Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Amanda Kathleen Brailsford
Nominee to be United States District Judge for the District of Idaho

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

   Response: I am not familiar with this statement or the context in which it was made. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent. To the extent "independent value judgments" in the referenced statement means personal preferences, beliefs, or values, then I disagree with the statement. If confirmed, I would be duty bound to apply Supreme Court and Ninth Circuit precedent regardless of my personal preferences, beliefs, or values.

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

   Response: I am not familiar with Judge Reinhardt's statement or the context in which it was made. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent. To the extent the statement suggests it is appropriate for a judge not to follow mandatory precedents, that is not an approach I follow as an Idaho Court of Appeals judge, and I would not take that approach if confirmed.

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

   Response: According to Black's Law Dictionary (11th ed. 2019), a "living constitution" is "[a] constitution whose interpretation and application can vary overtime 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 familiar with what Justice Brown Jackson said in 2013 about a "living constitution" so I can neither agree nor disagree with her comments. The Supreme Court has stated that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assoc.*, *Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

5. **What is implicit bias?**

Response: I do not have a definition for this phrase.

6. **Is the federal judiciary affected by implicit bias?**

Response: I have not studied the effects of implicit bias on the federal judiciary and do not have a basis to conclude that it either affects or does not affect the judiciary. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow the Supreme Court and Ninth Circuit precedents, and impartially apply those authorities to the facts of the case to resolve the issues properly presented.

7. **Do you have any implicit biases? If so, what are they?**

Response: I am not aware that I have any implicit biases. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented.

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

Response: I do not understand the meaning of the terms "attacks" and "mere criticism" in this context, which suggests a fact-specific scenario. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the merits of any matter that may come before any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Generally, however, an individual has a constitutionally protected First Amendment rights to free speech and assembly but those rights do not extend to protect unlawful conduct. *See, e.g.*, 18 U.S.C. § 1507 (prohibiting certain activities); *Virginia v.*

Black, 538 U.S. 343, 359 (2003) (discussing limitations for fighting words, inciting or producing imminent lawless action, and true threats). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to questions of constitutionally protected rights.

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

   Response: If confirmed, 18 U.S.C. § 3553(a)(1)-(7) and Supreme Court and Ninth Circuit precedent would guide my sentencing approach. I would weigh all factors, including those identified in § 3553(a)(2). Section 3553(a) does not assign one factor any more weight than another factor. In sentencing defendants, I would not consider my personal beliefs, if any.

10. **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 an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented. I am not familiar with all the Supreme Court decisions issued in the last 50 years and do not know if any one Supreme Court decision is typical of my judicial philosophy.

11. **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 an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented. I am not familiar with all the Ninth Circuit decisions issued in the last 50 years and do not know if any one Ninth Circuit decision is typical of my judicial philosophy.

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

    Response: Section 1507 of Title 18 of the United States Code generally prohibits: (1) picketing or parading in or near a building housing a court of the United States; (2) picketing or parading in or near a building or residence occupied or used by a judge, juror, witness, or court officer; and (3) using any sound-track or similar device or

demonstrating in or near such residence, if done with the intent to influence those persons or to interfere, obstruct, or impede the administration of justice.

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am not aware that the Supreme Court has ruled on the constitutionality of 18 U.S.C. § 1507. The Court, however, in *Cox v. Louisiana*, 379 U.S. 559, 561, 564 (1965), held that a Louisiana statute "modeled after a bill pertaining to the federal judiciary" later enacted as 18 U.S.C. § 1507 was facially valid.

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

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown v. Board of Education*, 349 U.S. 294 (1955), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Loving v. Virginia*, 388 U.S. 1 (1967), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Griswold v. Connecticut*, 381 U.S. 479 (1965), and all other Supreme Court and Ninth Circuit precedent.

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

Response: The United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), overruled *Roe v. Wade*, 410 U.S. 113 (1973). As a sitting judge and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United

States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

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

Response: The United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), overruled *Planned Parenthood of Southeastern, Pa. v. Casey*, 505 U.S. 833 (1992). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

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

Response: As sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply this precedent and all other Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

15. **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.

16. **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 Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

17. **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.

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

       Response: No.

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

       Response: No.

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

Response: No.

19. **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.

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

Response: On January 14 and 18, 2022, Idaho Senator Mike Crapo's chief of staff contacted me about my interest in the position. On January 25, I spoke to Senator Crapo about that subject. On February 3, Idaho Senator Jim Risch's chief of staff interviewed me; on February 15, both Senators' chiefs of staff interviewed me; and then on February 22, Senators Crapo and Risch interviewed me. On March 17, Senators Crapo and Risch notified me they had submitted my name to the White House for consideration.

On April 22, 2022, I interviewed with attorneys from the White House Counsel's Office, and I have had contact with White House Counsel's Office officials since that date. On April 29, I was notified that my name was being submitted to the Office of Legal Policy at the Department of Justice for vetting. Since May 2, 2022, I have been in contact with officials from the Office of Legal Policy. On January 18, 2023, the President announced his intent to nominate me, and on January 31, the nomination was sent to the Senate.

