immigrants, or women in California prisons.

This policy question is a matter of public interest and debate among policymakers and stakeholders, such as the California Department of Corrections and Rehabilitations. This issue is also being actively litigated in the courts. As a sitting judge and judicial nominee, I am thus precluded from commenting on it. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A).

b. **Would that include both prisoners that were born as women, but identify as men being placed in men's prisons, and prisoners born as men but identifying as women, being placed in women's prisons?**

Response: See my response to Question 43(a).

44. **In a 2010 article in the Hastings Race and Poverty Law Journal, you argued the prison crisis is a product of "determinate sentencing."**

Response: Over 13 years ago, I moderated a panel regarding barriers to reentry in California while I was as a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Law Journal in 2010, and was the product of the same two-day conference on the California prisons and the then-ongoing litigation in *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009). The purpose of this piece was to summarize the issues and concerns raised by the expert panelists regarding barriers to reentry. I was not a subject-matter expert at the time, although I later focused as a clinical professor on clean slate and criminal records remedies beginning in approximately 2012.

The quote in Question 44 is from a three-judge panel's decision in *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009). The full quote is as follows: "The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to

inflexible *determinate sentencing* and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system." *Id.* at 1003 (emphasis added). The article referenced the district court panel's observations regarding the causes of overcrowding in California prisons.

a. **Will you impose mandatory minimum sentences as the law requires?**

Response: Yes.

b. **How can the public have any confidence that you will, given your statements regarding determinate sentencing?**

Response: See my initial response to Question 44 above. Additionally, as a state court judge for nearly five years, I have fully and faithfully applied the laws in the cases that have come before me, including when sentencing criminal defendants. For the two years that I was assigned to a criminal department, I oversaw thousands of criminal hearings, during which I faithfully and impartially applied the law at all stages of the criminal proceeding from arraignment and bail hearings through trial and sentencing.

c. **Does 18 U.S.C. § 3553(a) require judges to consider the retributive aspects of a given sentence when fashioning an appropriate punishment?**

Response: Yes. Section 3553(a)(2)(A) requires judges to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[.]" 18 U.S.C. § 3553(a)(2)(A).

45. **In a 2010 law review article, you criticized law enforcement authorities for their role in identifying criminal aliens and coordinating with immigration authorities. Specifically, you criticized how "[a] person can be transferred to ICE at any point in the criminal process, even if they are not charged or convicted of an offense."**

Response: See my response to Question 43(a). As I explained in response to Senator Padilla's questions at the hearing, I was not at the time of the panel, nor am I currently, a subject-matter expert concerning immigrants in California prisons.

a. **Is illegal entry into the United States a criminal offense?**

Response: Yes, 8 U.S.C. § 1325 sets forth criminal offenses relating to unlawful entry into the United States.

b. **Should aliens who break our laws be criminally prosecuted?**

Response: The Supreme Court has recognized that the executive branch has broad discretion with respect to enforcement decisions. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the

decision to prosecute is particularly ill-suited to judicial review."). As a sitting judge and judicial nominee, I am precluded from commenting on the enforcement decisions made by the executive branch. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A). If confirmed, and if a case involving this issue comes before me, I will fully and faithfully apply the relevant law and any binding precedent.

46. **In 2018 you taught a "Social Justice Lawyering Concentration Core Seminar" at U.C. Hastings Law School, which prepared students and enhanced the "depth of their support network for pursuing a social justice career."**

    a. **Do you believe you are practicing a social justice career**?

    Response: No. As a judge, my duty is to fully and faithfully apply the laws to the facts before me. As set forth in the federal judges' oath, judges are required to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453.

    b. **Does this make you more ethical or socially responsible than attorneys who do not practice social justice law?**

    Response: No. I feel fortunate that I have had an opportunity to work in a wide variety of legal settings, from my clerkships to nationally-respected law firms to law school clinics, prior to becoming a state court judge nearly five years ago.

    c. **Is being a judge a "social justice career" in your view?**

    Response: No.

    d. **Can judges put their values aside and still be a social justice lawyer?**

    Response: Judges have the duty to fully and faithfully apply the laws to the facts before them, without regard to their personal values or policy preferences. As a state court judge since 2018, that is what I have done. California state court judges are not considered licensees of the state bar while in office, and it is not appropriate for them to serve as advocates under the judicial canons.

47. **In 2017, you moderated the Annual Social Justice Attorney Mixer for the Asian American Bar Association of the Greater Bay Area, where you attacked the Trump administration. During the panel, you asked "what role do lawyers and law students have in resisting the administration?".**

    a. **What did you mean to "resist the administration"?**

Response: The event referred to in Question 47 occurred over six years ago, before I was a judge. It was an annual mixer hosted by the Civil Rights Committee of the Asian American Bar Association of the Greater Bay Area for young public interest lawyers. I was asked to emcee the event by the event organizers who selected the topics and the questions. The question related to actions that lawyers and law students could take if they disagreed with the policies of the new administration.

As a state court judge for nearly five years, I have taken an oath to fully, faithfully, and impartially discharge and perform the duties of my office. It is incumbent that judges do so neutrally, without regard for politics or political affiliation. That is what I have done and will continue to do.

48. **You have publicly oppose the public distribution of booking photos ("mugshots"), correct**?

