Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Marian F. Gaston
Nominee to be United States District Judge for the Southern 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: As a California Superior Court judge, I took an oath to support and defend the Constitution of the United Sates and the constitution of the State of California, and have been ethically bound to apply the law in a fair and impartial manner. If honored with appointment to the District Court I will similarly take an oath to faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock 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 Judge Reinhardt's statement or the context in which it was made. If honored with appointment to the District Court I will faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs. I will faithfully apply Supreme Court and Ninth Circuit precedent.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary defines a "living constitution" as a "constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

4. **Do you agree with then-Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: According to the Supreme Court, the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCullough v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). Its fundamental principles "can, and must, apply to circumstances beyond those the Founders specifically

anticipated." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022).

5. **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 Federal Rules of Evidence recognize two types of facts: adjudicative facts and legislative facts. *See* Fed. R. Evid. 201 (Advisory Committee's note to subd. (a)). Adjudicative facts are "simply the facts of the particular case." *Id.* They are established through documentary or testimonial evidence and are typically found by a jury. *Id.* Legislative facts "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* Legislative facts are typically subject to judicial notice. *Id.*

   The Supreme Court has not articulated a bright line test to distinguish a factual finding from a legal conclusion, and has acknowledged that "the proper characterization as one of fact or law is sometimes slippery," *Thompson v. Keohane,* 516 U.S. 99, 109-10 (1995).

6. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: The First Amendment guarantees to the people the right to free speech and to present grievances to their government. Whether the exercise of speech crosses into illegal behavior is governed at the federal level by 18 U.S.C. § 1507 as well as decisions of the Supreme Court and Ninth Circuit, including the Supreme Court holding that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" are Constitutionally unprotected "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent in this and all areas.

7. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

   Response: If confirmed, I will be bound to consider all four primary purposes of sentencing, as outlined in 18 U.S.C. § 3553(a), and the appropriate balance would depend on the facts of the individual case.

8. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As a California Superior Court judge, I took an oath to support and defend the Constitution of the United States and the constitution of the State of California, and have been ethically bound to apply the law in a fair and impartial manner. If honored with appointment to the District Court I will similarly take an oath to faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs. These oaths define my judicial philosophy.

There is no single Supreme Court decision from the past 50 years that is a typical example of my judicial philosophy.

9. **Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As a California Superior Court judge, I took an oath to support and defend the Constitution of the United Sates and the constitution of the State of California, and have been ethically bound to apply the law in a fair and impartial manner. If honored with appointment to the District Court I will similarly take an oath to faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs. These oaths define my judicial philosophy.

There is no single Ninth Circuit decision from the past 50 years that is a typical example of my judicial philosophy.

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

Response: Section 1507 of Title 18 of the United States Code prohibits: (1) picketing or parading in or near a building or housing a court of the United States, or (2) picketing or parading in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or (3) using any sound-truck or similar device or resorting to any other demonstration in or near any such building or residence, if done with the intent to interfere with, obstruct, or impeded the administration of justice, or with the intent to influence any judge, juror, witness or court officer.

11. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: To my knowledge, the Supreme Court has not ruled on the facial constitutionality of § 1507. However, a Louisiana statute modeled after 18 U.S.C. §1507 was found to be constitutional on its face in *Cox v. Louisiana*, 379 U.S. 599 (1965).

12. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: According to the Supreme Court, "fighting words" are those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provide violent reaction." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

Response: The Supreme Court has held that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" are Constitutionally unprotected "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

14. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

    a. **Was *Brown v. Board of Education* correctly decided?**

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. However, because *Brown v. Board of Education* presents issues that are unlikely to come before me, I am comfortable sharing my opinion that *Brown v. Board of Education* was correctly decided.

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

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. However, because *Loving v. Virginia* presents issues that are unlikely to come before me, I am comfortable sharing my opinion that *Loving v. Virginia* was correctly decided.

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

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Griswold v. Connecticut* and all other mandatory authority.

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

Response: *Roe v. Wade,* 410 U.S. 113 (1973) was overturned by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

Response: *Planned Parenthood of Southeaster Pa. v. Casey,* 505 U.S. 833 (1992), was overturned by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Gonzales* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Heller* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *McDonald* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Hosanna-Tabor* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Bruen* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

15. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* S. Ct. 211 (2022), the Supreme Court stated that the government has the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* at 2126. To do so, the government must identify an historical analogy that is "relevantly similar" to the challenged regulation. *Id.* at 2132. This is the standard I am bound to apply if confirmed.

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response to all subparts: No.

17. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**

a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response to all subparts: No.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
    d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response to all subparts: No.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response to all subparts: No.

20. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response to all subparts: No.

21. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

    Response: In January 2021, I submitted my application for appointment to the United States District Court for the Southern District of California to the offices of Senator Dianne Feinstein and Alex Padilla. On March 15, 2021, I was interviewed by the local selection committee for Senator Feinstein. On April 20, 2022, I was interviewed by Senator Padilla's statewide committee. On April 27, 2022, I was interviewed by Senator Padilla's counsel. On May 10, 2022, I was interviewed by Senator Padilla. On May 17, 2022, I interviewed with the chair of Senator Feinstein's statewide committee. On July 26, 2022, I spoke with staff from the Office of the White House Counsel. Since that day, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, President Biden announced his intent to nominate me.

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

    Response to both questions: No.

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

    Response: I have spoken periodically with attorney Johanna Schiavoni who is on the advisory board for the local chapter of the American Constitution Society. Ms. Schiavoni was supportive of my candidacy and offered me congratulations upon my nomination.

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

    Response: No.

25. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

    Response: No.

26. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

    Response: No.

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

    Response: On July 26, 2022, I spoke with staff from the Office of the White House Counsel. Since that day, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, President Biden announced his intent to nominate me.

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

    Response: I received these questions via email on February 22, 2023, and began writing my answers immediately. The Office of Legal Policy provided me with limited feedback before I finalized my answers. All answers are my own.

Senator Mike Lee
Questions for the Record
Marian Gaston, Nominee to the United States District Court for the Southern District of California

1. How would you describe your judicial philosophy?

Response: As a California Superior Court judge, I took an oath to support and defend the Constitution of the United States and the Constitution of the State of California, and have been ethically bound to apply the law in a fair and impartial manner. If honored with appointment to the District Court I will similarly take an oath to faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs. These oaths define my judicial philosophy.

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

Response: If confirmed, I will faithfully apply all relevant Supreme Court and Ninth Circuit precedent when deciding cases that turn on the interpretation of a federal statute. When interpreting legal texts, I will first look to the plain language of the statute. (*See Ross v. Blake,* 578 U.S. 632, 638 (2016)). If there is no ambiguity in the statute, my inquiry ends there. (*See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), holding, "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.")

If the statute is ambiguous, I will then look to mandatory authority from the court where I preside. If confirmed to the United States District Court for the Southern District of California, this would include the United States Supreme Court and Ninth Circuit precedent. If there is no case directly on point, I would consider precedent regarding analogous statutes and persuasive authority from appellate courts outside the Ninth Circuit. I could also look to legislative history regarding the law. (*See, e.g., Milner v. Navy* 562 U.S. 562, 574 (2011)). The Supreme Court has cautioned that the court should consider legislative history "only when necessary to interpret ambiguous text," *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004).