21. **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.

22. **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.

23. **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.

24. **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.

25. **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.

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

    Response: *See* Response to Question No. 20 above.

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

    Response: In responding to these questions, I reviewed my prior submissions, including my answers to the Senate Judiciary Questionnaire and my calendars for the years 2022

and 2023. I personally conducted research and read authorities cited in these questions as necessary to refresh my memory, and I generally discussed my responses with and received feedback from the Office of Legal Policy at the Department of Justice.

Written Questions for Judge Amanda K. Brailsford
Nominee to the United States District Court for the District of Idaho
March 29, 2023

1. **As part of my responsibility as a member of this Committee to ensure the fitness of nominees, I ask each nominee to answer two questions:**

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Amanda Brailsford, Nominee to the United States District Court for the District of Idaho

1. How would you describe your judicial philosophy?

Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating"); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (ruling that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material" and that "[e]xtrinsic 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"); *United States v. Craft*, 535 U.S. 274, 287 (2002) (noting "risk of relying" on certain legislative history and that "failed legislative proposals" are particularly dangerous ground).

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

Response: If confirmed, I would look to the Constitutional provision at issue and follow Supreme Court and Ninth Circuit precedent for interpreting that constitutional provision. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (noting "established method of substantive-due-process analysis" inquires whether rights are deeply rooted in Nation's history and tradition and implicit in concept of ordered liberty); *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) ("The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation."). In the rare instance of an interpretation question of first impression of a constitutional provision, I would look to Supreme Court and Ninth Circuit precedent for the analysis method and interpret the provision using that method. 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) (noting analysis guided by principle that Constitution was written to be understood by voters and words and phrases were used in their normal, ordinary meaning). *See also Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment").

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

Response: The Supreme Court has analyzed the original public meaning of the Constitution's text in interpreting the meaning of a constitutional provision including, for example, the Second and Fifth Amendments. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment"); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (defining "original public meaning"). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 2 above. The plain meaning of the statute controls, if that language is unambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (ruling "the authoritative statement is the statutory text").

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

Response: The Supreme Court generally "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). Similarly, the Court has stated that in interpreting the Constitution:

> [W]e 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.

District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (citations, quotations and brackets omitted).

6. What are the constitutional requirements for standing?

Response: Article III standing requires that: (1) The plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. (2) There must be a causal connection between the injury and the conduct of which the plaintiff complains, i.e., the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court. (3) That the court will redress the injury by a favorable decision must be likely as opposed to merely speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: Article I, Section 8 of the Constitution enumerates Congress's powers, including to make all laws "necessary and proper" for carrying into execution the enumerated powers. The Supreme Court in *McCulloch v. Maryland*, 17 U.S. 316 (1819), initially defined this clause by explaining: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. The Court emphasized that the word "necessary" does not mean "absolutely necessary." *Id.* at 413–415; *see also Jinks v. Richland County,* 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."). More recently, in *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (citations, quotations, and brackets omitted), the Court ruled:

> [T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal Government is acknowledged by all to be one of enumerated powers, which means that every 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.

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 in *National Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534-355 (2012) (citations, quotations, and brackets omitted), stated:

> The Federal Government is acknowledged by all to be one of enumerated powers. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal

> Government's powers. . . . The enumeration of powers is also a limitation of powers, because the enumeration presupposes something not enumerated. The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it. . . . . If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

The Court in *Sebelius* also stated, however, 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.'" *Id.* at 570 (quoting *Woods v. Cloyd W. Miller Co.,* 333 U.S. 138, 144 (1948)). If confirmed, I would follow Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment protect certain fundamental rights that are so deeply rooted in our history and tradition that they are essential to the Nation's scheme of ordered liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022); *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (noting Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights that are deeply rooted in Nation's history and tradition and implicit in concept of ordered liberty). Fundamental rights that the Supreme Court has previously recognized include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Dobbs*, 142 S. Ct. at 2257-58.

10. What rights are protected under substantive due process?

Response: *See* Response to Question 9 above.

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

Response: A judge has a duty to apply binding precedent. Because *Ferguson v. Skrupa*, 372 U.S. 726 (1963), overruled *Lochner v. New York*, 198 U.S. 45 (1905), *Lochner* is no longer binding precedent. Likewise, because *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022), overruled *Roe v. Wade*, 410 U.S. 113 (1973), *Roe* is no longer binding precedent. If confirmed, I would faithfully

apply the binding Supreme Court and Ninth Circuit precedent, regardless of my personal beliefs if any.

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

Response: The Supreme Court explained the limits on Congress's powers under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted):

> [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.

In *United States v. Morrison*, 529 U.S. 598, 617 (2002), the Supreme Court ruled that Congress may not "regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."

