Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Wesley L. Hsu
Nominee to be United States District Judge for the Central 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 sitting Los Angeles Superior Court Judge and nominee to the federal district court, my duty is and would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me. To the extent that "independent value judgments" means "personal policy preferences," then I disagree with the statement.

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 the quote or the context in which the statement was made. As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, my duty is and would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

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

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: I am not aware of Judge Jackson's statement or the context in which it was made. I believe the Constitution is an enduring document with a fixed quality to it which is to be applied to "new circumstances." *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, I do not subscribe to a particular label, because I am and would be bound to follow all Supreme Court precedent including precedent related to the method of constitutional interpretation I should employ. My duty is and would be to review the

evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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: In *United States v. One Twin Engine Beech Airplane, FAA Reg. No. N-9826Z Serial No. AF*-305, 533 F.2d 1106, 1108 (9th Cir. 1976), the Ninth Circuit addressed the difference between a finding of "basic facts" which are entitled to deference on appeal and "ultimate facts" which are conclusions of law and therefore not entitled to deference on appeal.

> Definition of the demarcation line should be made pragmatically: if the inferences depend on the credibility of the witnesses or the persuasiveness of the evidence, the trier of fact is said to have made findings of fact; if not, the facts are relatively free from doubt and their consequences call for a conclusion of law.

Id.; *see also Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) ("The ultimate finding [that the transaction at issue was within the provisions of the statute at issue] is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board."). Later, the Ninth Circuit, when analyzing the concept of a mixed question of law and fact, stated the distinction in this way:

> The first step is the establishment of the "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators ...'." *Townsend v. Sain*, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.)). The second step is the selection of the applicable rule of law. The third step—and the most troublesome for standard of review purposes—is the application of law to fact or, in other words, the determination "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S. at 289 n. 19, 102 S.Ct. at 1790 n. 19.

United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984), *overruled on other grounds by Estate of Merchant v. C.I.R* ., 947 F.2d 1390 (9th Cir.1991). If I were so fortunate as to be confirmed, I would consider this and any other Supreme Court and

Ninth Circuit precedent in determining whether something is a question of fact or a question of law.

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

   Response: This question raises a fact-specific inquiry. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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: As directed by 18 U.S.C. § 3553(a)(2), I would weigh all of those purposes when imposing sentence, along with the other factors set forth in Section 3553(a). Any personal belief I might have as to which purpose is "the most important" would not factor into my sentencing decisions under Section 3553(a).

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 sitting Los Angeles County Superior Court Judge, I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me. I am unaware of any specific decision that is "a typical example of [my] judicial philosophy," and I am and, if I were so fortunate as to be confirmed, would be bound to follow all Supreme Court precedent.

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 sitting Los Angeles County Superior Court Judge, I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me. I am unaware of any specific decision that is "a typical example of [my] judicial philosophy," and I am and, if I were so fortunate as to be confirmed, would be bound to follow all Ninth Circuit precedent.

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

Response: Title 18, United States Code, Section 1507 states:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.
>
> Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

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

Response: In *Cox v. Louisiana*, 379 U.S. 559, 561-64 (1965), the Supreme Court held that a Louisiana state statute, modeled on 18 U.S.C. § 1507, punishing picketing near a courthouse was constitutional on its face.

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

Response: In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992), the Supreme Court described the "fighting words" doctrine as follows:

> [T]he exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech," *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. *Compare Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d

420 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (invalidating a ban on residential picketing that exempted labor picketing).

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

Response: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citations omitted). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* at 359-60. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

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

a. **Was *Brown v. Board of Education* correctly decided?**
b. **Was *Loving v. Virginia* correctly decided?**
c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response to all subparts: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, the judicial canons make it generally inappropriate for me to state an opinion regarding whether a particular case was correctly decided. Nevertheless, because the issue of statutes mandating racial segregation is so unlikely to come before me, I can opine that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided. As to the other cases, if I were so fortunate as to be confirmed, I would fully and faithfully follow binding precedent of the Supreme Court and the Ninth Circuit.

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

Response: In *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court held:

> In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

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

    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: No.

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

    Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

    Response: No.

    a. **Are you currently in contact with anyone associated with the Open Society Foundations?**

    Response: No.

    b. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response: No.

20. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

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

Response: I applied to Senator Feinstein's Judicial Advisory Committee on or about December 13, 2020. I interviewed with Senator Feinstein's Judicial Advisory Committee on April 23, 2021.

I applied to Senator Padilla's Judicial Evaluation Commission on February 15, 2021. I interviewed on April 5, 2022, with the local selection commission responsible for evaluating applicants for the Central District of California. I then had a telephonic interview with the statewide chair of the commission on or about May 3, 2022. On May 12, 2022, I had an interview with counsel for Senator Padilla. On May 25, 2022, I had an interview with Senator Padilla. On June 17, 2022, I had an interview with Senator Feinstein's statewide chair for judicial appointments. On July 27, 2022, I had an interview with White House Counsel's office. Since July 27, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On July 27, 2022, I had an interview with White House Counsel's office. Since July 27, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice (OLP). On December 20, 2022, I was notified by White House Counsel's office of the President's intent to nominate me on December 21, 2022. Since December 21, 2022, I was in touch with Department of Justice and White House officials. I was also in touch with Department of Justice officials related to responses to these questions for the record as detailed in response to question 28.

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

Response: I received these questions on February 22, 2023. I conducted research and drafted answers, which I submitted for review by the Office of Legal Policy on February 23, 2023. I reviewed their comments, and revised my draft answers where I felt appropriate.

Senator Mike Lee
Questions for the Record
Wesley Hsu, Nominee to the United States District Court for the Central District of California

1. How would you describe your judicial philosophy?

Response: As a sitting Los Angeles County Superior Court Judge, I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me. I strive to treat every litigant with dignity and respect and to ensure that each of them understands the rationale for my decisions. I hope that the parties that come before me, whether they prevail or not, feel that the rule of law has been upheld.

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

Response: If I were so fortunate as to be confirmed, my approach would be to first look to the text at issue to determine if the text clearly and unambiguously answers the question presented. If the text were ambiguous, I would apply binding precedent from the Supreme Court and Ninth Circuit to address the question, as well as the methods of interpretation and canons of instruction used by these higher courts. If that still did not answer the question, I would consider persuasive authority from other, non-binding courts. If that still did not answer the question, I would look to the legislative history while keeping in mind that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

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

Response: If I were so fortunate as to be confirmed, my approach would be to first look to the constitutional provision at issue as well as the applicable Supreme Court and Ninth Circuit precedent for interpreting that constitutional provision. In the rare case where I was confronted with a question of first impression involving a constitutional provision that had not yet been interpreted by the Supreme Court or Ninth Circuit, I would look to Supreme Court and Ninth Circuit precedent for the framework of analysis to be applied and interpret the text in a manner consistent with the method of analysis used. For example, the Supreme Court looked to the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) ("In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal

meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") (internal quotations and citations omitted).