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

Response: If confirmed, I will faithfully apply all relevant Supreme Court and Ninth Circuit precedent when deciding cases that turn on the interpretation of a constitutional provision. When interpreting constitutional provisions, I first look to the plain language of the provision. (*See Ross v. Blake* 578 U.S. 632, 638 (2016)). If there is no ambiguity in the provision, my inquiry ends there. If the statute is ambiguous, I then look to mandatory authority from the court where I preside. If

confirmed to the United States District Court for the Southern District of California, this would include the United States Supreme Court and Ninth Circuit precedent.

I am mindful that in some contexts, the Supreme Court has held that constitutional interpretation turns on the text's original public meaning. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (interpreting the Second Amendment by its original public meaning), and *Crawford v. Washington*, 541 U.S. 36 (2004) (interpreting the Confrontation Clause by its historical meaning).

If there is no case directly on point, I would consider precedent regarding analogous provisions and persuasive authority from appellate courts outside the Ninth Circuit. I could also look to legislative history regarding the law. (*See, e.g., Milner v. Navy,* 562 U.S. 562, 574 (2011)).

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

Response: Please see my answer to Question 3.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my answer to Question 2.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: In certain cases, the Supreme Court has adopted the plain meaning of a statue as it would have been understood at the time of enactment. *See, e.g. Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (interpreting the Second Amendment by its original public meaning); and *Crawford v. Washington*, 541 U.S. 36 (2004) (interpreting the Confrontation Clause by its historical meaning)

If confirmed, I would faithfully apply binding authority including Supreme Court and Ninth Circuit precedent on constitutional and statutory interpretation.

6. What are the constitutional requirements for standing?

Response: Standing requires a case or controversy where they plaintiff has established: (1) an injury in fact that is "concrete and particularized", "actual or imminent", (2) that the injury is fairly traceable to the defendant's actions, and (3) redressability. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-561 (1992).

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

Response: Article I, Section 8 lists various specific powers of the Legislative branch, and concludes with the statement that the Legislature has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18. Similarly, Section 5 of the Fourteenth Amendment confers to Congress the "power to enforce, by appropriate legislation, the provisions of this article."

In *McCullough v. Maryland* 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court recognized the authority of Congress to implement the powers enumerated in the Constitution, noting that there was nothing in the Constitution that excluded incidental or implied powers, and holding, "Let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 409, 421.

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

Response: If confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent. If there is no case directly on point, I would consider precedent regarding analogous statutes and persuasive authority from appellate courts outside the Ninth Circuit. I could also look to legislative history regarding the law. (*See, e.g., Milner v Navy* 562 U.S. 562, 574 (2011)). The Supreme Court has cautioned that the court should consider legislative history "only when necessary to interpret ambiguous text," *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004).

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

Response: The Supreme Court held in *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997), that the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution ensure protection of certain fundamental rights that are "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. Examples of these fundamental rights are the rights "to marry, to have children, to direct the education of one's children, to marital privacy, to use contraception, [and] to bodily integrity." *Id.* at 20 (citations omitted).

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9.

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

Response: As a sitting judge of the California Superior Court, I am bound by United States Supreme Court precedent, California Supreme Court precedent, and other binding authority. If confirmed to the District Court, I would continue to faithfully follow precedent on all issues including whether substantive due process protects a particular right.

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

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

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

Response: The Supreme Court has said that alienage, race, national origin, and religion are suspect classes that are subject to strict scrutiny. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633, (1948) (ancestry); *Wisconsin v. Yoder* 406 U.S. 205 (1972) (religion) (superseded by the Religious Freedom Restoration Act of 1991).

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

Response: The Framers divided government among the executive, the legislature and the judiciary to ensure that no one branch of government would accumulate excessive power and potentially subject the people to tyranny. James Madison, John Jay and Alexander Hamilton made the case for divided government throughout the Federalist Papers, particularly in No. 47, where Madison wrote that, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny," and he argued in No. 51 that, "Ambition must be made to counter ambition." John Adams insisted that the United States have a government "of laws, not of men." These principles are foundational to the United States and are explicit in the Constitution.

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

Response: When deciding a case in which one branch assumed an authority not granted it by the text of the Constitution, I would look to Supreme Court and Ninth Circuit precedent to determine the legality of the action. For example, in *Youngstown v. Sawyer*, 343 U.S. 579, the Supreme Court held that held that the president lacked the power to seize the steel mills in the absence of statutory authority conferred on him by Congress, noting that, "The Constitution limits [the president's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States….'" *Id.* at 587-588.

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

Response: Empathy is not a factor listed in the Rules of Civil Procedure or Criminal Procedure or in the factors for consideration at federal sentencing pursuant to 18 U.S.C. §3553(a).

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

Response: Neither invalidating a law that is constitutional nor upholding a law that is unconstitutional is permissible.

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

Response: The role of the courts it to be neither "aggressive" nor "passive" in exercising judicial review, but to faithfully apply the law. To my knowledge, the Supreme Court has not issued any statement describing any trend over time in its exercise of judicial power to strike down a federal law, or explaining what would account for changes in its practice over time.

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

Response: Black's Law Dictionary defines judicial review as the court's "power to review the actions of other branches or levels of government," particularly its "power to invalidate legislative and executive actions as being unconstitutional." Black's Law

Dictionary (11th ed. 2019). Black's Law Dictionary defines judicial supremacy as the doctrine that the constitutional pronouncements of the judiciary in its exercise of judicial review "are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: As a sitting judge and candidate for the District Court, it would be improper for me to counsel elected officials on how to follow the Constitution. The Supreme Court has held that elected officials have an obligation to obey duly rendered decisions of the federal courts. *See Cooper v. Anderson,* 358 U.S. 1, 4 (1955) (rejecting the contention that there is no duty incumbent upon state officials to obey federal court orders resting on the court's considered interpretation of the United States Constitution.)

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

Response: In broad terms, the authority of the courts relies not on military might or spending power, but on the public's trust and confidence in the judiciary. The judiciary earns that trust and confidence by faithfully and ethically performing its duties.

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

Response: A district court judge is bound by both Supreme Court and circuit court precedent regardless of the individual judge's opinion of the higher courts' decisions.

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

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with the context in which this specific definition of equity was given. Black's Law Dictionary lists nine definitions of equity, including "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary lists nine definitions of equity, including "fairness", and one definition of equality, which is listed as the "quality, state, or condition of being equal". Black's Law Dictionary (11th ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: Under the Equal Protection Clause of the Fourteenth Amendment, states are prohibited from denying "to any person within its jurisdiction the equal protection of the laws." I am not aware of any binding decision that has considered or adopted the definition in Question 24 for equal-protection purposes. If this issue came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to determine the Equal Protection Clause's proper scope.

27. How do you define "systemic racism?"

Response: I am not aware of a consensus definition of "systemic racism".

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

Response: I am not aware of a consensus definition of "critical race theory".

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

Response: Please see my answers to Questions 27 and 28.

30. In 2008 you were one of the primary authors of the California Coalition on Sexual Offending's position paper on sex offender residence restrictions. Do you stand by the arguments made in this position paper?

Response: This question refers to a 2008 position paper of the California Coalition on Sexual Offending which I co-authored 15 years ago when I served as a Deputy Public Defender at the San Diego County Office of the Public Defender, before I was a judge.