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

Response: The Supreme Court explained that a group qualifies as a "suspect class" if it "possess[es] an immutable characteristic determined solely by the accident of birth" or if it 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). The suspect classifications to which strict scrutiny applies include race, religion, nationality, and alienage. *See, e.g., Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876-77 (2021) (applying strict scrutiny to religion where law was not neutral and generally applicable); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971) (applying strict scrutiny to alienage); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (applying strict scrutiny to race); *Oyama v. California*, 332 U.S. 633, 644-(1948) (applying strict scrutiny to nationality).

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

Response: The separation of powers is a constitutional doctrine under which the Constitution grants separate, unique powers to each of the three branches of government under Article I, the Congress; Article II, the Executive; and Article III, the Judiciary. Because the Constitution grants different powers to these branches, each is given powers to check and balance the other two branches.

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

Response: If confirmed, I would look to Supreme Court and Ninth Circuit precedent to decide a case in which one branch assumed an authority the Constitution's text did not grant to it. For example, in *Youngstown v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President lacked the power to seize steel mills in the absence of Congress's statutory authority conferring such power to him:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits hi functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States."

Id. at 587-588.

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

Response: A judge's obligation is to apply the legal binding precedents to the established facts of a case.

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

Response: Neither result is better nor worse. Both results are undesirable and should be avoided. If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent in determining the constitutionality of a law.

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 trend and do not have a belief about why it occurred. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent in reviewing the actions of other branches or levels of government.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" to include a court's power to review the actions of other branches or levels of government; the courts' power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; and a court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary defines "judiciary supremacy" to mean the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review are binding on the coordinate branches of the federal government and the states. The doctrine applies to judicial determinations that some legislation or other 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 judge on the Idaho Court of Appeals and a judicial nominee, I should not counsel elected officials on their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions. Regardless, the Supreme Court has held elected officials have an obligation to obey federal court decisions in *Cooper v. Anderson*, 358 U.S. 1, 4 (1955) (rejecting argument state officials have no duty to obey federal court orders).

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: A judge's role is limited to applying the rule of law to the established facts regardless of his personal beliefs or feelings. Complying with this limited role is essential to maintaining the judiciary's integrity and the public's confidence in the judiciary.

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

Response: A district judge must apply the Supreme Court and (in my case if confirmed) Ninth Circuit precedent. A judge has no authority to and should not question binding precedent but rather should apply existing precedent to the facts of the case at issue. The Supreme Court has made clear that only it has the prerogative to overrule its precedent. *Bosse v. Oklahoma*, 580 U.S. 1, 2 (2016) (per curiam); *see also Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019) (noting court is mindful of Supreme Court's prerogative to overrule Supreme Court precedent).

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

Response: Section 3553(a)(1)-(7) of Title 18 of the United States Code governs sentencing. Any consideration of a defendant's group identities is not appropriate. Sentencing Guideline §5H1.10 provides that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."

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

Response: I am not familiar with the Biden Administration's definition of "equity" or in what context the Administration used it. Black's Law Dictionary (11th ed. 2019) defines "equity" to include fairness, impartiality and evenhanded-ness." As a sitting judge for the Idaho Court of Appeals and a judicial nominee, I should not comment on an elected official's position. To do so may call into question my impartiality or be construed as prejudicing an issue that could come before me either if I am confirmed or as an Idaho Court of Appeals judge.

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

Response: As noted above, Black's Law Dictionary (11th ed. 2019) defines "equity" to include fairness, impartiality and evenhanded-ness. Meanwhile, Black's Law Dictionary defines "equality" as including the quality, state or condition of being equal especially in 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 confirmed, I would faithfully follow the Supreme Court and Ninth Circuit precedent regarding the guarantees of the Equal Protection Clause.

27. How do you define "systemic racism?"

Response: I do not have a definition for this phrase.

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

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

> 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: *See* Responses to Questions 27 and 28 above.

Senator Josh Hawley
Questions for the Record

Amanda Brailsford
Nominee, U.S. District Court for the District of Idaho

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

   Response: No.

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

      Response: *See* Response to Question 1 above.

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

   Response: The Supreme Court has analyzed the Constitution's original public meaning in interpreting the Constitution in certain issues such as, for example, the Second Amendment and the Fifth Amendment. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment"); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (defining "original public meaning"). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent in determining whether to rely on the Constitution's original public meaning in analyzing an issue.

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

   Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary.

   Regarding legislative history, the Supreme Court has explained in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), that:

   > 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. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is

vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id. (citation omitted); *see also N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

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: Certain legislative history may be less probative of legislative intent than other legislative history. For example, the Supreme Court in *United States v. Craft*, 535 U.S. 274, 287 (2002), noted the "risk of relying" on certain legislative history and that "failed legislative proposals" are particularly dangerous ground on which to interpret a statute. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating"); *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("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 represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." (quotations and brackets omitted)).

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

Response: The Constitution is a domestic document and the laws of foreign nations generally have no relevance in interpreting the Constitution. The Supreme Court, however, has considered English common law in interpreting the Constitution's original public meaning. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (discussing English common law). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to interpret the Constitution.