Response: As an academic, prior to my appointment as a state court judge, I researched a problem raised in news outlets regarding the posting of mugshots on the Internet, the monetization of this practice, and the unintended consequences it may have on those whose mugshots are posted. As part of the research project, I examined the issue through the legal frameworks of federal constitutional rights, the common law right to access, and federal and state statutes concerning the right to access. I then proposed possible solutions to the problem of monetization and commercialization of mugshots, specifically limiting the statutory right to access mugshots, through either state or federal laws.

a. **Do you think it was proper for Fulton County, Georgia to distribute President Trump's booking photo?**

Response: The article referenced in Question 48 was published in 2018, after two years of research. Since being appointed to the state court, I have neither researched nor do I know the state of the current laws governing the right to access mugshots in the United States or more specifically in Georgia.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting judge, to comment on a matter that could be the subject of future litigation. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A).

Senator Josh Hawley
Questions for the Record

Eumi Lee
Nominee, U.S. District Judge for the Northern District of California

1. **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 1.

2. **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 instructed that the Constitution's "meaning is fixed according to the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court examines "legal and other sources to determine *the public understanding* of a legal text" at the time. *See id.* at 2127-28 (quoting *D.C. v. Heller*, 554 U.S. 570, 605 (2008)) (emphasis in original). If confirmed as a district judge, I would fully and faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit, including methods of constitutional interpretation.

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

   Response: As a sitting judge, I first consider the plain legal text, and if it clearly and unambiguously answers the question at issue, legislative history does not come into play. If, on the other hand, the legal text is ambiguous, I look to binding precedent and, barring that, persuasive authority from other, non-binding courts. If no binding or persuasive authority addresses the issue at hand, I consider the legislative history of the legal text, cautiously keeping in mind the Supreme Court's admonition that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed as a district judge, I would fully and faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit, including the role of legislative history in 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?**

Response: In *Garcia v. United States*, 469 U.S. 70 (1984), the Supreme Court emphasized that not all legislative history is created equal. As the Court has emphasized, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," and other forms of legislative history, such as "passing comments of one Member" or "casual statements from the floor debates" are eschewed. *Id.* at 76 (citations omitted). If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit, including the proper weighting of legislative history.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: Rarely, if ever. The Supreme Court did, however, reference English law when interpreting the Second Amendment in *New York Rifle & Pistol Ass'n., Inc. v. Bruen*, 142 S. Ct. 2111, 2142 (2022).

4. 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: For a death row inmate to succeed on a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment, he must: (1) "establish that the State's method of execution presents a 'substantial risk of serious harm'—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)) (alterations in original).

5. 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. See my response to Question 4.

6. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: No. In *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 67-74 (2009), the Supreme Court held that habeas corpus petitioners have no constitutional right to obtain post-conviction access to the State's evidence for DNA testing.

7. **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.

8. **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 the Free Exercise Clause, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny . . . so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). A law is not "neutral" if it is based on "hostility to a religion or religious viewpoint." *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018). A law is not deemed "generally applicable," if it treats religious conduct less favorably than any comparable secular activity. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Where the government action is not neutral or not generally applicable, it triggers strict scrutiny under the Free Exercise Clause. *See, e.g.*, *id.*

9. **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: Strict scrutiny is used to evaluate a claim that a state government action discriminates against a religious group or religious belief. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021).

10. **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 Ninth Circuit has evaluated "whether the beliefs professed . . . are sincerely held" and whether they are, in the person's "own scheme of things, religious." *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) (internal quotation marks and citation omitted). "'Religious' beliefs, then, are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions.'" *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 340 (1970)). The court's role is limited to determining if a person's religious belief is an "honest conviction," not whether that belief is reasonable. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

11. **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 traditionally lawful purposes, such as self-defense, within one's 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: Yes. *Mayorga v. Superior Court (People)*, Alameda County Superior Court, App. Div. No. 6288 (Apr. 26, 2023). Opinion, along with the opinion in the lead case on which it relies, supplied as part of the Questionnaire for Judicial Nominees.

12. **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: My understanding of Justice Holmes' statement is that judges should not impose their own policy preferences as part of their judicial review. Each day, when I take the bench, I set aside my personal preferences and decide each case according to binding precedent. If confirmed, I would do the same as a district judge.

    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 state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent because it is possible that related issues may come before the courts. In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Supreme Court recognized that "[t]he doctrine that prevailed in Lochner . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Id.* at 730. If confirmed, I would fully and faithfully follow binding Supreme Court and Ninth Circuit precedent.

13. **In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?**

    Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court stated: "Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution.'" *Id.* at 2423 (citation omitted). The phrase "court of history" appears to mean that, while not expressly overturned by the Supreme Court, history has proved the *Korematsu* case was wrongly decided.

14. **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 meet this description. As a sitting judge and nominee, I am generally precluded from commenting on whether any Supreme Court opinions are no longer good law if they have not been formally overruled. If I am confirmed as a district judge, I would fully and faithfully apply all binding Supreme Court precedent.

    a. **If so, what are they?**

       Response: See my response to Question 14.

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

       Response: Yes, I commit to faithfully applying all binding Supreme Court and Ninth Circuit precedents.

15. **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 my place to comment on the correctness of a particular decision. In *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), the Ninth Circuit held that "[c]ourts generally require a 65% market share to establish a prima facie case of market power." *Id.* at 1206. If confirmed, and confronted with a legal dispute of what constitutes a monopoly, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and Ninth Circuit.

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

Response: See my response to Question 15(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: See my response to Question 15(a).

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

Response: In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held "[t]here is no federal general common law." *Id.* at 78. The Court in *Rodriguez v. Federal Deposit Insurance Corp.*, 140 S. Ct. 713 (2020), reaffirmed *Erie* and emphasized that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Id.* at 717.

17. 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: The scope of a state constitutional right is generally a matter for the state court, and an interpretation by the highest court of the state is generally binding on federal courts. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed and I was presented with a case involving this issue, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the case before me.

a. **Do you believe that identical texts should be interpreted identically?**

Response: See my response to Question 17. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.") (citations omitted).