The 2008 position paper set out the views of the California Coalition on Sexual Offending on blanket residence restrictions for all California sex offenders on probation or parole, based on evidence available to the Coalition at the time the paper was written, including concerns that blanket residence restrictions had the unintended consequence of increasing risks to public safety. The paper did not argue that sex offender registry laws should be repealed and in fact advocated for collecting additional data during the sex offender registration process.

In 2015, the California Supreme Court issued a decision in *In re Taylor*, 60 Cal.4th 1019, 1041 (2015). The court affirmed the trial court's findings, based on testimony from law enforcement officials, that non-individualized residence restrictions had resulted in a "dramatic increase" in the number of homeless sex offenders and, "The increased incidence of homelessness . . . hampered the surveillance and supervision of such parolees." The court held that the blanket restrictions had, "No rational relational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and ha[d] infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary and oppressive." *Id.* at 1038.

As a Superior Court judge since 2015, I have faithfully applied the laws as they are written, and binding legal precedent, in all cases that have come before me. Any personal views or opinions I have on any issue that comes before me do not impact the decisions I make as a judge.

31. During your hearing, you defended the arguments made in this paper by saying that residency requirements in sex offender registration laws lead to homelessness. What evidence did you rely on to make that argument?

Response: The 2008 position paper cited statistics from the California Sex Offender Management Board and the Department of Justice, Violent Crime Information Center, Sex Offender Tracking Program. The position paper set out the views of the Coalition on blanket residence restrictions for all California sex offenders on probation or parole, based on evidence available to the Coalition at the time the paper was written, including concerns that residence restrictions had the unintended consequence of increasing risks to public safety.

32. Do you still believe that sex offender registry laws should be repealed?

Response: To be clear, the position paper did not argue that sex offender registry laws should be repealed. In fact, the paper advocated for collecting additional data during the sex offender registration process.

The paper set out the views of the California Coalition on Sexual Offending on the issue of California residence restrictions, based on evidence available to and known by the Coalition at the time the paper was written, and before I was a judge.

Senator Josh Hawley
Questions for the Record

Marian Gaston
Nominee, U.S. Court of Appeals for the Southern District of California

1. **Other than your 2008 position paper, have you ever advocated repeal of California's sex offender residence restrictions?**

   Response: I believe this question refers to a 2008 position paper of the California Coalition on Sexual Offending which I co-authored 15 years ago when I served as a Deputy Public Defender at the San Diego County Office of the Public Defender, before I was a judge.

   The 2008 position paper set out the views of the California Coalition on Sexual Offending on blanket residence restrictions for all California sex offenders on probation or parole, based on evidence available to the Coalition at the time the paper was written, including concerns that blanket residence restrictions had the unintended consequence of increasing risks to public safety. The paper did not argue that sex offender registry laws should be repealed and in fact advocated for collecting additional data during the sex offender registration process.

   In 2015, the California Supreme Court issued a decision in *In re Taylor*, 60 Cal.4th 1019, 1041 (2015). The court affirmed the trial court's findings, based on testimony from law enforcement officials, that non-individualized residence restrictions had resulted in a "dramatic increase" in the number of homeless sex offenders and, "The increased incidence of homelessness . . . hampered the surveillance and supervision of such parolees." The court held that the blanket restrictions had, "No rational relational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and ha[d] infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary and oppressive." *Id.* at 1038.

   As a Superior court judge since 2015, I have faithfully applied the laws as they are written, and binding legal precedent, in all cases that have come before me. Any personal views or opinions I have on any issue that comes before me do not impact the decisions I make as a judge.

2. **Have you ever imposed a sentence in a criminal sex offense case that sought to circumvent California's sex offender residence restrictions?**

   Response: No.

3. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

Response: No.

4. 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 said that the original public meaning of the Constitution's text should guide the lower courts' interpretation of those provisions in a variety of areas. For example, the Supreme Court has interpreted the Establishment Clause (*Kennedy v. Bremerton School District*, 597 U.S. ___ (2022)), the Confrontation Clause (*Crawford v. Washington*, 541 U.S. 36 (2004)), and the Second Amendment (*New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022)), according to the texts' original public meaning. If confirmed, I will apply relevant Supreme Court precedent if a matter of constitutional interpretation comes before me.

5. Do you consider legislative history when interpreting legal texts?

Response: When interpreting legal texts, I first look to the plain language of the statute. (*See Ross v. Blake* 578 U.S. 632, 638 (2016)). If there is no ambiguity in the statute, my inquiry ends there. If the statute is ambiguous, I then look to mandatory authority from the court where I preside. If confirmed to the United States District Court for the Southern District of California, this would include the United States Supreme Court and Ninth Circuit precedent. If there is no case directly on point, I would consider precedent regarding analogous statutes and persuasive authority from appellate courts outside the Ninth Circuit. Only then could I also look to legislative history regarding the law. (*See, e.g., Milner v. Navy* 562 U.S. 562, 574 (2011)). The Supreme Court has cautioned that the court should consider legislative history "only when necessary to interpret ambiguous text." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004).

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: Some forms of legislative history are more probative than others. For example, the Supreme Court has explained that while pre-enactment legislative history is "persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it," *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 242 (2011), post-enactment legislative history has "scant" probative value, *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010).

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

Response: The U.S. Constitution is a domestic document and the law of foreign nations typically has no relevance to its interpretation. However, the Supreme Court has occasionally consulted English common law in interpreting the U.S. Constitution (*see, e.g., Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022)). In any case involving constitutional interpretation that might come before me, I would apply Supreme Court precedent.

6. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The Supreme Court has held that a method of execution violates the Eighth Amendment's prohibition on cruel and unusual punishment when it presents a "substantial risk of serious harm" above and beyond death itself. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022). The petitioner seeking to bar the method of execution also "must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] the risk of harm involved." *Id.* (quoting *Glossip v. Gross*, 575 U.S. 863, 877 (2015)).

7. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes. Please see my answer to Question 6.

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

Response: The Ninth Circuit ruled in *Osborne v. District Attorney's Office for the Third Judicial District*, 423 F.3d 1050 (2005), that a habeas petitioner had the right to DNA testing. However, this decision was overturned by the Supreme Court, *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), which held that there is no Due Process right to post-conviction DNA testing.

9. 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.

10. 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: Laws infringing upon religious practices that are "neutral and of general applicability" are subject to rational basis review. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, if a law that burdens religion is not in fact neutral or generally applicable, the court must apply strict scrutiny, looking to whether the regulation is narrowly tailored to advance a compelling government interest, and that the law is "the least restrictive means of furthering that compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 728 (2014). The United States Supreme Court has articulated this standard in multiple Free Exercise cases, all of which are binding precedent. *See, e.g., Kennedy v. Bremerton School District*, 597 U.S. ___ (2022); *Tandon v. Newsom* (2021) 141 S. Ct. 1294, 1296–97 (per curium); *Fulton v. City of Philadelphia* 141 S. Ct. 1868, 1877–78 (2021).

11. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my answer to Question 10.

12. 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: In evaluating the sincerity of a person's religious beliefs, the courts' narrow function is to determine whether the person's asserted belief reflects an "honest conviction," not whether those beliefs are mistaken or unreasonable. *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 686 (2014) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 716 (1981)).