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: To establish an execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment, a petitioner must "establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself" and "'identify an alternative method that is feasible, readily implemented, and in fact significantly reduces' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (brackets omitted) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). The Ninth Circuit has applied the standard in *Glossip* to resolve an Eighth Amendment claim. *Atwood v. Shinn*, 36 F.4th 901, 903-04 (9th Cir. 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: *See* Response to Question 4 above. A petitioner is required to identify an alternative method that is feasible, readily implemented, and significantly reduces the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022).

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: In *Osborne v. District Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005), the Ninth Circuit held that a habeas corpus petitioner has a right to DNA testing. The Supreme Court, however, overruled this decision in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73-74 (2009), ruling that there is no "freestanding right to access DNA evidence for testing" under the Due Process Clause of the Constitution. The Court noted, however, that a habeas corpus petitioner may allege a federal actual innocence claim, which if viable would permit discovery for good cause. *Id.* at 72.

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: Laws incidentally burdening religion are ordinarily not subject to strict scrutiny as long as they are neutral and generally applicable. *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876 (2021). If a law is neutral and generally

applicable, it is subject to rational basis review. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Facial neutrality is not determinative," however. *Id.* at 534. A law is not neutral and generally applicable if, for example, it is specifically directed at a religious practice, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2422 (2022); prohibits religious conduct while permitting secular conduct undermining the government's asserted interest in a similar way, *id.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam); or is hostile to religion or a religious viewpoint, *Masterpiece Cakestop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Lukumi*, 508 U.S. at 534. If a law is not neutral and generally applicable, it is subject to strict scrutiny. *See, e.g., Tandon*, 141 S. Ct. at 1296 (applying strict scrutiny to regulations treating comparable secular activities more favorably); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (applying "least-restrictive-means standard" where mandate required "severe" economic consequences).

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: *See* Response to Question 8 above.

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 ruled that the Court's function is not to determine whether a plaintiff's religious belief is "mistaken or unreasonable." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 686 (2014). Rather, the Court's narrow function is to determine whether a plaintiff's asserted religious belief reflects "'an honest conviction.'" *Id.* (quoting *Thomas v. Review Bd. Of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (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, 595, 610, 628-29 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms unconnected to militia service, including to keep and use firearms for the protection of one's home and family. Further, the Court held that requiring firearms in a home to be rendered and kept inoperable at all times is unconstitutional. *Id.* at 630.

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. The Idaho Court of Appeals did issue *Peterson v. Gunderson*, No. 48781, 516 P.3d 1095 (Ct. App. 2022), which I authored. In that case, the plaintiff, who had a prior felony conviction for sexual exploitation of a child, challenged the sheriff's denial of his application to carry a concealed weapon. *Id.* at 1097. The plaintiff in that case, however, did not assert a constitutional challenge to the statutory scheme at issue.

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: Justice Holmes explained this statement by writing:

> [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*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). To the extent Justice Holmes' comments mean a judge's personal views are not a basis to conclude a statute is unconstitutional, I agree.

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

Response: In *Ferguson v. Skrupa*, 372 U.S. 726, (1963), the Supreme Court overruled *Lochner v. New York*, 198 U.S. 45 (1905). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), 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," overruling *Korematsu v. United States*, 323 U.S. 214 (1944). In doing so, the Court stated that the dissent's reference to *Korematsu* "affords this Court the opportunity to 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 the law under the Constitution.'" *Trump*, 138 S. Ct. at 2423. I understand this statement to mean that *Korematsu* 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, which are no longer good law but which the Court has not yet formally overruled.

a. If so, what are they?

Response: *See* Response to Question 14 above.

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

Response: Without exception, I would faithfully apply the Supreme Court 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 percent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court, including what constitutes a monopoly. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 15a 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: The Ninth Circuit has ruled that "[a] market share of sixty-five percent or more usually establishes a prima facie case of monopoly power" in the context of 15 U.S.C. § 2. *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021). The Supreme Court, however, has stated that "[o]bviously no magic inheres in numbers," but rather "[t] he relative effect of percentage command of a market varies with the setting in which that factor is placed." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 (1953) (quotations omitted).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as:

> The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law. An example is the nonstatutory law applying to interstate streams of commerce.

The Supreme Court has explained in *Rodriguez v. Federal Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020), the federal courts' role in creating 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.'"

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: If confirmed, I would apply state law to determine the scope of a state constitutional right. The Supreme Court has held that "the state courts are the ultimate

expositors of state law" and that federal courts are bound by the state's "constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

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

Response: *See* 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: Yes. The Supreme Court in *Mills v. Rogers*, 457 U.S. 291, 300 (1982), held that "the substantive rights provided by the Federal Constitution define only a minimum"; state laws "may recognize liberty interests more extensive than those independently protected by the Federal Constitution"; and "broader state protections would define the actual substantive rights possessed by a person living within that State."

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown v. Board of Education*, 349 U.S. 294 (1955), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: The Supreme Court has previously upheld nationwide injunctions. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). Federal Rule of Civil Procedure 65 provides the procedure by which a court may issue a preliminary injunction. A preliminary injunction is an extraordinary remedy never awarded as a matter of right but rather may only to be awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tip in his favor; and an injunction is in the public interest. *Id.* at 20.