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

Response: See my response to Question 17. The Supreme Court has determined that state constitutional provisions can provide greater protection than the United States Constitution. *See, e.g.*, *Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967)

(noting "the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

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

Response: Yes. As a sitting state court judge and nominee, I am generally precluded from commenting on the correctness of Supreme Court precedent because it is possible that related issues may come before the courts. However, because it is unlikely that *de jure* racial segregation in schools would be reimposed in the United States, I may state my view that *Brown v. Board of Education* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 authorizes federal courts to issue injunctions. Nevertheless, injunctions are "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) (citation omitted). A preliminary injunction will issue only upon a showing that (1) the plaintiff is "likely to succeed on the merits," (2) the plaintiff is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [plaintiff's] favor," and (4) it "is in the public interest." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal quotation marks and citation omitted). The Ninth Circuit has upheld nationwide injunctions in the context of the Administrative Procedure Act at times. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *rev'd in part on other grounds, vacated in part sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 n.7 (2020). The Ninth Circuit has also cautioned that nationwide injunctions "may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

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

Response: See my response to Question 19.

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

Response: See my response to Question 19.

20. 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 response to Question 19.

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

Response: As the Supreme Court explained in *In Bond v. United States*, 564 U.S. 211 (2011), "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Id.* at 221. "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Id.* And "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

22. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: One of several abstention doctrines may apply. The *Pullman* abstention doctrine "is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy" where the case challenges the constitutionality of a state law, and the state court has not had an opportunity to address the issue. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 783-84 (9th Cir. 2014). The *Younger* doctrine applies in "exceptional circumstances" where a qualifying and ongoing parallel state proceeding implicates important state interests and allows the litigant to raise constitutional challenges. *See Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 587-88 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 748 (2023). In the Ninth Circuit, the *Colorado River* doctrine allows a district court to stay a case under exceptional circumstances involving concurrent state proceedings. *See Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d at 835, 841 (9th Cir. 2017). The *Burford* abstention doctrine applies in certain exceptional circumstances to avoid interfering with complex state administrative processes. *See City of Tucson v. U.S. West Commc'ns, Inc.*, 284 F.3d 1128, 1132-33 (9th Cir. 2002). And under the *Rooker-Feldman* doctrine, a federal district court lacks subject matter jurisdiction to hear a direct appeal from a state court judgment. *See Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003).

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

Response: Damages and injunctive relief provide different forms of relief and the propriety of awarding one or the other depends upon the facts and circumstances of the case. Damages are usually awarded in the form of money for past harm, and injunctive relief is a court order to stop certain action or harm prospectively.

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain unenumerated rights that are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). In *Glucksberg*, the Supreme Court stated:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, 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.

521 U.S. at 720-21 (internal quotation marks and citations omitted). Examples include the right to marry, have children, direct the education and upbringing of one's children, marital privacy, contraception, and bodily integrity. *Id.* at 720.

25. 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: The First Amendment's right to free exercise of religion is a fundamental right. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court held in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic." *Id.* at 2432-33.

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 held that both the free exercise of religion and the freedom of worship are protected by the First Amendment Free Exercise Clause. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that the "Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment[.]" *Id.* at 591. In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Court held that "[t]he Clause 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.'" *Id.* at 2421

(quoting *Emp't Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

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 my response to Question 8.

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 my response to Question 10.

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. Pa.*, 140 S. Ct. 2367, 2383 (2020) (internal quotation marks and citation 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.

26. **Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.**

    Response: As a California state court judge, I am precluded from assigning a numerical value to quantify the confidence threshold to meet the "beyond a reasonable doubt" standard. *See, e.g.*, *People v. Medina*, 11 Cal. 4th 694, 745 (1995) (indicating prosecutor committed error with diagram suggesting "beyond a reasonable doubt" standard was less than "100%," but finding no prejudicial misconduct as standard jury instructions had been given). The Ninth Circuit Model Criminal Jury Instruction 6.5 (2023) defines reasonable doubt in part as "proof that leaves you firmly convinced the defendant is guilty." If confirmed, I would instruct juries in criminal cases in accordance with the Ninth Circuit model instructions and any applicable binding precedent.

27. **The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents."** ***Harrington v. Richter*****, 562 U.S. 86, 102 (2011).**

    a. **Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?**

       Response: As a sitting judge and nominee, I have the duty not to prejudge any issue that may come before me. If confirmed, and a case or controversy were to be presented involving this issue, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

    b. **In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?**

       Response: See my response to Question 27(a).

    c. **If you disagree with either of these statements, please explain why and provide examples.**

       Response: See my response to Question 27(a).

28. **U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential.** ***Cf.*** **Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.**

    a. **Do you believe it is appropriate for courts to issue "unpublished" decisions?**

       Response: As a sitting judge and nominee, it is not my place to comment on the appropriateness of the rules or practices of a higher court. If confirmed, I would follow and apply all binding authorities and applicable rules, including Federal Rule of Appellate Procedure 32.1(a), which provides: "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been": (i) "designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like"; and (ii) "issued on or after January 1, 2007." *Id.*; *see also* 9th Cir. R. 36-3 (Ninth Circuit's local rule governing the citation of unpublished dispositions or orders).

b. **If yes, please explain if and how you believe this practice is consistent with the rule of law.**

Response: See my response to Question 28(a).

c. **If confirmed, would you treat unpublished decisions as precedential?**

Response: See my response to Question 28(a).

d. **If not, how is this consistent with the rule of law?**

Response: See my response to Question 28(a).

e. **If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?**

Response: See my response to Question 28(a).

f. **Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.**

Response: No.

g. **Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.**

Response: No.