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

Response: If I were so fortunate as to be confirmed and I were presented with a case or controversy requiring me to interpret a constitutional provision, I would follow Supreme Court and Ninth Circuit precedent regarding interpreting the provision. The Supreme Court has provided guidance in interpreting particular constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), the Supreme Court evaluated the relevant text of the Second Amendment by looking to the original public meaning at the time of the founding.

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

Response: My approach to reading statutes is to follow the binding precedent, which states that "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987). "If 'the statute is clear and unambiguous, that is the end of the matter'" and "[t]here is no need to look beyond the plain meaning in order to derive the 'purpose' of the statute." *Tang v. Reno*, 77 F.3d 1194, 1196-97 (9th Cir. 1996) (internal citations omitted); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms").

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

Response: The Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020).

> After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. *See New Prime Inc. v. Oliveira*, 586 U.S. ——, —— – ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019).

Id.

6. What are the constitutional requirements for standing?

Response: "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

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

Response: Although Article I does enumerate the powers of Congress, one of the enumerated powers is the Necessary and Proper Clause, and the Supreme Court recognized as early as *McCulloch v. Maryland*, 17 U.S. 316 (1819), that the Necessary and Proper Clause gives Congress broad powers.

> [T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," which means that "[e]very law enacted by Congress must be based on one or more of" those powers. But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise."

Unites States v. Comstock, 560 U.S. 126, 133-34 (2010) (internal citations omitted).

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

Response: The Supreme Court has held that "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). I would evaluate the issue by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect certain unenumerated, or substantive due process, rights:

> The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. . . . Second, we have required in substantive due-process cases a careful description of the asserted fundamental liberty interest.

Id. at 719-21 (internal citations and quotations omitted). Examples of such rights that the Supreme Court has recognized include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), to control the education of such children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. What rights are protected under substantive due process?

Response: Examples of such rights that the Supreme Court has recognized include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), to control the education of such children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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 Los Angeles Superior Court judge and a nominee to the federal district court, it is not for me to question the binding Supreme Court precedent. I have, and would have if I am so fortunate as to be confirmed, an obligation and a duty to apply the binding precedent. Thus, my duty is to apply cases like *Loving v. Virginia*, 388 U.S. 1 (1967), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and not apply cases like *Lochner v. New York*, 198 U.S. 45 (1905), to the extent they have been overturned, *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)

(stating "[t]he doctrine that prevailed in Lochner . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded"). I would also not apply cases like *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022) ("We hold that Roe and Casey must be overruled."), which have been overturned.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted), the Supreme Court discussed Congress's power under the Commerce Clause:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce . . . .

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

Response: Black's Law Dictionary (11th ed. 2019) defines a suspect classification as "statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." The origin of the "suspect classification" is the famous footnote from *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) ("whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). In another footnote, the Supreme Court explained that a group qualifies as a "suspect class" if the group "possess[es] an immutable characteristic determined solely by the accident of birth," or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

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

Response: "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural

principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211 222 (2011).

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

Response: As a sitting Los Angeles County Superior Court Judge, I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me. If I were so fortunate as to be confirmed, I would apply the same approach to this question.

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

Response: Empathy should not play a role in the judge's consideration of the merits of the case; that is dictated by binding precedent and the material facts. I do believe empathy plays a role in the dignity and respect to be paid to all the litigants and lawyers that appear before a judge.

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

Response: Both outcomes posited by this question are undesirable, but the question of which is worse is a policy question. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on a policy matter. I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me, and I would continue to have the same approach if I were so fortunate as to be confirmed.

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

Response: I have not studied this issue and do not know the reason or reasons that may account for this change. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: Response: Black's Law Dictionary (11th ed. 2019) defines judicial review as follows:

> 1. A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary (11th ed. 2019) defines judicial supremacy as follows:

> The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states. • The doctrine usu. applies to judicial determinations that some legislation or other action is unconstitutional. Proponents of judicial supremacy frequently acknowledge that, when the courts determine that some action is constitutional, nonjudicial actors may legitimately act on their contrary judgment that the action is unconstitutional.

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 Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters that pertain solely to the other branches of government. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: Judges apply binding precedent to the material facts presented to them. They do not impose their will or personal viewpoint on proceedings.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when

confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: The Supreme Court has made clear repeatedly that:

> [I]t is that Court's 'prerogative alone to overrule one of its precedents.' *Bosse v. Oklahoma*, —— U.S. ——, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016) (per curiam) (quoting *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001)); see *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) ('Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'); *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ('[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))).

Kashem v. Barr, 941 F.3d 358, 376 (9th Cir. 2019). It is not for a district judge to make the decision called for in this question.

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: Black's Law Dictionary (11th ed. 2019) (inapplicable definitions omitted), defines equity in pertinent part as follows:

> 1. Fairness; impartiality; evenhanded dealing . . . .
>
> 2. The body of principles constituting what is fair and right; natural law . . . .
>
> 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances . . . .

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

Response: Please see my response to Question 24 for the definition of equity. Black's Law Dictionary (11th ed. 2019), defines equality as "the quality, state, or condition of being equal; esp., likeness in power or political status. . . ."

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

Response: The Fourteenth Amendment guarantees "the equal protection of the laws." If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

27. How do you define "systemic racism?"

Response: I believe the term "systemic racism" has different meanings for different people. While I am generally familiar with the concept, I have not had to define the term for use in a case or controversy. I believe that, in general, the concept of "systemic racism" is that there are long-standing societal impediments that pose obstacles for some minority groups.

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

Response: Black's Law Dictionary (11th ed. 2019), defines critical race theory as follows:

> 1. A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. • Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism. 2. The body of work produced by adherents to this theory.

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

Response: While I do not have detailed knowledge of either concept, I believe "critical race theory" is a form of academic study while "systemic racism" concerns the belief that long-standing societal impediments pose obstacles for some minority groups.

Senator Josh Hawley
Questions for the Record

Wesley Hsu
Nominee, U.S. Court of Appeals for the Central District of California

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

   Response: To the best of my recollection, I have not worked on a legal case or representation in which I 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: Please see my response to Question 1 above.

2. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: If I were so fortunate as to be confirmed and I were required to interpret a constitutional provision, I would follow binding Supreme Court and Ninth Circuit precedent and the framework of analysis set forth in such precedent, including consideration of the original public meaning. In *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), for example, the Supreme Court looked to the original public meaning of the Second Amendment.

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

   Response: As a sitting Los Angeles Superior Court judge, my approach is to first look to the text at issue to determine if it is clearly and unambiguously answers the question at issue. If the text is ambiguous, I apply binding precedent from the appellate and supreme courts to address the issue, as well as the methods of interpretation and canons of instruction used by these higher courts. If that still does not answer the question, I consider persuasive authority from other, non-binding courts. If that still does not answer the question, I would look to the legislative history while keeping in mind that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). I would employ the same approach if I were so fortunate as to be confirmed.