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

Response: *See* Response to Question 19 above.

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

Response: *See* 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: *See* Response to Question 19 above.

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

Response: The Supreme Court has articulated the role of federalism in our constitutional system in *Bond v. United States*, 564 U.S. 211, 220-22 (2011):

> 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-a-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.

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

Response: Various abstention doctrines require or allow a federal court to refuse to hear a case if doing so would intrude on the powers of another court. Examples of these doctrines include:

(1) The *Younger* abstention doctrine provides that when there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). This doctrine has been extended to state civil proceedings that are akin to criminal prosecutions or that implicate a State's interest in enforcing the orders and judgments of its courts. *Id.* at 72-73.

(2) The *Pullman* abstention doctrine is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. Abstention is appropriate when: (a) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (b) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (c) the possibly determinative issue of state law is unclear. *The San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

(3) Under the *Colorado River* abstention doctrine, a federal court determines whether to abstain from resolving a case pending the resolution of a parallel state action. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). The court evaluates eight factors in assessing the appropriateness of a *Colorado River* stay or dismissal, including (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. *Id.* at 841-42.

(4) The *Burford* abstention doctrine allows a federal court to dismiss a case only if it presents difficult questions of state law bearing on policy problems of substantial public import, the importance of which transcends the result in the case, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996).

(5) The *Thibodaux* abstention doctrine allows a federal court to abstain in cases involving unresolved state law questions that are "intimately involved with the [state's] sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *see also City of Tucson v. U.S. West Comm'ns, Inc.*, 284 F.3d 1128, 1134 (9th Cir. 2002) ("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.").

(6) Although not technically an abstention doctrine, the *Rooker-Feldman* doctrine is sometimes referred to as such a doctrine. "Under *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. The United States Supreme Court is the only federal court with jurisdiction to hear such an appeal." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003).

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

Response: An award of compensatory damages and injunctive relief have distinct purposes. An award of damages generally compensates a party for a proven loss or harm already sustained. *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 871 (9th Cir. 2017). In contrast, injunctive relief is intended to prevent irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The disadvantages and advantages of damages versus injunctive relief will depend on the specific facts of a particular case.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments

protect fundamental rights that are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. Fundamental rights that the Supreme Court has previously recognized include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257-58 (2022).

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: *See* Response to Question 8 above.

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

Response: In *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court held that the Free Exercise Clause of the First Amendment protects both freedom of religion and freedom of conscience. Further, the Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022), ruled that:

> The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.

Id. at 2421 (quotations omitted).

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

Response: *See* Response to Question 8 above.

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

Response: *See* Response to Question 10 above.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___, 140 S. Ct. 2367, 2383 (2020) (noting RFRA provides very broad protection and applies to all Federal law).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

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

Response: The Supreme Court has held that the Constitution "does not require any particular form of words to be used in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). If confirmed, I would instruct the jury on the definition of reasonable doubt using the Ninth Circuit Model Jury Instruction 3.5.

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

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the merits of any matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 27a.

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

Response: *See* 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: Ninth Circuit Rule 36-3 provides that unpublished Ninth Circuit disposition and orders are not precedent except under the doctrine of the law of the case or under the rules of claim or issue preclusion; may be cited to Ninth Circuit courts on or after January 1, 2007; and may not be cited before January 1, 2007 unless under the doctrine of the law of the case, for purposes of issue or claim preclusion, to show double jeopardy, notice of sanctionable conduct, entitlement to attorney fees, or the existence of a related case. If confirmed, I would follow the Ninth Circuit local rules and precedent regarding unpublished opinions.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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: See Response to Question 28a.

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: See Response to Question 28a.

29. In your legal career:

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

Response: I have tried three cases as first chair.

b. How many have you tried as second chair?

Response: I have tried three cases as second chair.

c. How many depositions have you taken?

Response: I have taken about 100 depositions.

d. How many depositions have you defended?

Response: I have defended about 100 depositions.

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

Response: I have not argued any cases before a federal appellate court but have briefed many which were submitted without argument.

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

Response: I have argued five cases before state appellate courts.

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

Response: I have appeared approximately five times before the Equal Employment Opportunity Commission as counsel.

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

Response: I have argued approximately 30 dispositive motions before trial courts.

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

Response: I have argued approximately 20 evidentiary motions before trial courts.

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: While in private practice, I billed 2000 hours or more annually.

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

Response: On average, I dedicated at least 100 hours to pro bono activities annually.

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: I am not familiar with the statement or its context, but on its face, it appears to mean that a good judge who faithfully applies the law may have to reach a result inconsistent with his personal views.

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

a. **What do you understand this statement to mean?**

Response: I am not familiar with the statement or its context, but on its face, it appears to mean that judges fairly and impartially apply the rule of law.

b. **Do you agree or disagree with this statement?**

Response: I agree judges should fairly and impartially apply the law.