29. In your legal career:

a. **How many cases have you tried as first chair?**

Response: I have tried one case as first chair. It settled during trial.

b. **How many have you tried as second chair?**

Response: I have tried one case as second chair. It settled during trial.

c. **How many depositions have you taken?**

Response: I do not recall the specific number of depositions I have taken, but I would estimate between three to five.

d. **How many depositions have you defended?**

Response: I do not recall the specific number of depositions I have defended, but I would estimate between three to five.

e. **How many cases have you argued before a federal appellate court?**

Response: To the extent that the term "argued" here is limited to cases in which I engaged in oral argument, I have not argued before a federal appellate court. To the extent that "argued" includes briefing in the federal appellate courts, I would estimate two cases.

f. **How many cases have you argued before a state appellate court?**

Response: To the extent that the term "argued" here is limited to cases in which I engaged in oral argument, I have not argued before a state appellate court. To the extent that "argued" includes briefing in the state appellate courts, I would estimate between three to five cases.

g. **How many times have you appeared before a federal agency, and in what capacity?**

Response: While in practice, I appeared as sole counsel before the United States Immigration Court in a pro bono asylum case. I would estimate that I appeared before the administrative law judge between four to six times in that case. While a clinical professor, I appeared as sole counsel and supervised students in Social Security disability hearings before federal administrative law judges at the Office of Disability Adjudication and Review. I do not recall the specific number of appearances, but I would estimate fifteen to twenty.

h. **How many dispositive motions have you argued before trial courts?**

Response: While a clinical professor, I appeared as sole counsel and supervised students in state court on a number of dispositive motions related to clean slate and wage-and-hour cases. I do not recall the specific number of appearances, but I would estimate between fifteen to twenty.

i. **How many evidentiary motions have you argued before trial courts?**

Response: While a clinical professor, I appeared as sole counsel and supervised students in state court on a number of evidentiary motions related to clean slate and wage-and-hour cases. I do not recall the specific number of appearances, but I would estimate between fifteen to twenty. While in private practice, I argued one evidentiary motion in federal court.

30. If any of your previous jobs required you to track billable hours:

a. **What is the maximum number of hours that you billed in a single year?**

Response: I do not recall the maximum number of hours that I billed in a single year at Keker & Van Nest LLP. I would estimate the maximum number of hours was 2,000 hours.

b. What portion of these were dedicated to pro bono work?

Response: I do not recall what portion of the estimated hours were dedicated to pro bono work.

31. 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: Although I am not familiar with this quote or the context in which it was made, I understand this statement to mean judges may not always "like" the outcome or result that they are compelled to reach in upholding their judicial oath and duties.

32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges do not make the rules, they apply them.

b. Do you agree or disagree with this statement?

Response: As a sitting state court judge, I generally agree with this statement, excepting local rules and standing orders, which are drafted and implemented by courts. If confirmed, I would fully, faithfully, and impartially follow all Supreme Court and Ninth Circuit precedent without reservation, and apply it to the facts of the case before me.

33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: Although I am not familiar with this quote or the context in which it was made, I understand this statement to mean that the job of judges is to follow the law fairly and impartially, without value judgments, regardless of the outcome.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: My judicial philosophy is to fully and faithfully apply the law in an impartial manner in every case. This requires that I understand the limited role of the judiciary and approach each case with humility and an open mind. I diligently review the factual record and the written submissions of the parties, research the law and binding precedent, and faithfully and impartially apply the law to the limited issue(s) that are properly before me. At hearings, I listen to the parties' arguments, recognizing the importance of the case to each litigant and issue a decision (whether oral or written) that follows binding precedent and can be understood by the lawyers and laypersons alike.

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

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, I have not ever taken the position in litigation or a publication that a federal or state statute was unconstitutional.

35. 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.

36. What were the last three books you read?

Response: The last three books I read were Harry Potter and the Chamber of Secrets, Harry Potter and the Prisoner of Azkaban, and Harry Potter and the Goblet of Fire, with my child.

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

Response: The question of whether America is a systematically racist country is a policy question. As a sitting state court judge and if I were fortunate enough to be confirmed, I have and would have the duty and obligation not to prejudge any case that may come before me and to treat all litigants fairly and without bias. If a case or controversy were to be presented involving this question, my duty would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the case before me. Beyond these observations, and consistent with Code of Conduct for United States Judges and positions taken by prior nominees, I am precluded from commenting on matters of public policy, including how past laws and policies may impact the country, as these issues may come before me.

38. What case or legal representation are you most proud of?

Response: I am most proud of my pro bono representation in an asylum case, which spanned almost four years. I represented an applicant and her minor son in removal proceedings. The applicant had fled Honduras after being repeatedly beaten, raped, and threatened by her common-law husband. The client's application for asylum was granted.

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

Response: Yes.

a. How did you handle the situation?

Response: As a lawyer, I followed my duty to be a zealous advocate for clients, consistent with my obligations to represent my clients ethically.

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

Response: Yes.

40. What three law professors' works do you read most often?

Response: I do not recall reading any law professors' works since becoming a state court judge in 2018. Prior to that, I most often read case law as a clinical professor who regularly appeared in court. While researching the article I wrote about mugshots and privacy, I read the work of Professor Daniel J. Solove regarding privacy and information technology.

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

Response: There is no single Federalist Paper that has most shaped my views of the law.

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: Over the course of my legal education and legal career, many judicial opinions have changed my understanding of the state of the law or the nature or scope of specific laws or precedent.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court returned the issue of abortion to the people and their elected representatives. The Court stated that its "opinion [was] not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2261.