13. 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: *District of Columbia v. Heller*, 554 U.S. 570 (2008), held that "the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595. This includes the right to use that firearm for traditionally lawful purposes such as "protection of one's home and family." *Id.* at 629.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

14. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: Justice Holmes made that statement in a passage about the role of the Constitution. He stated that the Constitution is "not intended to embody a particular economic theory, whether of paternalism and organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views…." *Lochner v. New York*, 198 U.S. 45, 75-76 (1905). I agree that the Constitution contemplated a democracy with citizens with fundamentally differing views and that statutes with which one disagrees are not unconstitutional by virtue of that disagreement.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: The Supreme Court overruled *Lochner v. New York* 198 U.S. 45 (1905) in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). As a judge I am bound to apply Supreme Court precedent regardless of my personal views, if any.

15. 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: I take this statement in the majority holding to mean that over time, it had become generally agreed that *Korematsu v. United States*, 323 U.S. 214 (1944), had been wrongly decided.

16. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

Response: No.

a. If so, what are they?

Response: As a sitting judge, I am required by the California Code of Judicial Ethics to fairly and neutrally apply the law, which includes faithfully applying binding precedent including all United States Supreme Court precedent. My personal agreement or disagreement is immaterial. If confirmed to the United States District Court for the Southern District of California, I would continue to apply Supreme Court precedent and other mandatory authority as required by the Code of Conduct for United State Judges.

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

Response: Yes.

17. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?
b. If not, please explain why you disagree with Judge Learned Hand.
c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response to all subparts: As a sitting judge, it is generally improper for me to praise or criticize statements of the Supreme Court or appellate court justices. If confirmed, I would adhere to all Supreme Court and Ninth Circuit precedent regarding what constitutes a monopoly. For instance, the Supreme Court has held that there is "no doubt" that 87% of market share constituted a monopoly in *United States v. Grinnel Corp.,* 384 U.S. 563, 571 (1966), and that "it may be assumed" that 75% of market share constituted a monopoly in *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 379, 391 (1956).

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

Response: Federal common law is defined by Black's Law Dictionary as the "body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding cases governed by state law." Black's Law Dictionary (11th ed. 2019). The Supreme Court held in *Erie R. Co. v. Tompkins* that there is no general federal common law. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Rather, the federal courts in diversity-of-jurisdiction cases apply substantive state law.

19. 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: "[S]tate courts are the ultimate expositors of state law," and federal courts "are bound by their constructions except in extreme circumstances." *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). I would therefore look to state court precedent to determine the scope of a right protected by a state constitution. "Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer *procedural* protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State." *Mills v. Rogers*, 457 U.S. 291, 300 (citations omitted) (1982).

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

Response: Generally, yes. However, "state courts are the ultimate expositors of state law," and federal courts "are bound by their constructions except in extreme circumstances." *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). I would therefore look to state court precedent to determine the scope of a right protected by a state constitution.

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

Response: Whether a provision of a state constitution guarantees greater protections than those guaranteed by the United States Constitution is a matter of statutory construction by the individual state. Please see my answer to Question 19.

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

Response: As a sitting judge, it in generally inadvisable for me to comment on the correctness or wrongfulness of Supreme Court precedent. However, because *Brown v. Board of Education*, 347 U.S. 483 (1954), presented issues that are unlikely to become before me, I believe I may in this narrow instance share my opinion that *Brown v. Board of Education* was correctly decided.

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

Response: Yes. The Supreme Court has upheld national injunctions issued by the district courts. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89

(2017). However, the Supreme Court has noted that injunctions are a "drastic and extraordinary" remedy, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and the Ninth Circuit has instructed that such injunctions should be granted only when "necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F. 3d 558, 582 (9th Cir. 2018).

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

Response: National injunctions are issued in accordance with Federal Rule of Civil Procedure 65, and have been upheld as being within the inherent equitable powers of the court. *See Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), rev'd and remanded, 138 S. Ct. 2392 (2018); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), aff'd in part, rev'd in part on other grounds, sub nom. *Summers v. Earth Island Inst*., 555 U.S. 488 (2009).

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

Response: Please see my answer to Question 21.

22. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my answer to Question 21.

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

Response: Federalism is an underlying principle of the United States Constitution as reflected in the Tenth Amendment, which makes clear that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people". U.S. Const. amend. X. This vision of limited government, with federal power shared by three branches, was intended as a "bulwark against tyranny". *U.S. v. Brown*, 381 U.S. 437, 443 (1965). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991), quoting Federalist No. 45.

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

Response: Multiple abstention doctrines prevent the federal court from resolving matters in deference to adjudication in the state court.

For example, the *Pullman* doctrine prohibits the federal courts from hearing a state's constitutional issue when the state has means to resolve the issue, reflecting "a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).

The *Younger* doctrine similarly bars federal courts from hearing constitutional issues arising from a state court criminal prosecution until that matter has concluded. *Younger v. Harris*, 401 U.S. 37 (1971).

Colorado River Water Conservation District v. United States, 424 U.S. 800, 817–18 (1976), holds that a federal court faced with "exceptional circumstances" can abstain from exercising its federal jurisdiction if there is a parallel proceeding in state court and, after carefully considering a series of factors that are "heavily weighted in favor of the exercise of jurisdiction," the court finds that exercising jurisdiction would waste judicial resources.

There are also abstention doctrines that may apply in matters where federal intervention may have an impermissibly intrusive or disruptive effect on state policies. *See Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), and *Louisiana Power & Light v. Thibodaux* 300 U.S. 25 (1959).

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

Response: In an individual case, the appropriateness of damages versus injunctive relief would depend upon the relief sought; the facts of the case itself; and the general principle that damages are intended to compensate a party for past harm while injunctive relief is provided to prevent future harm.

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

Response: The Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), that the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution ensure protection of certain fundamental rights that are "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. Examples of these fundamental rights are the rights "to marry, to have children, to direct the education of one's children, to marital privacy, to use contraception, [and] to bodily integrity." *Id.* at 720 (citations omitted).

27. 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 the free exercise of religion is a fundamental right recognized by the Founders. U.S. Const. amend. I. Please see my answers to Question 10 for the scope of the right to free exercise of religion.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: "The Free Exercise Clause embraces a freedom of conscience and worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my answer to Question 10.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 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: According to the Supreme Court, where it applies, "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton Cnty.,* 140 S. Ct. 1731 (2020). If confirmed I would follow all relevant Supreme Court and Ninth Circuit precedent when interpreting RFRA.

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.

28. 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: "Beyond a reasonable doubt" is defined in each jurisdiction's jury instructions and is not subject to quantification. If confirmed I would follow all Supreme Court and Ninth Circuit precedent regarding what constitutes guilt "beyond a reasonable doubt."

29. **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: "For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey v. Dittman*, 877 F.3d, 297, 302 (2017). As a candidate for the District Court, I am prohibited from prejudging how these principles must be applied in any case that comes 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: Please see my answer to Question 29a.

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

    Response: Please see my answer to Question 29a.

30. **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: Ninth Circuit Rule 36-3 provides 18 that unpublished Ninth Circuit dispositions and orders are (a) not precedent except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion; (b) citable to courts within the Ninth Circuit if issued on or after January 1, 2007; and (c) not citable if issued before January 1, 2007, except under limited circumstances (*e.g.,* when relevant under preclusion doctrines, or for factual purposes, or to demonstrate the existence of a conflict). (*See Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001)). Thus, unpublished Ninth Circuit decisions issued in or after 2007 are citable without restriction as persuasive authority, while pre-2007 unpublished decisions are not citable, subject to certain rare exceptions.

As a candidate for the District Court it would be improper for me to comment on the appropriateness or inappropriateness of the actions of the Court of Appeals.