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: I am not familiar with the statement or its context, but on its face, it appears to mean that judges should impartially apply the law.

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

Response: I agree judges should impartially apply the law.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: *See* Response to Question 34.

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

36. What were the last three books you read?

Response: *Against All Odds* by Alex Kershaw, *Where Men Win Glory* by Jon Krakauer, and *Dune* by Frank Herbert.

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

Response: I am unaware of a universally recognized definition of "systemic racism." If confirmed, I would faithfully apply the laws prohibiting racial discrimination.

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

Response: I am most proud of my representation of Idaho growers in various matters, including antitrust litigation and crop damage cases.

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 complied with my duty as an attorney to represent my clients zealously regardless of my personal beliefs, while at the same time complying with all other ethics rules, including my duty of candor to the court.

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

Response: Yes.

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

Response: I do not often read the works of law professors.

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

Response: No particular Federalist Paper has 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: In addressing legal issues, my understanding of the law may evolve as I read applicable authorities. I have no specific recollection, however, of any one opinion or article changing my mind.

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

Response: The Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022), declined to address this issue leaving it for the voters in the States. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent on this issue regardless of my personal beliefs, if any.

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: In approximately 2013, I testified as a witness in a malpractice action against a law firm. The testimony is not available to me.

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: Yes.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: While an attorney in private practice, colleagues would occasionally request me to review their briefs. I have no specific recollection, however, of making significant substantive changes or of the cases in which those briefs were filed.

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

Response: *See* Response to Question 47 above.

48. Have you ever confessed error to a court?

Response: I do not recall having ever confessed an error to a court.

a. If so, please describe the circumstances.

Response: *See* Response to Question 48 above.

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: I swore an oath to be truthful when testifying to the Committee and complied with that oath.

Senator John Kennedy
Questions for the Record

Judge Amanda Brailsford

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

   Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent.

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

   Response: The Supreme Court has stated that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assoc. Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary.

   Regarding legislative history, the Supreme Court in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), has ruled that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." Further, the Supreme Court in that case explained:

   > 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. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history

> has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id. (citation omitted); *see also N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

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

Response: *See* Response to Question 3 above. While at least one Ninth Circuit panel has considered a President's signing statement as legislative history for purposes of interpreting an ambiguous statutory provision, another panel has rejected a President's statement as probative of a provision's meaning. *Compare U.S. Aviation Underwriter's, Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1099-1100 (9th Cir. 2012) (noting President Clinton's intent as reflected in signing statement) *with Estate of Reynolds v. Martin*, 985 F.2d 470, 477 n. 8 (9th Cir. 1993) ("We give little credence to President Bush's statement accompanying his signing of the bills . . . . It is not the President's place to write federal statutes."). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972), the Supreme Court considered whether under the Federal Constitution a privately owned shopping center may prohibit distribution of handbills on its property when adequate alternative avenues of communication are available. In addressing this issue, the Court held that "when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in the expression beyond those already existing under the applicable law." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (stating holding in *Lloyd*). The Court in *PruneYard* ruled, however, that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to taking without just compensation or contravene any other federal constitutional provision." *Id.* It held that "neither [the property owners'] federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of [individuals] to exercise state-protected rights of expression and petition on [the owners'] property." *Id.* at 88.

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

Response: The Supreme Court has held that nonresident aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (listing cases and aliens' constitutional protections, including under Equal Protection Clause and First, Fifth, Sixth, and Fourteenth Amendments). Although the Court did not address what constitutes a "substantial connection" in that case, it ruled that the appellant "was a citizen and resident of Mexico with no voluntary attachment to the United States" at the time of the search; "the place searched was located in Mexico"; and under those circumstances the Fourth Amendment had no application. *Id.* at 274-75. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to determine an alien's right to privacy if that issue arose.

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: *See* Response to Question 6 above.

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

   Response: The Supreme Court in *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), held that the Fourteenth Amendment Due Process Clause did not protect the right to abortion. The Court did not address at what point human life is entitled to equal protection under the Constitution, but rather it "return[ed] the issue of abortion to the people's elected representatives." *Id.* at 2243. If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent bearing on any equal protection issue presented.

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: I am not familiar with any suggestion that the Thirteenth Amendment provides a basis for the right to abortion. If confirmed, I would faithfully apply *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), and all other the Supreme Court and Ninth Circuit precedent.

   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: *See* Response to Question 9a. A judge has a duty to comply with existing mandatory 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: No.

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

Response: In *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189–90 (2008), the Supreme Court held that under some circumstances states may require voter identification. It discussed restrictions on the right to vote, stating:

> [U]nder the standard applied in *Harper* [*v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)], 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. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court, including whether voter identification requirements are unlawful. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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: The Supreme Court in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), held that:

> [W]hen 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. Only if a

> firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

If confirmed, I would apply the Supreme Court and Ninth Circuit precedent.