The Court explained that "[n]othing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'" *Id.* (citation omitted). As a sitting state court judge and judicial nominee, it would not be appropriate to comment further as this is an issue that may come before me as a judge. If confirmed, I would fully and faithfully apply the *Dobbs* decision and any other binding Supreme Court or Ninth Circuit precedent.

44. 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.

45. 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.

46. Do you currently hold any shares in the following companies:

a. Apple?
b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Response as to all subparts: Not directly, but I do have investments in different mutual funds which may or may not hold shares at any given time.

47. 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 believe there were times when I was an associate in private practice, when I drafted portions of a brief or motion, but my name

may not have appeared. Similarly, there were times as a senior associate, where I edited the briefs of junior associates to provide feedback, but where my name may not have appeared. As a clinical professor, I sometimes edited briefs on cases that were supervised by other clinical instructors, but where my name may not have appeared. Similarly, there were times when I provided feedback to clinical programs or community partners (such as the Legal Aid Society – Employment Law Center) that were filing briefs, but where my name may not have appeared. I edited and provided feedback on the reply brief before the Louisiana Court of Appeal as an appellate consultant to the Advancement Project in 2017.

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

   Response: Unfortunately, I did not keep records of the cases where I edited a brief that was filed in court without my name, other than for the Advancement Project – *Voice of Ex-Offender v. State*, 2017-1141 (La. App. 1 Cir. 4/13/18), 249 So. 3d 857, *writ denied,* 2018-0945 (La. 10/29/18), 255 So. 3d 575.

48. Have you ever confessed error to a court?

a. **If so, please describe the circumstances.**

   Response: To the best of my recollection, I have never confessed error to a court.

49. 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: Section 2, Clause 2 of Article II of the Constitution grants the President the power to appoint federal judges with the advice and consent of the Senate. *See* U.S. Const. art. II, § 2, cl. 2. Nominees, like myself, are typically called to testify before the Senate Judiciary Committee as part of its "advice and consent" process. *Id.* Prior to my testimony to the Senate Judiciary Committee, I swore an oath to testify truthfully, and I fulfilled that oath. As a sitting judge and nominee, I am also bound by the California Code of Judicial Ethics and Code of Conduct for United States Judges, which prohibits judges and judicial nominees from making certain public statements.

Questions for Judge Lee
Senator John Kennedy

1. **In 2010, you published *An Overview of Special Populations in California Prisons* as faculty scholarship in the University of California, Hastings College of Law Scholarship Repository. You are listed as the sole author on the cover page of this faculty scholarship. At your confirmation hearing, you told members of the Judiciary Committee that this work originated from a panel that you moderated.**

   On page 224, the article makes the following assertion:

   "Special populations fare no differently in the California prison system. Their treatment in the criminal justice system generally reflects not only society's view of prisoners, but also mirrors government policies concerning these groups and the discrimination or prejudices that these groups face. This mirroring happens through deliberate actions, as exemplified by the cooperation between county jails and Immigration Customs Enforcement ("ICE"), or through willful ignorance, as illustrated by the prevalent policy of anatomically classifying transgender prisoners for housing purposes with the result being high instances of sexual assault and rape among this population." (emphasis added).

   Please identify who made this assertion. Did you make this assertion or do you contend that a member of the panel made this assertion? If you contend that a member of the panel made this assertion, please identify the panel member that made this assertion.

   Response: As I stated at the hearing, the piece arose from a symposium panel discussion among subject-matter experts that I moderated over 13 years ago when I was a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Law Journal in 2010, and was the product of a two-day conference. The purpose of the piece was to summarize, including a factual review of, the issues and concerns raised by the expert panelists regarding three segments of the California prison population. As I explained in response to Senator Padilla's questions, I was not and am not a subject-matter expert concerning transgender individuals, immigrants, or women in California prisons.

   The three sentences quoted above provided an introductory overview of some of the issues and concerns raised by the subject-matter-expert panelists concerning these specific prison populations (*i.e.*, women, immigrants, and transgender individuals): Barbara Bloom, Angie Junck, and Alexander Li-Hua Lee.

2. **On page 229, the article poses the following questions:**

   "Will CDCR continue to house prisoners based on their biological attributes, despite their gender identity, and offer the mere protection of segregation within the facilities?

Will CDCR create a separate transgender facility or will they place individuals according to their gender self-identification?

Please identify who posed this question. Did you present this question or do you contend that a member of the panel presented this question? If you contend that a member of the panel presented this question, please identify the panel member that presented this question.

Response: See my response to Question 1. These issues were raised by the subject-matter expert on transgender individuals in California prisons, Alexander Li-Hua Lee.

3. **On Page 241, the article concludes as follows:**

"In conclusion, because each of these populations traditionally has been marginalized by American society based on their gender, race, ethnicity, or status, they are often further distanced from and marginalized by society upon incarceration. A recent president said, 'you can fairly judge the character of society by how it treats the weak, the vulnerable, the most easily forgotten.' As the people of California face the enormity of the budget and prison crisis and struggle to comply with the mandates of the three-judge panel's monumental decision in *Coleman v. Schwarzenegger*, the state will continue its precarious balancing act of ensuring the health and safety of prisoners while addressing public safety concerns. In doing so, the treatment of these special populations must continue to be monitored."

Please identify who made this assertion. Did you make this assertion or do you contend that a member of the panel made this assertion? If you contend that a member of the panel made this assertion, please identify the panel member that made this assertion.

Response: See my response to Question 1. The sentences quoted above provided a concluding summary of the issues and concerns raised by the subject-matter experts concerning these particular California prison populations: Barbara Bloom, Angie Junck, and Alexander Li-Hua Lee. The direct quote referenced above is from former President George W. Bush's commencement address at Concordia University on May 14, 2004.