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: Supreme Court precedent requires that judges weigh different types of legislative history differently. In *Garcia v. United States*, [global replace] 469 U.S. 70, 76 (1984) (footnote omitted), the Supreme Court explained:

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969). We have eschewed reliance on the passing comments of one Member, *Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S.Ct. 1510, 1517, 71 L.Ed.2d 715 (1982), and casual statements from the floor debates. *United States v. O'Brien*, 391 U.S. 367, 385, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). In *O'Brien*, *supra*, 391 U.S., at 385, 88 S.Ct., at 1683, we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in *Zuber*, *supra*, 396 U.S., at 187, 90 S.Ct., at 325.

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

Response: Although I am aware that the Supreme Court consulted the English common law when interpreting the ordinary public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), I believe that it is rarely appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution. If I were so fortunate to be confirmed as a federal district court judge and if presented with a case or controversy involving this issue, I would apply binding Supreme Court and Ninth Circuit precedent and the methods required by that precedent to interpret constitutional provisions.

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

Response: The Supreme Court recently considered this question and held as follows.

> A death row inmate may attempt to show that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on "cruel and unusual" punishment. To succeed on that claim, the Court held in *Glossip*, he must satisfy two requirements. First, he must establish that the State's method of execution presents a "substantial risk of serious harm"—severe pain over and above death itself. *Id.* at 877, 135 S.Ct. 2726. Second, and more relevant here, he "must identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]" the risk of harm involved. *Ibid.* (internal quotation marks omitted). Only through a "comparative exercise," we have explained, can a judge "decide whether the State has cruelly 'superadded' pain to the punishment of death." *Bucklew*, 587 U. S., at ——, 139 S.Ct., at 1126.

Nance v. Ward, 142 S. Ct. 2214, 2219-20 (2022).

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

Response: Yes. "'A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives.'" *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)).

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

Response: I am not aware of any Supreme Court or Ninth Circuit case that has recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime.

7. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

8. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially

neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990)). A law is not "neutral" if based "on hostility to a religion or religious viewpoint." *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires."); *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534-42 (1993) (city ordinances enacted due to concern about religious practices not "neutral"). Where the government action is not neutral, not generally applicable, or substantially burdens religious exercise, strict scrutiny applies. *See, e.g.*, *Fulton*, 141 S. Ct. at 1877 ("A law is not 'generally applicable' if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise"); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 720-22 (2014) (Religious Freedom and Restoration Act protected for-profit corporation and triggered strict scrutiny to contraceptive mandate which caused "severe" economic consequences to respondent).

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

Response: "At a minimum, the protection of the Free Exercise Clause pertains if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text,

> for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Id. at 533 (internal citations omitted). A law is not "neutral" if based "on hostility to a religion or religious viewpoint." *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires."); *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534-42 (1993) (city ordinances enacted due to concern about religious practices not "neutral"). Where the government action is not neutral, not generally applicable, or substantially burdens religious exercise, strict scrutiny applies. *See, e.g.*, *Fulton*, 141 S. Ct. at 1877 ("A law is not 'generally applicable' if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise").

10. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Ninth Circuit follows Supreme Court precedent. The Supreme Court has declared, "it is not for us to say that [the owners and their companies'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction . . . .'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)). The Supreme Court has also held:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 713-14 (1981).

11. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm, unconnected with a militia, and that the individual may keep and bear arms for traditionally lawful purposes, such as self-defense within the home. *Id.* at 582-84, 594. The Court therefore concluded that "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

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.

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

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

Response: With the quoted passage above, I understand Justice Holmes to mean that the Constitution does not enact a particular policy viewpoint. In other words, as Justice Holmes states later in his dissent, "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Homes, J., dissenting). As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine regarding whether I agree with what Justice Holmes meant by this statement as any view I might have would not be relevant to my application of binding precedent. If I were so fortunate as to be confirmed, I would be bound by precedent from the Supreme Court and Ninth Circuit, and it is my understanding is that *Lochner* is no longer binding precedent.

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

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If I were so fortunate as to be confirmed, I would fully and faithfully follow binding precedent of the Supreme Court and the Ninth Circuit. It is my understanding that *Lochner v. New York*, 198 U.S. 45 (1905), however, has been largely overturned and is no longer binding precedent. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating "[t]he doctrine that prevailed in Lochner . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded").

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

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the Supreme Court held that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." The Court added, "[t]he dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear— 'has no place in law under the Constitution.'" I understand that phrase to mean that, although not expressly overturned by the Supreme Court previous to that point, history had already proven that the *Korematsu* case was wrongly decided.

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

Response: I am not aware of any Supreme Court opinions that have not been formally overruled that I believe are no longer good law.

a. If so, what are they?

Response: Please see my response to Question 14 above.

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

Response: I am committed to applying fully and faithfully all Supreme Court and Ninth Circuit precedent.

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

a. Do you agree with Judge Learned Hand?

Response: The Supreme Court has held that evidence that Kodak controlled nearly 100% of the parts market and 80% to 95% of the service market "with no readily available substitutes" was sufficient to create a triable issue of material fact as to whether Kodak had "monopoly power" under Section 2 of the Sherman Act. *Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 481 (1992). In *Image Tech v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997), the Ninth Circuit held that a prima facie case of sufficient market power is established with evidence that the defendant had 65% market share, but, in *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995), the Ninth Circuit has held that less than 50% of market share is "presumptively insufficient to establish market power."

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

Response: Please see my response to 15.a. above.

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: Please see my response to 15.a. above.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as "[t]he 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 all cases governed by state law." The Supreme Court has discussed the issue of federal common law:

> Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. *See* Art. I, § 1; Amdt. 10. As this Court has put it, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may

> appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). These areas have included admiralty disputes and certain controversies between States. *See, e.g.*, *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be " 'necessary to protect uniquely federal interests.' " *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)).

Rodriguez v. Federal Deposit Insurance Corporation, 140 S. Ct. 713, 717 (2020).

17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: Because the interpretation of a state constitutional right is generally a matter for the state court, I would, if so fortunate as to be confirmed, generally defer to the interpretation declared by the highest court in the state. *See Erie v. Tompkins*, 304 U.S. 64, 77-79 (1938); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"). If confirmed as a federal district court judge and I were presented with a case or controversy involving this issue, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: Please see my response to Question 17 above.

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

Response: Please see my response to Question 17 above.

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

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, the judicial canons make it generally inappropriate for me to state an

opinion regarding whether a particular case was correctly decided. Nevertheless, because the issue of statutes mandating racial segregation is so unlikely to come before me, I can opine that *Brown v. Board of Education* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 controls the issuance of injunctions. The Supreme Court has held that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Ninth Circuit has stated:

> A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citation omitted). "A party can obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original) (quoting *Winter*, 555 U.S. at 20, 129 S.Ct. 365). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018). Additionally, the Ninth Circuit counseled, "[a]lthough 'there is no bar against ... nationwide relief in federal district court or circuit court,' such broad relief must be '*necessary* to give prevailing parties the relief to which they are entitled.'" *Id.* at 582 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis in original removed in part)). "[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

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

Response: Please see my response to Question 19 above.