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

Response: Please see my answer to Question 30c.

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

Response: Ninth Circuit Rule 36-3 provides 18 that unpublished Ninth Circuit dispositions and orders are (a) not precedent except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion; (b) citable to courts within the Ninth Circuit if issued on or after January 1, 2007; and (c) not citable if issued before January 1, 2007, except under limited circumstances (*e.g.,* when relevant under preclusion doctrines, or for factual purposes, or to demonstrate the existence of a conflict). (*See Sorchini v. City of Covina,* 250 F.3d 706 (9th Cir. 2001)). Thus, unpublished Ninth Circuit decisions issued in or after 2007 are citable without restriction as persuasive authority, while pre-2007 unpublished decisions are not citable, subject to certain rare exceptions. If confirmed, I would follow Ninth Circuit precedent and the applicable local rules regarding the authority of unpublished decisions.

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

Response: Please see my answer to Question 30c.

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

Response: Please see my answer to Question 30c.

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: Please see my answer to Question 30c.

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: Please see my answer to Question 30c.

31. In your legal career:

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

Response: I have tried approximately 50 cases to verdict as first chair.

b. How many have you tried as second chair?

Response: I have tried one case to verdict as second chair.

c. How many depositions have you taken?

Response: I have taken approximately 10 depositions.

d. How many depositions have you defended?

Response: I have defended approximately 10 depositions.

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

Response: I have not argued before a federal appellate court.

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

Response: I have argued one case before a state appellate court.

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

Response: I have not appeared before a federal agency.

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

Response: I have argued hundreds of dispositive motions before trial courts.

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

Response: I have argued thousands of evidentiary motions before trial courts.

32. 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?

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

Response to both parts: None of my previous jobs required me to track billable hours.

33. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with this statement from Justice Scalia. I understand it to mean that judges who neutrally apply the law will not always personally want the required outcome.

34. 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 am not familiar with this statement from Chief Justice Roberts. I take this statement to reflect Justice Roberts' view that judges should be impartial.

b. Do you agree or disagree with this statement?

Response: I agree that judges should apply the law impartially.

35. 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: I am not familiar with this statement by Justice Holmes. I take this statement to reflect Justice Holmes' view that the role of a judge is to be impartial.

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

Response: I agree that judges should apply the law impartially.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: Following remand from the California Supreme Court, I was assigned to represent a client at an evidentiary hearing at the trial court level on a case raising a constitutional challenge in *People v. McKee,* 47 Cal. 4th 1172 (2012).

37. 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: I have not deleted or attempted to delete any content from social media.

38. What were the last three books you read?

Response: The last three books I read were *The Architect's Apprentice* by Elif Shafek, *Mighty Be Our Powers* by Leymah Gbowee, and *The House at Sugar Beach* by Helene Cooper.

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

Response: I am not aware of a consensus definition of the phrase "systemically racist". Multiple statutes and constitutional provisions prohibit discrimination, e.g. Civil Rights Act of 1964 §7, 42 U.S.C. §2000 et seq (1964). As a sitting judge, I apply the law fairly and impartially in all matters that come before me.

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

Response: I am most proud of the legal work I have done as a judge presiding over a collaborative court serving children who were sex trafficking survivors. Please see Question 18 in my SJQ.

41. 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 an attorney my obligation was to zealously advocate for my clients within the bounds of ethics, with steadfast candor to the court. I did so irrespective of any personal views I may hold.

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

Response: Yes.

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

Response: I do not often read works by law professors.

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

Response: Federalist No. 78.

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

Response: While I cannot cite to any particular judicial opinion, law review article, or other legal opinion that made me change my mind, as a Superior Court judge I preside over all cases with an open mind.

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

Response: If confirmed to the District Court, I would apply Supreme Court and Ninth Circuit precedent on this issue without regard to any personal views, if any.

46. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: To the best of my recollection, I have testified under oath one time at a motion to withdraw a guilty plea filed by a former client in case SCD189967. The motion was denied. The matter would have been recorded by a court certified court reporter.

47. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade,* 410 U.S. 113 (1973)?
b. The Supreme Court's substantive due process precedents?
c. Systemic racism?
d. Critical race theory?

Response to all subparts: No.

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

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

Response to all subparts: No.

49. Have you ever authored or edited a brief that was filed in court without your name on the brief?

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

Response: No.

50. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

51. 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: Prior to my testimony to the Senate Judiciary Committee, I swore an oath to testify truthfully, and I fulfilled that oath.

Nomination of Marian Fitzgerald Gaston
to be United States District Judge for the Southern District of California
Questions for the Record
Submitted February 22, 2023

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

2. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: As a sitting judge and candidate for the federal court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. If confirmed to serve as a judge on the District Court of the Southern District of California, I will faithfully apply *Heller* and all other binding authority of the Supreme Court and Ninth Circuit.

3. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: *District of Columbia v. Heller*, 554 U.S. 570 (2008), held that "the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595. This includes the right to use that firearm for traditionally lawful purposes such as "protection of one's home and family." *Id.* at 629.

4. **Has your understanding of the Second Amendment changed at all as a result of the Supreme Court's holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022)? If so, how?**

   Response: Yes. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), the Supreme Court stated that the government has the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* at 2126. To do so, the government must identify an historical analogy that is "relevantly similar" to the challenged regulation. *Id.* at 2132. As a judge, I am bound to faithfully apply *Bruen* and other binding authority.

5. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022), the Supreme Court ruled that, to justify a regulation restricting Second Amendment rights, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." How would you, as a judge, go about determining the "historical tradition" of acceptable firearm regulation in the United States?

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), the Supreme Court stated that the government has the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* at 2126. To do so, the government must identify an historical analogy that is "relevantly similar" to the challenged regulation. *Id.* at 2132. This is the standard I am bound to apply if confirmed.

6. Do you believe that judges should respect Congress's legislative choices regarding the sentencing of criminals under federal law, including the choice of whether to apply sentencing reductions retroactively?

Response: Yes. Sentencing in federal criminal cases is governed by 18 U.S.C. 3553(a). Judges are bound by the Code of Conduct and required to follow the law.

7. Do you believe that finality and predictability are important in federal criminal sentencing? Why or why not?

Response: Yes. The Supreme Court has held that finality and predictability are important principles as criminal law, as they serve both the retributive and deterrent functions of the law. *Shinn v. Martinez Ramirez,* 596 U. S. ____, 7-8, 10 (2022) (slip opinion).

8. Does the president have unilateral authority to categorically ignore immigration laws established by Congress?

Response: Article II of the Constitution requires the president to "take Care that the Laws be faithfully executed" and take an oath or affirmation to "faithfully execute the Office of President." U.S. Const. Art. II, §3. These clauses have been interpreted as meaning that, "[A]bsent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions." *In re Aiken County*, 725 F.3d 255, 259 (2013). The lawfulness of any particular actions by a president would depend on the facts of the individual case.

9. What is your understanding of the Citizenship Clause of the Fourteenth Amendment?

Response: The Citizenship Clause of the Fourteenth Amendment states, "[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const., amend. XIV, Section 1.

10. Do you believe that the Citizenship Clause of the Fourteenth Amendment contains any exceptions? If so, please describe who you believe to be excluded from birthright citizenship.

Response: There are certain limited exceptions to the Citizenship Clause of the Fourteenth Amendment. For example, children born to a parent or parents with diplomatic immunity are excluded from birthright citizenship, as they are not "subject to the US law." *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

11. Is it unlawful for an agent of state government to actively assist any individual in breaking federal immigration law?