4. **Do you stand by your testimony at your confirmation that you, as the sole listed author of *An Overview of Special Populations in California Prisons*, did not make any assertions of your own in this article?**

Response: At the hearing, I explained that this symposium-edition piece summarized different issues and concerns raised by subject-matter experts on a panel that I moderated as a professor. The purpose of the piece was not to express my own opinions as I was not and am not a subject-matter expert concerning transgender individuals, immigrants, or women in California prisons.

Senate Judiciary Committee
Nominations Hearing
September 6, 2023
Questions for the Record
Senator Amy Klobuchar

Eumi K. Lee, to be U.S. District Judge for the Northern District of California

Since 2018, you have served as a Superior Court Judge in Alameda County. During this time you have presided over thousands of hearings in both civil and criminal matters, as well as approximately 70 cases that have gone to verdict.

- **How has your experience as a state trial court judge prepared you to serve as a federal district court judge?**

  Response: For nearly five years, I have been honored to serve the people of Alameda County as a trial court judge. My experience has been invaluable in preparing me to serve as a federal district judge. I have served as a neutral for nearly five years, ruling on matters fairly and impartially in accordance with the law and all binding precedent. I have presided over thousands of criminal and civil cases and managed a courtroom with a heavy civil docket of nearly 1,200 cases. I have also presided over cases from their inception to their resolution, including from case management calendars, law and motion calendars, as well as bench and jury trials. And I have sentenced individuals and entered judgments in numerous cases. I will bring all this valuable experience to bear if I am fortunate enough to be confirmed as a federal district judge.

- **What steps have you taken to ensure that those who appear before you have confidence that the court reached a fair and just decision, regardless of the outcome?**

  Response: As a state court judge, I took an oath to fully, faithfully. and impartially discharge and perform the duties of my office, and I take that oath very seriously. I take steps each day to ensure that I am reaching fair and just decisions in each case that comes before me, without regard to personal views or policy preferences. I do so, not only to discharge my duties to the best of my ability, but also so that those who appear before me have confidence that they got a fair shake, even if they disagree with the outcome. First, I consciously set aside any personal views or preferences as to the issues in the case. Second, I diligently review the factual record and the written submissions of the parties. Third, I research the law and binding precedent and faithfully and impartially apply the law to the limited issue(s) that are properly before me. Fourth, at hearings, I listen to the parties' arguments with an open mind, recognizing that each litigant thinks his or her case is the most important. And finally, I issue a decision (whether oral or written) that follows binding precedent, explains my reasoning, and can be understood by the lawyers and laypersons alike.

Senator Mike Lee
Questions for the Record
Eumi Kim Lee, Nominee to serve as U.S. District Court Judge for the Northern District of California

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

   Response: My judicial philosophy is to fully and faithfully apply the law in an impartial manner in every case. This requires that I understand the limited role of the judiciary and approach each case with humility and an open mind. I diligently review the factual record and the written submissions of the parties, research the law and binding precedent, and faithfully and impartially apply the law to the limited issue(s) that are properly before me. At hearings, I listen to the parties' arguments, recognizing the importance of the case to each litigant and issue a decision (whether oral or written) that follows binding precedent and can be understood by the lawyers and laypersons alike.

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

   Response: First, I would begin with the plain statutory text and any binding precedent of the Supreme Court and the Ninth Circuit that interprets the specific statutory provision at hand. If the text is ambiguous and no binding precedent existed, then I would consider any applicable canons of construction in accordance with Supreme Court and Ninth Circuit precedent. In appropriate cases, I would consider persuasive or analogous authority from other jurisdictions. If none of those sources resolved the issue, I would follow the interpretive methods set forth by the Supreme Court and Ninth Circuit, including consulting the legislative history of the statute, keeping in mind the Supreme Court's admonition that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

   Response: First, I would begin with the binding precedent of the Supreme Court and the Ninth Circuit, interpreting the specific constitutional provision, as well as the provision itself. In the unusual instance that no such precedent existed, I would look to the text of the provision and the meaning of the terms at issue, following the methods of construction and interpretation employed by the Supreme Court. *See, e.g., N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127-28 (2022). If none of those sources resolved the issue, I would follow the interpretive methods set forth by the Supreme Court and Ninth Circuit in the most analogous circumstances and persuasive authority from other courts.

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

Response: The Supreme Court has instructed that, in the context of the Second Amendment, the Constitution's "meaning is fixed according to the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). Accordingly, the Court looked to "legal and other sources to determine the public understanding of a legal text" at the time. *See id.* at 2127-28 (quoting *D.C. v. Heller*, 554 U.S. 570, 605 (2008)). If confirmed as a district judge, I would fully and faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit, including proper methods of constitutional 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: As a sitting judge, the plain text is the first and primary source of statutory interpretation. If the plain meaning of the text is clear and unambiguous from the face of the text, my inquiry ends there. If not, then I look to binding precedent and its interpretations of the statute. In appropriate cases, I would consider persuasive authority from other courts, as well as the legislative history of the statute at issue, keeping in mind the Supreme Court's admonition that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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 "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). If I am confirmed, I will continue my practice as a judge of faithfully following binding precedent when interpreting statutory or constitutional provisions, including any precedent regarding the role of plain meaning in interpreting a particular provision.

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

Response: In *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that Article III standing requires an injury in fact that is (1) concrete and particularized, not conjectural or hypothetical; (2) fairly traceable to the defendant's challenged conduct; and (3) likely redressable by a favorable decision. *Id.* at 560-61.