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

Response: Please see my response to Question 19 above.

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

Response: Please see my response to Question 19 above.

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

Response: The Supreme Court described federalism as follows:

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right. But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (Blackmun, J., dissenting)). Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. See ibid. By denying any one government complete jurisdiction over all the concerns of public life,

> federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. *See New York*, *supra*, at 181, 112 S. Ct. 2408. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Bond v. United States, 564 U.S. 211, 220-22 (2011).

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

Response: 1) "*Burford* abstention allows a federal district court to abstain from exercising jurisdiction if the case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if decisions in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

2) *Colorado River* abstention allows for abstention "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colo. River*, 424 U.S. at 813. "Under 'exceedingly rare' circumstances, *Smith*, 418 F.3d at 1033, 'considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' may counsel in favor of abstention, *Colo. River*, 424 U.S. at 817, 96 S.Ct. 1236 (alteration omitted) (internal quotation marks omitted)." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d at 835, 841 (9th Cir. 2017). Although the Ninth Circuit has held that Colorado River is not technically an abstention doctrine, *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021) (observing that Colorado River is not an abstention doctrine but "shares the qualities of one."), that Court has set forth the following eight factors to use in assessing the appropriateness of applying *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to

> avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins., 862 F.3d at 841-42 (quoting *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011).

3) *Pullman* abstention may be appropriate where "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain." *Courthouse News Service v. Planet*, 750 F.3d 776, 783-84 (9th Cir. 2014).

4) *Thibodaux* abstention may be appropriate in cases involving unresolved state law questions that are "intimately involved with the sovereign prerogative" of the state. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). "In *Thibodaux*, the Supreme Court approved a district court's decision to abstain from hearing an eminent domain case where state law apportioning power between the city and the state was uncertain, and any decision by the federal district court would affect state sovereignty." *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1134 (9th Cir. 2002) (citing *Thibodaux*).

5) *Younger* abstention may be appropriate where (1) there is an "ongoing state judicial proceeding," (2) those "proceedings implicate important state interests," and (3) there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754, F.3d 754, 758 (9th Cir. 2014) (quoting *Middlesex Cnty. Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

While not a formally an abstention doctrine, "[u]nder *Rooker–Feldman*, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). As the Ninth Circuit has stated:

> In its routine application, the *Rooker–Feldman* doctrine is exceedingly easy. A party disappointed by a decision of a state court may seek reversal of that decision by appealing to a higher state court. A party disappointed by a decision of the highest state court in which a decision may be had may seek reversal of that decision by appealing to the United States Supreme Court. In neither case may the disappointed party appeal to a federal district court, even if a federal question is present or if there is diversity of citizenship between the parties. *Rooker–Feldman* becomes difficult—and, in practical reality, only comes into play as a contested issue—when a disappointed party seeks to take not a formal direct appeal, but rather its de facto equivalent, to a federal district court.

Id. at 1155. The Ninth Circuit then concluded:

> . . . the operation and purpose of the "inextricably intertwined" test in Feldman is fairly clear. A federal district court dealing with a suit that is, in part, a forbidden de facto appeal from a judicial decision of a state court must refuse to hear the forbidden appeal. As part of that refusal, it must also refuse to decide any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision.

Id. at 1158.

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

Response: Although I understand that generally damages are to redress past harm whereas injunctive relief is to prevent future harm and that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), the advantages and disadvantages of those forms of relief involve case- and party-specific inquiries. As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, my duty is and would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect certain unenumerated, or substantive due process, rights.

> The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. . . . Second, we have required in substantive due-process cases a careful description of the asserted fundamental liberty interest.

Id. at 719-21 (internal citations and quotations omitted). Examples of such rights that the Supreme Court has recognized include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), to control the education of such children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

25. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: The Free Exercise Clause of the First Amendment is a fundamental right. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Laws encumbering that fundamental right that are not neutral or not generally applicable are subject to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The Supreme Court has stated, "it is not for us to say that [the owners and their companies'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction . . . .'" Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 716 (1981)). The Supreme Court has also held:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 713-14 (1981).

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

Response: The Supreme Court has held that both the free exercise of religion and the freedom of worship are protected by the Free Exercise Clause. In *Lee v.*

Weisman, 505 U.S. 577, 591 (1992), the Supreme Court held that the Free Exercise Clause protected the "freedom of worship." *See also West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). In *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)), on the other hand, the Supreme Court stated, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

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: With respect to the First Amendment's Free Exercise Clause, the Supreme Court stated in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021), "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." Where the governmental action is not "neutral" or "generally applicable, strict scrutiny applies, requiring narrow tailoring to a compelling governmental interest. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421-22 (2022). Where the governmental action involves "official expressions of hostility" toward the free exercise of religion, no "further inquiry" is required, and the action cannot stand. *Id.* at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)).

Where the Religious Freedom and Restoration Act (RFRA) or the Religious Land Use and Institutionalized Persons Act (RLUIPA) governs, the governmental action must meet strict scrutiny if it substantially burdens the free exercise of religion, even if the action is facially neutral and applicable. *See., e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014). In *Hobby Lobby*, the Supreme Court found that "severe" economic consequences qualified as a substantial burden under RFRA. *Id.* at 720-21.

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: The Religious Freedom Restoration Act ("RFRA") ". . . applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) ("Placing Congress' intent beyond dispute, RFRA specifies that it 'applies to all Federal law, and the

implementation of that law, whether statutory or otherwise'"). "RFRA also permits Congress to exclude statutes from RFRA's protections[,]" however. *Id.*

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: I have not 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.

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

Response: As a sitting Los Angeles Superior Court judge, it is inappropriate for me to assign a numerical answer to the beyond a reasonable doubt standard. *See People v. Medina*, 11 Cal. 4th 694, 745 (1995) (prosecutor committed error by using a diagram suggesting "beyond a reasonable doubt" standard was less than "100%" and noting that "courts, recognizing the difficulty and peril inherent in such a task, have discouraged "experiments" by trial courts in defining the "beyond a reasonable doubt" standard). Ninth Circuit Model Criminal Jury Instruction 6.5 (2023), defines reasonable doubt as follows:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.
>
> A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty.
>
> On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

If I were so fortunate as to be confirmed, I would give this instruction to criminal juries or apply this instruction when the parties have waived jury trial.

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

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

Response: As a sitting Los Angeles County Superior Court Judge, and if I were to be so fortunate as to be confirmed, I have and would have the duty and obligation not to prejudge any case or controversy that may come before me. If confirmed as a federal district court judge, and a case or controversy were to be presented involving this question, my duty would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: Please see my response to Question 27a.

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

Response: Please see my response to Question 27a.