Response: Article VI of the United States Constitution and 4 U.S.C. §101 require every member of a state legislature, every executive and judicial officer of every state, to take an oath to support the Constitution of the United States. Further, the Supreme Court has held that elected officials have an obligation to obey duly rendered decisions of the federal courts. *See Cooper v. Anderson,* 358 U.S. 1, 4 (1955) (rejecting the contention that there is no duty incumbent upon state officials to obey federal court orders resting on the court's considered interpretation of the United States Constitution.) The lawfulness of the actions of any agent of state government would depend on the facts of the individual case.

12. Is it unlawful for an agent of state government to actively shield or hide an individual from lawful federal immigration enforcement?

Response: Article VI of the United States Constitution and 4 U.S.C. §101 require every member of a state legislature, every executive and judicial officer of every state, to take an oath to support the Constitution of the United States. Further, the Supreme Court has held that elected officials have an obligation to obey duly rendered decisions of the federal courts. *See Cooper v. Anderson,* 358 U.S. 1, 4 (1955) (rejecting the contention that there is no duty incumbent upon state officials to obey federal court orders resting on the court's considered interpretation of the United States Constitution.) The lawfulness

of the actions of any agent of state government would depend on the facts of the individual case.

13. Please describe what you believe to be the limits of the Environmental Protection Agency's authority according to the terms of the Supreme Court's ruling in *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022), the Supreme Court held that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *Id.* (citing *Utility Air v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014)). "To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.*

14. Please describe what you believe to be the Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022).

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overturned *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), finding that there is not a Fourteenth Amendment Due Process-based right to abortion and "return[ing] the issue of abortion to the people's elected representatives." *Id.* at 2244.

15. Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted an injunction against a California prohibition on church gatherings in homes that had been enacted to reduce the spread of COVID, holding that, "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id*. at 1296.

16. What is your understanding of the fiduciary duties owed by investment firms to their investors?

Response: The Supreme Court has held that in analyzing whether an investment firm has violated its fiduciary duty to its investors, when challenged, "[T]he burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein…. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain." *Jones v. Harris*, 559 U.S. 335, 340 (emphasis omitted).

17. Do federal drug scheduling actions pursuant to the Controlled Substances Act preempt state or local laws that purport to 'legalize' substances contrary to their federal drug control status?

Response: Section 903 of the Controlled Substances Act states, "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

18. Under what circumstances, if any, do you believe that it is appropriate for courts to order attorneys to break attorney-client privilege?

Response: On January 23, 2023, the U.S. Supreme Court dismissed as improvidently granted the writ of certiorari in *In re Grand Jury*, 598 U.S. ___ (2023), a Ninth Circuit case that had invited the Court to consider the scope of attorney-client privilege protection for dual-purpose communications, *i.e.*, communications that seek legal advice but also contain business or other non-legal information. In the Ninth Circuit, the dismissal leaves in place the lower court's binding order that privilege exists where the primary purpose of the communication was legal advice. Some courts (most notably, the D.C. Circuit) apply a different test, finding privilege if a significant purpose of the communication was legal advice. If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent on the issue of attorney-client privilege.

19. What is your understanding of the current state of the law regarding the executive privilege of the president of the United States?

Response: In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court held that there is a "presumptive privilege for Presidential communications" based on "all the values to which we accord deference for the privacy of all citizens and, added to those values . . . the necessity for protection of the public interest in candid, objective, and even

blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. However, "[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

20. Please describe what you believe to be the Supreme Court's holding in *United States v. Taylor*, 596 U.S. ____ (2022).

Response: In *United States v. Taylor*, 596 U.S. ___ (2022), the Supreme Court held that attempted Hobbs Act robbery does not qualify as a "crime of violence" under §924(c)(3)(A) because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force.

21. If an individual is ordered deported by our immigration courts, and the individual has exhausted all appeals, should the court's deportation order be carried out, or ignored?

Response: A lawful court order should not be ignored.

22. What is your view of arbitration as a litigation alternative in civil cases?

Response: The Federal Arbitration Act of 1925 established that arbitration agreements are "valid, irrevocable, and enforceable." 9 U.S.C. §2. Arbitration agreements may be declared unenforceable by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 339 (2011).

23. Please describe what you believe to be the Supreme Court's holding in *Kennedy v. Bremerton*, 597 U.S. ____ (2022).

Response: In *Kennedy v. Bremerton*, the Supreme Court ruled that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal, in this case, praying while at work, holding that, "Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret

out and suppress religious observances even as it allows comparable secular speech." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2433 (2022).

24. Please describe what you believe to be the Supreme Court's holding in *Torres v. Texas Department of Public Safety*, 597 U.S. ____ (2022).

Response: In *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455 (2022), the Supreme Court held that that state sovereign immunity does not prevent states from being sued under federal law related to the nation's defense, finding that, "Congress' power to build and maintain a national military is 'complete in itself.' (Citations omitted.) Text, history, and precedent show the States agreed that their sovereignty would 'yield ... so far as is necessary' to national policy to raise and maintain the military. (Citations omitted.) And because States committed themselves not to 'thwart' the exercise of this federal power, '[t]he consent of a State,' including to suit, 'can never be a condition precedent to [Congress'] enjoyment' of it. We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power '[t]o raise and support Armies' and 'provide and maintain a Navy.' § 8, cls. 12–13." *Id.* at 2466.

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

Response: I received these questions via email on February 22, 2023, and began researching and writing my answers immediately. The Office of Legal Policy provided me with limited feedback before I finalized my answers. All answers are my own.

26. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please identify the department or agency with which those officials are employed.

Response: No.

Senator John Kennedy
Questions for the Record

Ms. Marian Gaston

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: As a California Superior Court judge, I took an oath to support and defend the Constitution of the United States and the Constitution of the State of California. I am ethically bound to apply the law in a fair and impartial manner. If honored with appointment to the District Court I will similarly take an oath to faithfully and impartially discharge my duties under the laws and Constitution of the United States, and will be bound by the Code of Conduct that requires judges to act in accordance with the law, and not in the furtherance of personal preferences or beliefs. These oaths define my judicial philosophy.

2. **Do you believe the meaning of the Constitution is immutable or does it evolve over time?**

   Response: According to the Supreme Court, the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCullough v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). Its fundamental principles "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022).

   If confirmed, I would faithfully apply mandatory authority including Supreme Court and Ninth Circuit precedent on constitutional and statutory interpretation.

3. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: In matters of textual analysis, the court's analysis must be guided by the plain language of the statute itself. (*See Ross v. Blake,* 578 U.S. 632, 638 (2016)). If there is no ambiguity in the statute, my inquiry ends there. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.") If the statute is ambiguous, I then look to mandatory authority from the court where I preside. If confirmed to the United States District Court for the Southern District of California, this would include the United States Supreme Court and Ninth Circuit precedent. If there is no case directly on point, I would consider precedent regarding analogous statutes and persuasive authority from appellate courts outside the Ninth Circuit. Only then could I also look to legislative history regarding the law. (*See, e.g., Milner v. Navy* 562 U.S. 562, 574 (2011)).

4. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: Please see my answer to Question 3.