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

Response: Congress has the power, under Article I, Section 8, Clause 18 of the U.S. Constitution, "[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." U.S. Const. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819)

("Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it.").

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

Response: In *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power it undertakes to exercise." *Id.* at 570 (citation omitted). To evaluate the constitutionality of a law enacted by Congress without reference to a specific Constitutional enumerated power, I would follow binding precedent from the Supreme Court and the Ninth Circuit.

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain unenumerated rights that are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Examples include the right to marry, have children, direct the education and upbringing of one's children, marital privacy, contraception, and bodily integrity. *Glucksberg*, 521 U.S. at 720-21.

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

Response: The Supreme Court has held that Congress does not have the power under the Commerce Clause to regulate activity that does not substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549 (1995) (holding that a prior version of the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause). In *Lopez*, the Court identified three broad categories of activity Congress may 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) activities that "substantially affect interstate commerce." *Id.* at 558-59.

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

Response: The Supreme Court has described "traditional indicia of suspectness" to include groups that "possess an immutable characteristic determined solely by the accident of birth" or are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation

marks and citations omitted). The Supreme Court has designated race, religion, national origin, and alienage as suspect classes subject to strict scrutiny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The Supreme Court has described checks and balances and separation of powers as playing a vital role in our Constitution's structure. *See Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) ("The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny."); *see also 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 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (quoting *Buckley*, 424 U.S. at 122).

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

Response: As a sitting judge, I apply binding precedent and would continue to do so if confirmed as a district judge. If such a case was before me, I would decide the case by considering the legal arguments of the parties, research binding precedent, and look to that precedent for guidance, including how to decide a case in which one branch assumed an authority not granted to it by the text of the Constitution. The Supreme Court has previously decided cases in which a branch exceeded its constitutional authority, such as *Marbury v. Madison*, 5 U.S. 137 (1803) (Congress); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President).

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

Response: A judge has a duty to approach each case with an open mind and to apply all binding precedents faithfully and impartially without fear or favor, prejudice or passion. While judges should remain humble and cognizant that their exercise of judicial power can profoundly impact the lives of litigants before them, one's personal views, including empathy, play no role in a judge's decision in a given case.

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

Response: Both outcomes are improper and contrary to law.

16. 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 studied the trend described in this question, nor have I studied its potential upsides and downsides. What I can say with confidence is that, if confirmed as a district judge, I would faithfully apply binding Supreme Court and Ninth Circuit precedent when evaluating the constitutionality of federal statutes.

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

Response: Judicial review refers to the federal judiciary's province and duty to assess the constitutionality of actions by the executive and legislative branches. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* Black's Law Dictionary (11th ed. 2019) (defining "judicial review" as, *inter alia*, a "court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional"). Judicial supremacy refers to the Supreme Court's role as the final arbiter on the meaning of constitutional provisions. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *see also* Black's Law Dictionary (11th ed. 2019) (defining "judicial supremacy" as "[t]he 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.").

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

Response: The Supreme Court has held that elected officials must follow its precedents interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a sitting judge and judicial nominee, it is inappropriate for me to comment on how elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions.

19. **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: Article III limits the federal judicial power to deciding the cases and controversies that are properly before them in accordance with binding precedent. Judges must decide cases impartially based on the applicable law and not their

personal views or policy preferences, and they must stay in their limited lane. That has been my practice for nearly five years as a state court judge, and I will continue that practice if confirmed as a federal district judge.

20. 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 statement in this question. I am not aware of any Supreme Court or Ninth Circuit precedent that defines "equity" in this context. Black's Law Dictionary defines "equity" as, *inter alia*, "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). If confirmed, I would fully and faithfully apply any applicable binding Supreme Court and Ninth Circuit precedent to decide any such issue that properly comes before me.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that explains the difference between "equity" and "equality." As aforementioned, Black's Law Dictionary defines "equity" as, *inter alia*, "[f]airness; impartiality; evenhanded dealing." The same source 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). If confirmed, I would fully and faithfully apply any applicable binding Supreme Court and Ninth Circuit precedent to decide any such issue that properly comes before me.

22. Does the 14th Amendment's Equal Protection Clause guarantee "equity" as defined by the Biden Administration? (Listed above in question 20).

Response: The Fourteenth Amendment's Equal Protection Clause provides: "No 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 Supreme Court or Ninth Circuit binding authority that addresses whether "equity" is guaranteed under the Fourteenth Amendment's Equal Protection Clause. As a sitting judge and judicial nominee, it is not appropriate for me to comment on this issue as it may come before me. What I can say, however, is that if I am confirmed, I would fully and faithfully apply any such binding precedent to any such issue that comes before me.

23. How do you define "systemic racism?"

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that defines "systemic racism." Black's Law Dictionary defines "racism" as, *inter alia*, "[t]he assumption of lower intelligence and importance given to a person because of their racial characteristics." Black's Law Dictionary (11th ed. 2019). Merriam-Webster's Dictionary defines "systemic racism" as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." Merriam-Webster's Dictionary (2022). If confirmed, I would fully and faithfully apply any applicable binding Supreme Court and Ninth Circuit precedent to decide any such issue that properly comes before me.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that defines "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). If confirmed, I would fully and faithfully apply any applicable binding Supreme Court and Ninth Circuit precedent to decide any such issue that properly comes before me.

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

Response: See my answers to Questions 23 and 24.

26. In the hearing, you inferred that the 2010 article you wrote in the *Hastings Race and Poverty Journal* summarized a panel discussion that you moderated. While a footnote acknowledges that the ideas discussed by the panel contributed to your work, you are listed as the author of the article and the specific policy positions you discuss are not attributed to particular panelists. Did you ultimately author the article? Do you stand behind the conclusions in your article, including your criticism that "The vulnerability of the transgender population to sexual assault and rape in prison is caused in large part by the prison system's classification of transgender and the repercussions of that classification on their housing placements. The prison system relies heavily on a dichotomous, sex-based means of classification. Prisoners are classified by their biological attributes rather than their gender identification."?