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

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

Response: The Supreme Court precedent identifies numerous factors for consideration in overturning precedent. *See Janus v. American Fed. of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (identifying case law and "most important" factors in that case to include quality of reasoning, workability of rule, consistency with other related decisions, developments since decisions handed down, and reliance on decision); *see also Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (overruling cases and noting important factors of "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance"). I am not aware of any Supreme Court or Ninth Circuit authority requiring a certain quantum of factors needed to overrule prior precedent.

b. Is one factor alone ever sufficient?

Response: *See* Response to 13a above.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" to include a court's power to review the actions of other branches or levels of government; the courts' power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; and a court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary defines "judiciary supremacy" to mean the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review are binding on the coordinate branches of the federal government and the states. The doctrine applies to judicial determinations that some legislation or other action is unconstitutional.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent providing that the Ninth Amendment protects individual rights or otherwise provides structural protection applicable to the people. Justice Thomas, however, wrote in his concurrence in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 851 (2010) (Thomas, J., concurring), that "certain 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. . . ." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

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

Response: I am not familiar with Justice Breyer's view of "active liberty." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

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

Response: The Ninth Circuit has stated that "[t]he Ninth Amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir.1991); *see also San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) (citing authority noting "[t]he Ninth Amendment is not a source of rights as such; it is simply a rule about how to read the Constitution."). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

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

Response: In certain circumstances, the Supreme Court has considered founding-era history when interpreting constitutional protections. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (interpreting Establishment Clause); *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2131-32 (2022) (interpreting Second Amendment). I am not aware, however, of any binding precedent providing founding-era history is useful for interpreting the Ninth Amendment's meaning. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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 held that nonresident aliens "receive constitutional protections

when they have come within the territory of the United States and developed substantial connections with this country." In that case, the Supreme Court discussed the meaning of "the people" in the Constitution:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const., Amdt. 1 ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *See United States ex rel. Turner v. Williams,* 194 U.S. 279, 292, 24 S. Ct. 719, 723, 48 L.Ed. 979 (1904) (Excludable alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of these Amendments contrasts with the words "person" and " accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

Verdugo-Urquidez, 494 U.S. at 265-66; *see also District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (analyzing Constitution's use of phrase "the people" and noting "right" attributable to "the people" refers to "an individual right").

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

Response: *See* Response to Question 19a above.

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

Response: The Supreme Court has held in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights that are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. The Court did not address whether the meaning of the Due Process Clauses change over time. It has held, however, in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: In *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 n. 22 (2022), the Supreme Court noted 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." For example, Justice Thomas in *McDonald v. Chicago*, 561 U.S. 742, 813–850 (2010) (Thomas, J., concurring in part and concurring in judgment), noted the Court reserved the question of "whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court in *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), held that the Fourteenth Amendment Due Process Clause did not protect the right to abortion. In reaching this conclusion, the Court also noted "[t]hat is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause." *Id.* at 2248 n. 22. If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court held in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnotes omitted), that:

> 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.

Recently, however, the Supreme Court in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022) (citation omitted), relied on the major questions doctrine and ruled:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

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

Response: *See* Response to Question 24 above.

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

Response: Article I of the United States Constitution enumerates Congress's powers and provides specific limitation on those powers in Article I, Section 9. The Constitution also limits Congress's powers by granting enumerated powers to the executive and judicial

branch in Articles II and III, respectively. Further, the Tenth Amendment reserves for the States powers that the Constitution neither delegates to the United States nor prohibits.

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

Response: The Supreme Court explained Congress's powers and its limits under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted):

> [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. Morrison*, 529 U.S. 598, 617 (2000), the Supreme Court ruled that Congress may not "regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."

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

Response: The Supreme Court has stated that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995) (noting general rule that "obligations imposed by the Fifth and the Fourteenth Amendments are undisguisable").

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 judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 24.

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

Response: In *Murphy v. National Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1475-76 (2018), the Supreme Court explained the anti-commandeering doctrine is "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." I am not aware of any binding precedent discussing the limitations of the anti-commandeering doctrine. If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: In *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (citations, quotations, brackets omitted), the Supreme Court explained:

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. This is because the 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.

34. Is the death penalty constitutional?

Response: Yes. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

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 the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. The Supreme Court has stated "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) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct of United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

37. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

Response: *See* Response to Question 5 above.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court in described the adequate and independent state grounds doctrine in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citation omitted), stating:

> This 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. This rule applies whether the state law ground is substantive or procedural. 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.

In contrast, the Supreme Court has stated that the Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance

thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015).

40. 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: The Ninth Circuit has held in *Kashem v. Barr*, 941 F.3d 358, 380 (9th Cir. 2019), that due process requires the Government to inform an individual when placed on a no-fly list, stating that "individuals challenging their No Fly List designation are presumptively entitled to a full statement of the reasons for their inclusion on the list and to disclosure of the original evidence—inculpatory and exculpatory—upon which the government relied in making the designation."

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

Response: To the best of my knowledge, the Supreme Court has not explicitly identified a textual source for the different standards of review for determining whether state laws or regulations violate constitutional rights. The Supreme Court, however, has identified three standards of review for determining a constitutional violation. They include:

(1) Strict scrutiny, which applies to suspect classes including race, religion, national origin, and alienage and provides that a law can only survive if it advances interests of the highest order and is narrowly tailored to achieve those interests. *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1881 (2021); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (referring to standard as "least-restrict-means standard").