5. **What First Amendment restrictions can the owner of a shopping center place on private property?**

   Response: On the facts of *PruneYard Shopping Center v. Robins,* the Supreme Court held that the public had the right "to exercise state-protected rights of free expression" on privately owned shopping center property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

   However, where private property has not been dedicated to public use, a private property owner may have a policy against all handbilling. "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that '(n)o person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'" *Lloyd Corp., Limited v. Taylor*, 407 U.S. 551, 567 (1972).

6. **Are non-citizens unlawfully present in the United States entitled to a right of privacy?**

   Response: Generally, non-citizens receive certain constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. *See*, *e.g., Plyler v. Doe,* 457 U.S. 202, 212 (1982) (The provisions of the Fourteenth Amendment " 'are universal in their application, to all persons within the territorial jurisdiction ...' ") (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); *Kwong Hai Chew,* 344 U.S. 590, 596, n. 5 (1953)). If presented with a case involving a non-citizen's claim to a right to privacy, I would apply all Supreme Court and Ninth Circuit precedent.

7. **Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?**

Response: Generally, non-citizens receive certain constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. *See*, *e.g., Plyler v. Doe,* 457 U.S. 202, 212 (1982) (The provisions of the Fourteenth Amendment "'are universal in their application, to all persons within the territorial jurisdiction ...'") (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); *Kwong Hai Chew,* 344 U.S. 590, 596, n. 5 (1953); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) (holding that the warrantless search of the car of a Mexican citizen was an unreasonable search and seizure)).

The Supreme Court has also held that, "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people'…. While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

If presented with a case involving a non-citizen's claim to a right to privacy, I would apply all Supreme Court and Ninth Circuit precedent.

8. At what point is a human life entitled to equal protection of the law under the Constitution?

Response: The issue of when human life is entitled to equal protection of the law under the Constitution has not been resolved by the Supreme Court. In *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), the court noted varying viewpoints then "return[ed] the issue of abortion to the people's elected representatives." *Id.* at 2244.

9. A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.

a. Do you agree?

Response: In *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), the court held that there is not a Fourteenth Amendment Due Process-based right to abortion and "return[ed] the issue of abortion to the people's elected representatives." *Id.* at 2244. I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

As a sitting California Superior Court judge and candidate for the District Court I may not ethically comment on pending cases or issues that may come before me.

b. Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?

Response: Please see my answer to Question 9a.

10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

Response: No.

11. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: The Supreme Court has held that under at least some circumstances states may lawfully require voters to present identification in order to cast a ballot. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), the Supreme Court stated that the government has the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* at 2126. To do so, the government must identify an historical analogy that is "relevantly similar" to the challenged regulation. *Id.* at 2132. This is the standard I am bound to apply if confirmed.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: The Supreme Court has listed a variety of factors to determine whether overturning precedent is prudent in the context of stare decisis, including the reasoning underlying the decision, its workability, its effect on other areas of the law and the extent to which it has been relied upon. *See, e.g., Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Janus v. AFCSME* 138 S. Ct. 2448 (2018).

b. Is one factor alone ever sufficient?

Response: The Supreme Court has listed a variety of factors to determine whether overturning precedent is prudent in the context of stare decisis, including the reasoning underlying the decision, its workability, its effect on other areas of the law and the extent to which it has been relied upon. The Supreme Court has not said that a particular number of factors are necessary as justification for overturning precent nor has the Supreme Court identified one factor alone as being sufficient. *See, e.g., Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Janus v. AFCSME* 138 S. Ct. 2448 (2018).

14. Please explain the difference between judicial review and judicial supremacy.

Response: Black's Law Dictionary defines judicial review as the court's "power to review the actions of other branches or levels of government," particularly its "power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines judicial supremacy as the doctrine that the constitutional pronouncements of the judiciary in its exercise of judicial review "are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

15. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. I am not aware of any Supreme Court or Ninth Circuit precent addressing whether the Ninth Amendment protects individual rights or provides structural protection to the people. If confirmed to the District Court, I will faithfully apply all Supreme Court and Ninth Circuit precedent as relates to the Ninth Amendment.

16. Under former U.S. Supreme Court Justice Stephen Breyer's view of 'active liberty', is the Ninth Amendment evolving?

Response: I am not familiar with the term "active liberty" or Justice Breyer's view of that term. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent on issues involving the Ninth Amendment.

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: If confirmed, I will faithfully apply any Supreme Court or Ninth Circuit precedent interpreting the Ninth Amendment. I am unaware of any binding authority

holding that the Bill of Rights do or do not inform the court's understanding of the meaning of the Ninth Amendment.

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response: The Supreme Court has said that the original public meaning of the Constitution's text should guide the lower courts' interpretation of those provisions in a variety of areas. For example, the Supreme Court has interpreted the Establishment Clause (*Kennedy v. Bremerton School District*, 597 U.S. ___ (2022)), the Confrontation Clause (*Crawford v. Washington*, 541 U.S. 36 (2004)), and the Second Amendment (*New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022)), according to the texts' original public meaning. I am not aware of any Supreme Court precedent regarding the original meaning of the Ninth Amendment and the relevance of the original meaning of the Ninth Amendment to its interpretation. If confirmed, I will apply relevant Supreme Court precedent if a matter of Ninth Amendment interpretation comes before me.

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people'*?

Response: The Supreme Court has held that, "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people'…. While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

b. Is the term's meaning consistent in each amendment?

Response: Please see my answer to Question 19a.

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: The Supreme Court has held that non-citizens and immigrants are included in "the people" for the purposes of some amendments (*See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982), "Aliens, even aliens whose presence in this country is unlawful, have

long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.") If confirmed, I will apply Supreme Court and Ninth Circuit precedent to the facts before me.

21. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: The Supreme Court held in *Washington v. Glucksberg* 521 U.S. 702, 720 (1997) that the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution ensure protection of certain fundamental rights that are "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. Examples of these fundamental rights are the rights "to marry, to have children, to direct the education of one's children, to marital privacy, to use contraception, [and] to bodily integrity." *Id.* at 20 (citations omitted). The Supreme Court did not directly address whether the meaning of the Due Process Clause changes over time.

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?

Response: If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent when addressing whether the Privileges or Immunities Clause within the Fourteen Amendment is a source of unenumerated rights. For example, in *Sáenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court found that the right to intrastate travel is protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent on the issue of whether the right to terminate a pregnancy is among the 'privileges or immunities' of citizenship. To my knowledge, neither the Supreme Court nor Ninth Circuit have issued binding authority on this issue. As a sitting judge and candidate for the District Court, I am prohibited from commenting on pending or impending cases.

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: When interpreting the meaning of statutes under *Chevron*, courts apply a two-step test. First, they must decide if the statute's meaning is "unambiguous." If the meaning is clear, the court applies that meaning. But if it is ambiguous, the court must defer to the agency's interpretation so long as it is reasonable. *Chevron U.S.A., Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Supreme Court has clarified that *Chevron* deference does not apply in "extraordinary cases." *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022).

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022), the Supreme Court held that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *Id.* (citing *Utility Air v. Environmental Protection Agency*, 573 U. S., 302, 324 (2014)). To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims." *Id.*

26. How does the Constitution limit the powers of Congress? Please provide examples.

Response: The Constitution divides government between three branches: The powers of Congress are listed in Article I of the United States Constitution; in Article II, the Constitution delineates the powers of the executive branch; and Article III establishes the jurisdiction of the federal judiciary. Congress's power is thus limited in some respects. For example, Congress is not permitted to issue bills of attainder; this leaves questions of guilt in criminal matters reserved to the judicial branch. Legislation passed by Congress may be vetoed by the President, giving the executive branch the ability to check the legislature's power. In addition, the Bill of Rights restricts all three branches' power in the area of individual liberties.