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

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

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it is inappropriate for me to opine about the appropriateness of the rules of a higher court. I note, however, that, if I were so fortunate as to be confirmed, I would be bound by the rules promulgated by the higher courts, and Ninth Circuit Federal Rule of Appellate Procedure 32.1(a) states:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other

written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

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

Response: Please see my response to Question 28.a.

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

Response: Please see my response to Question 28.a. above.

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

Response: Please see my response to Question 28.a. above.

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

Response: Yes, I would, if I were so fortunate as to be confirmed, consider unpublished decisions cited by litigants when hearing cases because courts in the Ninth Circuit may not prohibit or restrict the citation of unpublished decisions pursuant to Federal Rule of Appellate Procedure 32.1(a).

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

Response: No.

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

Response: No.

29. In your legal career:

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

Response: During my tenure at the United States Attorney's Office, I tried four cases to verdict as sole counsel and 10 cases to verdict as co-lead counsel. Additionally, I had three hung juries during which I was either sole counsel (one) or co-lead counsel (twice in the same prosecution).

b. How many have you tried as second chair?

Response: While at Gibson, Dunn, and Crutcher, LLP, I was an associate on a trial team for one trial that resulted in a jury verdict. I was also an associate on a trial team for a binding arbitration when the arbitrator issued a decision.

c. How many depositions have you taken?

Response: I do not recall the specific number of depositions I took while serving as an associate at Gibson, Dunn, and Crutcher, LLP, from 1997 to 2000, but I would approximate the number as three to five.

d. How many depositions have you defended?

Response: I do not recall the specific number of depositions I defended while serving as an associate at Gibson, Dunn, and Crutcher, LLP, from 1997 to 2000, but I would approximate the number as six to eight.

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

Response: I do not recall the specific number of federal appellate matters I have handled in my career. To the extent that the term "argued" here is limited to cases in which I engaged in oral argument, I would estimate eight to 10 oral arguments. If the term "argued" includes briefing in the federal appellate courts, I would estimate approximately 30-40 cases.

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

Response: To the extent that the term "argued" here is limited to cases in which I engaged in oral argument, I have not argued before a state appellate court. If the term "argued" includes briefing in the state appellate courts, I do not recall the specific number of state appellate matters I handled while an associate at Gibson, Dunn & Crutcher, but I would estimate approximately three to five cases where I was on the team that worked on the briefing.

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

Response: While in a law school clinic, I represented one or two clients at asylum hearings before the Immigration and Naturalization Service.

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

Response: I do not recall the specific number of dispositive motions that I argued before trial courts while an associate at Gibson, Dunn, and Crutcher, LLP, but I would estimate approximately two to three times where I was the oral advocate.

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

Response: I do not recall the specific number of evidentiary motions that I argued before trial courts. I would estimate approximately 50 times.

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

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

Response: I do not recall the specific number of hours that I billed in my years at Gibson, Dunn, and Crutcher, LLP. I would estimate approximately 1900.

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

Response: I do not recall what portion of the estimated hours were dedicated to pro bono work but I would estimate 2%.

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

a. What do you understand this statement to mean?

Response: Although I am not familiar with this statement or the context in which it was made, I understand its clearly-expressed meaning: sometimes judges may not "like" the result they are compelled to reach.

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

a. What do you understand this statement to mean?

Response: Although I am not familiar with this statement or the context in which it was made, I understand its clearly-expressed meaning: judges do not make rules, they apply them.

b. Do you agree or disagree with this statement?

Response: There are instances where judges make rules (such as the local rules of court), but this statement largely tracks with my approach to cases, which is to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

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

Response: Although I am not familiar with this statement or the context in which it was made, I understand its clearly-expressed meaning: judges are obligated to apply binding precedent, regardless of outcome.

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

Response: In following my approach of reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me, I believe I am also doing justice by upholding the rule of law.

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

Response: To the best of my recollection, I have not ever personally taken the position in litigation or a publication that a federal or state statute was unconstitutional. While serving as an officer and member of the board of governors for the Southern California Chinese Lawyers Association (SCCLA) in approximately 2007, however, I did vote in favor of SCCLA joining an Amicus Curiae Brief filed in the California Supreme Court by the Asian American Bar Association of the Greater Bay Area and 62 Asian Pacific American Organizations in support of the respondents who were challenging California state law prohibiting gay marriage. The brief argued that strict scrutiny under the California Equal Protection Clause should apply to the marriage classification and that the California state law at issue did not survive strict scrutiny. A copy of the brief was submitted with my Senate Judiciary Questionnaire attachments.

a. If yes, please provide appropriate citations.

Response: *In re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008).

35. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: Yes. I previously had a private Facebook account, which I only rarely used and which was only viewable to family and friends, but I deleted that account in May of 2022, because I was, for the first time, assigned to cover an unlimited civil calendar. Having social media connections with attorneys appearing before a judge creates a risk of the appearance of impropriety. This did not pose an issue in my court assignments up to that point because none of the "friends" on my Facebook account was likely to appear before me in family law, criminal, small claims, or unlawful detainer. With a transfer to unlimited civil, however, the chances of such an appearance increased, so I deleted the account to avoid the potential issue. I did not retain a copy. I used Internet tools in an effort to locate an archived version of the page but was unsuccessful.

36. What were the last three books you read?

Response: Fire and Blood, Empire of the Summer Moon, Leviathan Falls

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

Response: The question of whether America is a systematically racist country is a policy question. As a sitting Los Angeles County Superior Court Judge, and if I were to be so fortunate as to be confirmed, I have and would have the duty and obligation not to prejudge any case or controversy that may come before me and to treat all litigants fairly and without bias. If confirmed as a federal district court judge, and a case or controversy were to be presented involving this question, my duty would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: I am most proud of the family law cases involving child custody over which I presided wherein the parties first appeared before me diametrically opposed but, after I spent significant court time with them and considering each parent's schedule and circumstances, were able to resolve the case amicably based upon the initial custody order that I had crafted. When I left that assignment, one of the lawyers told me that I had "helped a lot of people," and of that I am very proud.

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

Response: Yes.

a. How did you handle the situation?

Response: I followed my duty and obligation to be a zealous advocate for my client, consistent with my duty and obligation to represent my client ethically.

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

Response: Yes.

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

Response: Because I taught Cyber and Intellectual Property Crimes, I read Professor Orin Kerr's textbook every year that I taught. Other than that, I do not regularly read law professors' works.

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

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

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

Response: I recall that during my first year at the United States Attorney's Office, I handled a prosecution where I contemplated adding a carjacking charge pursuant to 18 U.S.C. § 2119, but the prior prosecutor believed that the intent requirement of the statute could not be met. I did my own legal research and found *Holloway v. United States*, 526 U.S. 1 (1999), and the holding of that case convinced me that a prosecution under Section 2119 could succeed. The defendant was in fact convicted on that charge.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court returned the issue of abortion to the people and their elected representatives and specifically held that voters and not courts may decide whether "fetal life," as that term is used in prior decisions, constitutes "an 'unborn human being.'" 142 S. Ct. 2228, 2243, 2257 (2022) (quoting Miss. Code Ann. § 41-41-191(4)(b)). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further. If I were so fortunate as to be confirmed, I would fully and faithfully follow binding precedent of the Supreme Court and the Ninth Circuit.