(2) Intermediate scrutiny, which applies to quasi-suspect classes including gender and sex and requires the law be substantially related to achieving a sufficiently important government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

(3) Rational basis review, which applies to all other classes and requires only that the law be rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

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

Response: Federal Rule of Civil Procedure 65 provides the procedure by which a court may issue a preliminary injunction, including a universal or nationwide injunction. A preliminary injunction is an extraordinary remedy never awarded as a matter of right but rather may only to be awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). A

plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tip in his favor; and an injunction is in the public interest. *Id.* at 20; *see California v. Azar*, 911 F.3d 558, 575, 582 (9th Cir. 2018) (noting required showing and that "broad relief" of nationwide injunction "must be *necessary*").

Questions from Senator Thom Tillis
for Amanda Kathleen Brailsford
Nominee to be United States District Judge for the District of Idaho

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

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

   > A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents.

   Judicial activism is inappropriate.

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

   Response: Impartiality is an expectation and an obligation for a judge. *See, e.g.,* 28 U.S.C. § 453 (requiring affirmation of impartiality); *see generally* Code of Conduct for United States Judges, Canon 3.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: If confirmed, I would interpret the law pursuant to the Supreme Court and Ninth Circuit precedents regardless of any belief I may have about whether the outcome is undesirable.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

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

Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 595, 628-29 (2008), held that the Second Amendment confers an individual right to keep and bear arms, including for protection of one's home and family. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010), the Court held the Fourteenth Amendment's Due Process Clause incorporates this Second Amendment right. In *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022), the Court held that the government must justify that any law regulating the possession of firearms must be "consistent with the Nation's historical tradition of firearm regulation." If confirmed, I would faithfully apply these and other Supreme Court and Ninth Circuit precedent regarding the Second Amendment.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: If confirmed, I would evaluate such a lawsuit by faithfully applying the Supreme Court and Ninth Circuit precedent to the facts of the case, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) ("The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation.").

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: The Supreme Court in *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), stated that the doctrine of qualified immunity protects government officials from liability for civil damages for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known and that the protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. In determining whether qualified immunity protects a government official, the court must make two inquiries: (1) whether the plaintiff has alleged a violation of a constitutional right; and (2) whether that right was clearly established at the time of defendant's alleged misconduct. *Id.* at 232. The Court held that, while the sequence of these inquiries is often appropriate, it is not mandatory, and the district court has discretion to determine which of the two prongs it should address first. *Id.* at 236; *see also Rodis v. City, County of San Fransisco*, 558 F.3d 964, 968 (9th Cir. 2009) (citing and applying *Pearson*). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the sufficiency of a law or the correctness of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would

faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a law's "proper scope" based on my personal belief. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: During my more than 20 years as an attorney handling matters involving complex civil litigation, including a two-year clerkship for the Ninth Circuit, and my more than 4 years as a judge on the Idaho Court of Appeals, I have not handled any matters involving patent eligibility. If confirmed, I would diligently work to understand thoroughly any legal topic presented to me and would faithfully apply Supreme Court, Ninth Circuit and Federal Circuit precedent to issues of patent eligibility. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the Supreme Court's patent eligibility jurisprudence or prejudge how I would apply the law. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: *See* Response to Question 12 above.

14. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: During my more than 20 years as an attorney handling matters involving complex civil litigation, including a two-year clerkship for the Ninth Circuit, and my more than 4 years as a judge on the Idaho Court of Appeals, I have not handled any matters involving copyright law. If confirmed, I would diligently work to understand thoroughly any legal topic presented to me and

would faithfully apply Supreme Court, Ninth Circuit and Federal Circuit precedent to issues of copyright law.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: *See* Response to Question 14a above.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: *See* Response to Question 14a above.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: *See* Response to Question 14a above.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and legislative history only if necessary and authorized by precedent. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: Whether a court must defer to an agency's interpretation of a statute depends on the statutory provision 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." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is clear on its face, then the court will defer to the agency's interpretation of the text if the interpretation is reasonable and "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001)). Recently, however, the Supreme Court in *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587 (2022), relied on the major questions doctrine and ruled:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

Id. at 2609 (citations omitted). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: *See* Response to Question 15a above.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: *See* Response to Question 15a above.

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: I have been nominated for the District of Idaho. There is one "active" judge and one "senior" judge in that District. (If confirmed, I would be the second "active" judge.) As the assignment process has been explained to me, a computer-generated program makes case assignments, which are entirely random by both subject matter and location (Boise, Pocatello, and Coeur d'Alene). For this reason, I am not aware that "judge shopping" or "forum shopping" in Idaho is a problem or even a possibility.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: *See* Response to Question 17a.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Yes, I commit not to engage in such conduct.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: *See* Response to Question 17a above.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: *See* Response to Question 17a above.