27. Please describe the modern understanding and limits of the Commerce Clause.

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

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: The Supreme Court held in *United States v. Morrison* that the Commerce Clause did not permit Congress to enact a federal civil remedy for acts of gender-

motivated violence as part of the Violence Against Women Act. *United States v. Morrison,* 529 U.S. 598 (2000).

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: The Due Process Clause in the Fifth Amendment to the United States Constitution provides, "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause in Section One of the Fourteenth Amendment to the United States Constitution provides, "...nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. IV, cl. 1. The Amendments have been interpreted as having the same meaning: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (J. Frankfurter, concurring.)

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: The Constitution vests Congress with explicit authority to enact criminal law in three places. Article I, Section 8, clause 6 states that "Congress shall have Power ... To provide for the Punishment of counterfeiting the Securities and current Coin of the United States." The Constitution gives Congress authority over three additional classes of crime, when it declares that "Congress shall have Power ... To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Const. Art. I, §8, cl. 10. The Constitution also defines the crime of treason, but empowers Congress to set its punishment. U.S. Const. Art. III, §3. The Constitution also vests in Congress the power to make laws "necessary and proper" to the implementation of its other enumerated powers. U.S. Const. Art. I, §8, cl.18. The Supreme Court has held that this power extends to the authority to make criminal laws. *See, e.g., United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: The Supreme Court has said that if a regulatory agency seeks to decide an issue of major national significance, concerning an issue of vast economic and political significance, its action must be supported by clear congressional authorization. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–2608 (2022).

32. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: The anti-commandeering doctrine prohibits the federal government from "commandeering" state personnel or resources for federal purposes. One perceived

limitation to the anti-commandeering doctrine is the Supremacy Clause, that allows Congress to preemptively legislate in some areas (e.g. drug regulation). U.S. Const. Art. IV, paragraph 2. Another arguable limit on the anti-commandeering doctrine is the spending power of Congress that allows Congress to withhold funding from states that do not implement Congressional policies. U.S. Const. Art. I, §8, cl. 1.

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court considered "evolving standards of decency" in holding that the Eighth and Fourteenth Amendments prohibit executing juvenile offenders. *Id.* at 560-561. If confirmed I will faithfully apply *Roper* and all other Supreme Court precedent.

34. Is the death penalty constitutional?

Response: Yes. In *Gregg v. Georgia*, 428 U.S. 153 (1976) the Supreme Court held that the death penalty does not invariably violate the Constitution.

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: I know of no binding Supreme Court or Ninth Circuit precedent on this issue. As a sitting judge and candidate for the District Court, I may not ethically comment on pending or impending litigation.

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent when addressing an issue of "absolute immunity." The Supreme Court has recognized the defense of "absolute immunity" for legislators in their legislative functions, (*see, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)), and of judges in their judicial functions (*see*, *e.g., Stump v. Sparkman*, 435 U.S. 349 (1978)). The Supreme Court has also recognized absolute immunity of certain officials of the executive branch, including prosecutors and similar officials (s*ee Butz v. Economou*, 438 U.S. 478 (1978), executive officers engaged in adjudicative functions (*Id.* at 513–517), and the President of the United States (*see Nixon v. Fitzgerald*, 457 U.S. 731 (1981)).

37. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: I know of no binding Supreme Court or Ninth Circuit precedent on this issue. The regulation of speech that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn

to achieve a compelling state interest. *See, e.g., International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). The second category of public property is the designated public forum, whether of a limited or unlimited character - property that the State has opened for expressive activity by part or all of the public. *Id.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.

If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent regarding the forums created by social media companies vis a vis speech restrictions in the context of the First Amendment.

38. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Supremacy Clause establishes that the federal constitution, and federal law generally, take precedence over state laws including state constitutions. U.S. Const. Art. IV, paragraph 2. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. *See, e.g., McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Ware v. Hylton,* 3 U.S. (3Dall.) 199 (1796).

The Adequate and Independent State grounds doctrine says that, where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the federal court lacks jurisdiction if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). If there exist matters in the record actually decided by the state court which are sufficient to maintain the judgment of that court, notwithstanding any error in deciding the federal question, the federal court would not be justified in reversing the judgment of the state court. *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875).

The Adequate and Independent State grounds doctrine therefore respects the principles codified by the Supremacy Clause while prohibiting the federal court from assuming jurisdiction when a case has been satisfactorily decided based on state law.

39. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: In *Kashem v. Barr,* 941 F.3d 358 (2019), the Ninth Circuit held that individuals may be placed on a no-flylist without a hearing, finding that, "Where national security concerns arise . . . an exact statement of reasons 'may not always be possible.'"

Id. at 382, citing *Al Haramain Foundation, Inc. v. U.S. Dept. of Treasury,* 686 F.3d 965, 983 (9th Cir. 2012). "Under the framework we established in *Al Haramain II*, the government may use classified information without disclosure in 'extraordinary circumstances' – i.e., 'if that information *truly* implicates national security.'" *Id.* citing *Al Haramain* at 982, n.9.

If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent regarding the application of the Fifth Amendment's Due Process Clause to the placement of individuals on the no-fly list.

40. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: There are three commonly used standards of review for determining whether a law or regulation violates a constitutional right. The most stringent standard of review requires the government to show that the challenged statute is narrowly tailored to achieve a compelling government interest; this standard is applied when the law implicates a fundamental liberty interest. Furthermore, if the law discriminates against a "suspect class", which the Supreme Court has held to include race, national origin, alienage, or religion, the law must be the least restrictive alternative for achieving the goal of the law. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.")

The next level of scrutiny, intermediate scrutiny, is typically applied in sex discrimination cases and requires the government to show that the law is substantially related to an important government interest. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that, "The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification. The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'") (Citations omitted.)

The lowest burden, rational basis, applies in all other cases, and requires the government to show that a law is rationally related to a legitimate government interest. *See, e.g., Railway Exp. Agency v. People of State of N.Y.,* 336 U.S. 106, 110 (1949) (holding that a regulation does not violate equal protection if it "has relation to the purpose for which it is made.")

41. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: The Supreme Court has upheld national injunctions issues by the district courts. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017).

National injunctions are issued in accordance with Federal Rule of Civil Procedure 65, and have been upheld as being within the inherent equitable powers of the court. *See Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), rev'd and remanded, 138 S. Ct. 2392 (2018); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), aff'd in part, rev'd in part on other grounds, sub nom. *Summers v. Earth Island Inst*., 555 U.S. 488 (2009).

42. Have you ever filed a brief in federal court? If the answer is yes, please summarize your experience(s). If the answer is no, please simply indicate that.

Response: Every brief I have filed has been filed in state court.

43. Have you ever argued a motion in federal court? If the answer is yes, please summarize your experience(s). If the answer is no, please simply indicate that.

Response: All of my motion work has been in state court.

44. Have you ever tried a case in federal court? If the answer is yes, please summarize your experience(s). If the answer is no, please simply indicate that.

Response: Every case I tried was before the state court.

45. Have you ever tried a case before a jury in federal court? If the answer is yes, please summarize your experience(s).

Response: My jury trials have all been tried in state court.