Response: As I stated in the hearing, I wrote the piece referenced in Question 26. This piece arose from a symposium panel discussion among subject-matter experts that I moderated over 13 years ago as a professor at UC Hastings College of the Law. The piece was published in the symposium edition of the Hastings Race and Poverty Law Journal in 2010, and was the product of a two-day conference. The purpose of the piece was to summarize, including a factual review of, the issues and concerns raised by the expert panelists regarding three segments of the California

prison population. As I explained in response to Senator Padilla's questions at the hearing, I am not a subject-matter expert concerning transgender individuals, immigrants, or women in California prisons, nor was I a subject-matter expert on these topics at the time.

Additionally, these issues are a matter of public debate for policymakers, and are being actively litigated in the courts. As a sitting judge and judicial nominee, I am thus precluded from commenting on it. *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A). If confirmed and a case were to be presented involving this issue, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent faithfully and impartially to the case that was before me.

27. Do you believe that biologically male prisoners—especially those with violent sexual convictions—should ever be placed in female-only prisons?

Response: See my response to Question 26.

28. In your nomination hearing, you did not provide an answer to the following question so I will ask it again for the record. In *Students for Fair Admissions*, the majority stated "Eliminating racial discrimination means eliminating all of it….. For the guarantee of equal protection cannot mean one thing when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Do you agree with this statement?

Response: As a sitting state court judge and nominee, I am generally precluded from expressing opinions about Supreme Court precedent. If confirmed as a district judge, I will faithfully apply all binding precedent of the Supreme Court to the matters that come before me. *Students for Fair Admissions* is binding precedent, and I will apply it fully and faithfully, without reservation.

29. You were on the board for the Asian Law Caucus, which took the opposing position to that of majority in *Students for Fair Admission* in an earlier case called *Coalition to Defend Affirmative Action, et al. v. Regents of the University of Michigan*. Does your current position on affirmative action align with your previous beliefs in *Coalition to Defend Affirmative Action*, or with the Supreme Court majority in *Students for Fair Admissions*?

Response: See my response to Question 28.

Questions from Senator Thom Tillis
for Eumi Kim Lee, nominated to serve as U.S. District Judge for the Northern District of California

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: No, a judge's personal views and background are irrelevant in interpreting and applying the law. Judges have a sworn duty to fully and faithfully apply the law to the facts of the case before them, without regard to any personal views.

2. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Impartiality is an expectation for (and the duty of) a judge.

3. **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.

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, sometimes a judge's faithful interpretation of the law results in what some may consider an undesirable outcome. As a judge, I am duty bound to faithfully and impartially follow the law. That is my limited judicial role in our democracy, and I will continue to do so if confirmed as a district judge.

6. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed, I will fully and faithfully apply all binding precedent to the facts of each case before me. In the context of the Second Amendment, this includes the Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of*

Chicago, 561 U.S. 742 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

7. **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: Government officials are entitled to qualified immunity from claims brought under 42 U.S.C. § 1983, unless (1) they violated a federal constitutional or statutory right, and (2) the unlawfulness of their conduct was clearly established at the time of the violation. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *see also Hopson v. Alexander*, 71 F.4th 692, 697 (9th Cir. 2023). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (internal quotation marks and citation omitted); *see also Mueller v. Auker*, 576 F.3d 979, 992 (9th Cir. 2009) ("Under qualified immunity, an officer will be protected from suit when he or she "makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances.") (internal quotation marks and citation omitted).

8. **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 state court judge and as a judicial nominee, it is not appropriate for me to comment on whether existing jurisprudence "provides sufficient protection" in certain circumstances. This question is best left for policymakers to decide. This question also involves issues that have come before me as a sitting judge and may come before me if confirmed, and thus it is not appropriate for me to comment under judicial codes of conduct. *See* Code of Conduct for United States Judges, Canon 3(A). If confirmed, I would fully and faithfully follow the binding precedent from the Supreme Court and the Ninth Circuit to the facts of any case that comes before me.

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

   Response: Please see my responses to Questions 7 and 8.

10. **What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?**

    Response: This issue of intellectual property rights and enforcement is actively being litigated in the courts and discussed by policymakers. As a sitting state court judge and as a judicial nominee, it is inappropriate for me to comment on this issue because the issue may

come before me. *See* Code of Conduct for United States Judges, Canon 3(A). If confirmed, I would faithfully follow the binding precedent from the Supreme Court, Ninth Circuit, and the Federal Circuit to all cases that come before me.

11. **In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"**

    Response: In the district for which I have been nominated, cases are "assigned blindly and at random by the Clerk[.]" N.D. Cal. General Order No. 44(D)(2) – Assignment Plan; *see also id.* at (D)(2)(c) ("Such system will be designed to accomplish . . . a high level of security so as to reasonably avoid prediction of the results of any case assignment."). If confirmed, I will fully comply with General Order No. 44, other federal and local rules, and any applicable precedent.

12. **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 shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?**

    Response: While I am aware that some have criticized the Supreme Court's patent eligibility jurisprudence, it is inappropriate for me to comment on the correctness of Supreme Court jurisprudence or on matters that may come before me. As a judicial nominee, and consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, I am precluded from doing so. If confirmed, I would faithfully follow the binding precedent from the Supreme Court and the Federal Circuit on 35 U.S.C. § 101 to the cases that come before me.