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

Response: Other than at my hearing before the Senate Judiciary Committee, I have testified under oath as a witness twice in criminal matters. The first time involved a prosecution for satellite signal theft in the Central District of California in approximately 2001, and the defense attorney called me as a witness to testify regarding a letter that I had written to him when I had handled the case prior to trial. The second time involved a prosecution for possession of child pornography in the District of New Jersey in approximately 2009. That case resulted in large part because of the assistance of a confidential informant who was dealing with me through an attorney. The defense attorney called me to discuss the confidential informant since the confidential informant could not be located for trial. I do not believe that testimony is available online or as a record.

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

a. *Roe v. Wade,* 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

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

b. Amazon?

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

c. Google?

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

d. Facebook?

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

e. Twitter?

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

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

Response: I believe there were times when I was an associate at Gibson, Dunn, and Crutcher, LLP, when I drafted memos of which a portion was used for a final brief without my name on the brief. As a former member of the Criminal Appeals Section at the United States Attorney's Office for the Central District of California from approximately 2001 to 2003, part of my duties was to review and edit briefs filed in the Ninth Circuit filed by other Assistant United States Attorneys, and normally my name would not appear on the final brief. As a former supervisor in that office, as part of my supervisorial responsibilities during the period from approximately 2005 to 2015, I would review and provide feedback on court filings and briefs authored by the individuals I supervised.

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

Response: Unfortunately, I did not keep records of the cases wherein I authored or edited a brief that was filed in court without my name on the brief, nor can I recall those cases.

48. Have you ever confessed error to a court?

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

a. If so, please describe the circumstances.

Response: Not applicable.

49. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: Nominees must speak truthfully, consistent with the Code of Conduct for United States Judges, because they have taken an oath to do so.

Nomination of Wesley Liu Hsu
to be United States District Judge for the Central 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: *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding precedent of the United States Supreme Court. As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, the judicial canons make it generally inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If I were so fortunate as to be confirmed, I would fully and faithfully follow binding precedent of the Supreme Court and the 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: The Second Amendment right to keep and bear arms is an individual right belonging to individual persons. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

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: In *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court held:

   > In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must

demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

When so holding, the Supreme Court found that means-end scrutiny, such as strict or intermediate scrutiny, is not applied in the Second Amendment context, abrogating contrary authority. *Id.* at 2127.

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: The sources to which the Supreme Court looked in *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), would guide my approach to this analysis. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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: If I were so fortunate as to be confirmed, it would be my duty and obligation to apply the sentencing statutes, including 18 U.S.C. § 3553(a) and any applicable statutes regarding retroactive sentencing reduction.

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

Response: Yes. The Supreme Court recently held that finality is important in criminal sentencing. *Shinn v Martinez Ramirez*, 142 S. Ct. 1718, 1733 (2022). The Ninth Circuit held that predictability is a goal of federal sentencing. *United States v. Matthews,* 278 F.3d 880, 886 (9th Cir. 2002) (en banc). If I were so fortunate as to be confirmed, I would conduct every sentencing in accordance with the laws enacted by Congress and binding precedent.

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

Response: Article II of the Constitution states that the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. The Supreme Court has repeatedly stated that ". . . the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . ." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: Section 1 of the Fourteenth Amendment provides:

> All 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Saenz v. Roe*, 526 U.S. 489, 506-507 (1999), the Supreme Court held:

> [T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." *Zobel*, 457 U.S., at 69, 102 S.Ct. 2309. It is equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence.

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: In *United States v. Wong Kim Ark*, 169 U.S. 649, 674-75 (1898), the Supreme Court recognized an exception to birthright citizenship for the "children of ambassadors or public ministers of a foreign government."

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that addresses this specific issue. *See generally Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (federal court may award injunction governing future conduct to plaintiff where state official violates federal law). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that addresses this specific issue. *See generally Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (federal court may award injunction governing future conduct to plaintiff where state official violates federal law). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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, 2610 (2022), the Supreme Court applied the major questions doctrine to action by the Environmental Protection Agency. Specifically, the Supreme Court stated that "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and

political significance of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)). Where the major questions doctrine applies, the Court must find "clear congressional authority" for the agency's action. *Id.* at 2609.

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: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022), the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and returned the issue of abortion to the people and their elected representatives.

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 held that the petitioners were entitled to a preliminary injunction enjoining the State of California from imposing certain COVID-19 restrictions. The Court followed a four-step analysis:

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. . . .
>
> Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . .
>
> Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. . . . Instead, narrow 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. Otherwise, precautions that suffice for other activities suffice for religious exercise too. . . .

> Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Id. at 1296-97 (internal citations omitted).

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

Response: As the Supreme Court recited in *Jones v. Harris Associates LP*, 559 U.S. 335, 340 (2010), "§ 36(b), 84 Stat. 1429, of the [1970] Act [amending the Investment Advisors Act of 1940] imposed upon investment advisers a 'fiduciary duty' with respect to compensation received from a mutual fund,15 U.S.C. § 80a–35(b) . . . ." In *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 194 (1963), the Supreme Court held that "the Investment Advisors Act of 1940 imposed Investment Advisers Act of 1940 prohibits, as a 'fraud or deceit upon any client,' a registered investment adviser's failure to disclose to his clients his own financial interest in his recommendations." *Sante Fe Industries Inc. v. Green*, 430 U.S. 461, 471 n.11 (1977).

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: The Controlled Substances Act expressly provides that it is not intended to "occupy the field" of drug enforcement:

> No provision of [the Controlled Substances Act] shall be construed as indicating an intent on the part of 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 . . . and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. The answer to this question would therefore turn on whether federal illegality and state legality can "consistently stand together." As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might

come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: "While the attorney-client privilege is 'arguably most fundamental of the common law privileges recognized under Federal Rule of Evidence 501,' it is 'not absolute.'" *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (citation omitted). "Under the crime-fraud exception, communications are not privileged when the client 'consults an attorney for advice that will serve him in the commission of a fraud' or crime." *Id.*

> To invoke the crime-fraud exception, a party must "satisfy a two-part test": First, the party must show that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." Second, it must demonstrate that the attorney-client communications for which production is sought are "sufficiently related to" and were made "in furtherance of [the] intended, or present, continuing illegality."

Id. (citations omitted).

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, 708 (1974), the Supreme Court stated that the executive "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." As such, the Supreme Court applied "a presumptive privilege for Presidential communications." *Id.* "But this presumptive privilege must be considered in light of our historic commitment to the rule of law." *Id.* The Supreme Court held that the district court did not err in issuing the grand jury subpoena for the tape recordings at issue:

> We conclude that when 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. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713. In doing so the Court distinguished cases where the executive privilege was asserted over military or diplomatic secrets as those duties conferred to the President by Article II are entitled to "the utmost deference." *Id.* at 710.

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*, 142 S. Ct. 2015, 2019-21 (2022), the Supreme Court applied the "categorical approach" to an attempted Hobbs Act robbery conviction and found that such a conviction did not qualify as a "crime of violence" for purposes of applying 18 U.S.C. § 924(c).

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: As a general matter, court orders should be followed. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: In *Epic Systems Inc. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted), the Supreme Court noted that it has "often observed that the [Federal] Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.'" The Court also cautioned:

> Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U.S., at 342, 131 S.Ct. 1740 (internal quotation

marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

Id. at 1623.

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*, 142 S. Ct. 2407 (2022), the Supreme Court found that a school district's dismissal of a football coach for engaging in private prayers after football games at school violated both the coach's free exercise and free speech rights and that the government interest in avoiding an Establishment Clause violation did not justify its actions.

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: *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455, 2469 (2022), held that "[t]ext, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense." As a consequence, sovereign immunity did not protect Texas from the suit which stated a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994. *Id.*

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 on February 22, 2023. I conducted research and drafted answers, which I submitted for review by the Office of Legal Policy. I reviewed their comments and revised my draft answers where I felt appropriate.

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 individual outside of the United States federal government wrote or drafted my answers to these questions or the written questions of the other members of the

Committee. I discussed my answers with the Office of Legal Policy and took their feedback into account before finalizing my answers. My answers are my own.

Senator John Kennedy
Questions for the Record

Mr. Wesley Hsu

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

   Response: As a sitting Los Angeles County Superior Court Judge, I approach every case by reviewing the evidence and arguments submitted by the parties with an open mind, researching the applicable statutes and precedent, and applying the binding precedent to the material facts before me. I strive to treat every litigant with dignity and respect and to ensure that each of them understands the rationale for my decisions. I hope that the parties that come before me, whether they prevail or not, feel that the rule of law has been upheld.

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

   Response: I believe the Constitution is an enduring document with a fixed quality to it which is to be applied to "new circumstances." *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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: As a sitting Los Angeles County Superior Court judge and if I were so fortunate as to be confirmed, my approach is and would be to first look to the text at issue to determine if the text clearly and unambiguously answers the question presented. If the text were ambiguous, I would apply binding precedent from the Supreme Court and Ninth Circuit to address the question, as well as the methods of interpretation and canons of instruction used by these higher courts. If that still did not answer the question, I would consider persuasive authority from other, non-binding courts. If that still did not answer the question, I would look to the legislative history while keeping in mind that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

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

Response: In *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1099 (9th Cir. 2012), the Ninth Circuit did consider, among other legislative history, the statements of the President regarding the General Aviation Revitalization Act of 1994.

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

Response: In *Llyod Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972), the Supreme Court held that property does not lose "its private character merely because the public is generally invited to use it for designated purposes." The Supreme Court therefore concluded that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Id.* at 570. *But see PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-88 (1980) (holding that California Constitution's protection of free speech and petitioning, reasonably exercised, in privately owned shopping centers does not violate owner's rights under the First, Fifth, and Fourteenth Amendments). Therefore, the Supreme Court ordered the injunction prohibiting the shopping center owner from enforcing its bar against the distribution of handbills.

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

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Supreme Court listed a number of its decisions providing constitutional protections to resident, non-citizens:

> *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 211–212, 102 S.Ct. 2382, 2391–92, 72 L.Ed.2d 786 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S.Ct. 472, 477, 97 L.Ed. 576 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S.Ct. 1443, 1449, 89 L.Ed. 2103 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886) (Fourteenth Amendment protects resident aliens).

In distinguishing those cases from the case under consideration, the Supreme Court noted, "These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* The Supreme Court did not address what constitutes "substantial connection," other than to find that the respondent's forcible entry into the United States for a matter of days did not confer Fourth Amendment protection for his

property in Mexico. *Id.* At least one district court has recently found that the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), may have implicated the scope of certain constitutional rights as applied to resident, undocumented persons. *United States v. Charles*, ___ F. Supp. 3d ___, 2022 WL 4913900 *5 (W.D. Tex. Oct 3, 2022). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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: Please see my response to Question 6 above.

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

   Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022), the Supreme Court returned the issue of abortion to the people and their elected representatives. Therefore, this question raises a policy question. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on a policy matter. If I were so fortunate as to be confirmed, I would fully and faithfully the laws enacted by Congress and binding precedent.

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: As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. I would note that, if I were so fortunate so as to be confirmed to the United States District Court for the Central District of California, I would be bound by Supreme Court and Ninth Circuit precedent. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

b. 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: Lower courts have a duty and an obligation to following controlling precedent.

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: Lower courts have a duty and an obligation to following controlling precedent.

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 state laws that require voters to present identification in order to cast a ballot are permissible. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

> Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. 460 U.S., at 788, n. 9, 103 S.Ct. 1564. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands.

Id. at 190. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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: If I were so fortunate as to be confirmed, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and any additional precedent decided after *Bruen*, and apply the binding precedent to the material facts before me. Specifically, I would begin the analysis by compare the

restriction before me to the sources of history and tradition examined by *Bruen* and submitted by the parties.

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: I am aware that the Supreme Court has analyzed several factors when overturning its own precedent. *See, e.g.*, *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-86 (2018). I am not aware of any Supreme Court or Ninth Circuit precedent regarding how many of those factors are "necessary to provide a special justification for overturning precedent."

b. Is one factor alone ever sufficient?

Response: Please see my response to Question 13.a. above.

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

Response: Black's Law Dictionary (11th ed. 2019) defines judicial review as follows:

> 1. A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary (11th ed. 2019) defines judicial supremacy as follows:

> The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states. • The doctrine usu. applies to judicial determinations that some legislation or other action is unconstitutional. Proponents of judicial supremacy frequently acknowledge that, when the courts determine that some action is constitutional, nonjudicial actors may legitimately act on their contrary judgment that the action is unconstitutional.

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

Response: In his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742, 851 n.20 (2010) (citations omitted), Justice Thomas wrote, "[C]ertain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment's Establishment Clause, which "does not purport to protect individual rights."

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

Response: I am not aware of former Justice Breyer's "view of 'active liberty," and I would not presume to characterize the Ninth Amendment pursuant to such view.

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: The Bill of Rights are informative for understanding the meaning of the Ninth Amendment. *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) ("The Ninth Amendment is not a source of rights as such; it is simply a rule about how to read the Constitution.") (quotation omitted); *see also Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir.1991) ("The Ninth Amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation.").

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

Response: I am aware that the Supreme Court has looked at Founding-era history to interpret multiple amendments, such as the Establishment Clause in the First Amendment and the Second Amendment. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts 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: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Supreme Court defined the meaning of "the people" as used in the Fourth Amendment as those "within the territory of the United States and [who have] developed substantial connections with this country." In *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), the Supreme Court defined the meaning of "the

people" as used in the Second Amendment as those withing the "political community."

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

Response: As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: Please see my response to Question 19.a. above. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material 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: I believe the Due Process Clause of the Fourteenth Amendment, like the Constitution as a whole, is enduring with a fixed quality to it which is to be applied to "new circumstances." *N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). As the Supreme Court made clear in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted),

> [T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . . Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."

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

Response: The Supreme Court stated in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2248 n.22 (2022), that "[s]ome scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights." The Supreme Court also noted that "the question whether the Privileges or Immunities Clause protects 'any rights besides those enumerated in the Constitution' was reserved in *McDonald v. City of Chicago*, 561 U.S. 742, 819-20, 832, 854 (2010) (opinion of Thomas, J.). *Dobbs*, 142 S. Ct. at 2248 n.22. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: Please see my response to Question 22 above.

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

Response: In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court held as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Subsequently, in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2610 (2022), the Supreme Court applied the major questions doctrine to action by the Environmental Protection Agency. Specifically, the Supreme Court stated that "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (quoting *FDA v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)). Where the major questions doctrine applies, the Court must find "clear congressional authority" for the agency's action. *Id.* at 2609.

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

Response: Under the Administrative Procedure Act (APA), agency action will generally be upheld unless such action was arbitrary and capricious or contrary to law. *See Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502 (2009) ("the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious"). Please see my response to Question 24 above regarding *Chevron* deference. In *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, (1989)), the Supreme Court held that when an agency is interpreting its own regulation, it is entitled to deference unless "plainly erroneous or inconsistent with the regulation." The Court in *Auer* also weighed that the agency's position was an authoritative or official position implicating the agency's substantive expertise and was not an ad hoc litigation position. *Id.* at 461-63.

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

Response: The Constitution limits the powers of Congress by both enumerating its rights, such as the authority to regulate interstate commerce but not intrastate commerce, and specifically denying Congress certain powers, i.e. the suspension of habeas corpus.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted), the Supreme Court discussed Congress's power under the Commerce Clause:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce . . . .

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

Response: In *United States v. Lopez*, 514 U.S. 549, 567 (1995), the Supreme Court found that Congress lacked authority to enact the Gun-Free School Zones Act, because the

prohibited conduct was not economic activity that substantially affected interstate commerce.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment should not be interpreted differently. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217–18, (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

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: As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2610 (2022), the Supreme Court applied the major questions doctrine to action by the Environmental Protection Agency. Specifically, the Supreme Court stated that "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." Id. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)). Where the major questions doctrine applies, the Court must find "clear congressional authority" for the agency's action. *Id.* at 2609.

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

Response: In *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018), the Supreme Court applied the anti-commandeering doctrine to invalidate the portion of Professional and Amateur Sports Protection Act (PASPA) which prohibited states from authorizing gambling. The Supreme Court stated, "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." The Supreme Court concluded, "The PASPA

provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do." *See also New York v. United States*, 505 U.S. 144 (1992) (applying anti-commandeering doctrine to invalidate federal law instructing states to take tile of radioactive waste or to regulate it). "[The Supreme Court] ha[s] always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166.

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

Response: In *Graham v. Florida*, 560 U.S. 48, 58 (2010), the petitioner, who was a juvenile when he committed the crime that resulted in the probation at issue in the case, challenged his sentence to life imprisonment for a probation violation under the Eighth Amendment. The Supreme Court held as follows:

> To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C.J., dissenting)).

Applying this line of cases, the Supreme Court found that the juvenile, non-homicide offender must have a meaningful opportunity to seek release, reversing the court below. *Graham*, 560 U.S. at 74-76.

34. Is the death penalty constitutional?

Response: The death penalty can be legally imposed for certain federal crimes under 18 U.S.C. §§ 3591-3599, and the Supreme Court has upheld the constitutionality of the death penalty for certain state and federal crimes. *But see, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 412-13 (2008) ("imposition of the death penalty for the rape of a child where death was not intended nor did death occur violated the Eighth Amendment).

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: Article II of the Constitution states that the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. The Supreme Court has repeatedly stated that ". . . the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . ." *United States v. Nixon*, 418 U.S. 683, 693 (1974); see also *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment further on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the material facts before me.

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

Response: I am aware of recent litigation regarding this issue. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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 am aware of recent litigation regarding this issue. As a sitting Los Angeles County Superior Judge and nominee to the federal district court, it would be inappropriate for me to comment on such matters or prejudge any issue that might come before me. If I were so fortunate as to be confirmed and the issue were to come before me, I would review the evidence and arguments submitted by the parties with an open mind, research the applicable precedent, and apply the binding precedent to the material facts before me.

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

Response: "Th[e Supreme] Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See, e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872)." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991).

> This rule applies whether the state law ground is substantive or procedural. *See, e.g.*, *Fox Film*, *supra*; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct.

> 794, 79 L.Ed. 1530 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729. In his dissent, Justice Blackmun argued that the Supremacy Clause required the courts to exercise its discretion when applying the Adequate and Independent State grounds doctrine because the doctrine was intended to ensure that federal rights were vindicated, and instead Justice Blackman opined that the Court was using the doctrine to abdicate its responsibility to do so. *Id.* at 760-62 (Blackmun, J., dissenting). Subsequently, the Supreme Court held, "The Supremacy Clause . . . 'creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law[ ].' Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 324, 135 S. Ct. 1378, 191 L.Ed.2d 471 (2015)." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020).

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 (9th Cir. 2019), the Ninth Circuit decided a Due Process challenge brought by American citizens regarding the manner in which they were added to the no-fly list. Specifically, the government conceded that it had not given the plaintiffs all of the reasons they were on the no-fly list, and no adversarial hearing occurred. The Ninth Circuit concluded that the federal government's actions comported with the Due Process Clause. As to the notice, the Ninth Circuit concluded that the general information provided in the letters was sufficient for the plaintiffs to tailor their responses to the government's concerns and that no adversarial proceedings were required because on the facts before the Ninth Circuit a live hearing would create national security risks. *Id.* at 385-86, 389.

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

Response: The "compelling state interest" test applicable to in strict scrutiny cases appears to have had its origin in *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). The intermediate scrutiny test is first applied to gender discrimination in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Finally, the rational basis test appears to be far older. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). None of these decisions cites a textual source.

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

Response: Federal Rule of Civil Procedure 65 controls the issuance of injunctions. The Supreme Court has held that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Ninth Circuit has stated:

> A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citation omitted). "A party can obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original) (quoting *Winter*, 555 U.S. at 20, 129 S.Ct. 365). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018). Additionally, the Ninth Circuit counseled, "[a]lthough 'there is no bar against ... nationwide relief in federal district court or circuit court,' such broad relief must be '*necessary* to give prevailing parties the relief to which they are entitled.'" *Id.* at 582 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis in original removed in part)). "[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).