**Senator Dick Durbin**
**Chair, Senate Judiciary Committee**
**Written Questions for Judge Ana Isabel de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**
**May 24, 2023**

1. **You currently serve as a District Court Judge in the Eastern District of California. Previously, you served for four years as a Superior Court Judge in Fresno County, where you presided primarily over criminal and juvenile cases. You have issued thousands of decisions and orders as a judge and have presided over at least ten bench and jury trials.**

   **What lessons have you learned from your experience as a judge presiding over cases at both the state and federal levels?**

   Response: I have had the great privilege of serving the people of Fresno County as a superior court judge in a high-volume misdemeanor department and at the Juvenile Justice Center and the people of Eastern District of California as a district judge. As a superior court judge I handled a high-volume misdemeanor calendar where I routinely heard over 150 cases per day prior to the COVID pandemic. As part of that assignment, I heard motions to suppress, Serna motions, and Pitchess motions on a weekly basis. After two years in the misdemeanor department, and in light of the work I had done on the misdemeanor calendar, the Presiding Judge assigned me to work at the Juvenile Justice Center where I handled felony and misdemeanor bench trials, motions to suppress, and motions to transfer juveniles to adult court. As a federal district judge in the Eastern District of California, I inherited a docket, which at last count, had 1,156 cases. Since taking the federal bench, I have had jury trials on criminal and civil issues; imposed sentence on over 110 defendants and reviewed orders drafted by Magistrate and Bankruptcy judges. The Eastern District is one of the busiest districts in the country, serving almost eight million residents, encompassing six large urban areas, and extending over 87,000 square miles. The biggest lessons that I have learned from my work as a judge are the importance of a good judicial temperament, always being prepared, and being accessible. First, having a good judicial temperament is something that all judges should aspire to have as it really sets the tone for the courtroom and the way in which the litigants will perceive the judge and the entire legal process. Treating everyone who comes before me with respect and dignity, being patient and listening to litigants, and timely responding to requests are all things that have helped me be efficient and effective in my role in our system of justice. Second, whether it is being placed in an unfamiliar assignment, as was the case when I was placed in misdemeanors and at the Juvenile Justice Center, or in one that has over 1,100 pending cases, being prepared is necessary to keep cases moving. My chambers staff and I are always on time, prepared, and ready to tackle whatever we have on our docket that day. We are also mindful of the fact that although it may be one of more than a thousand cases for us, for the parties it may well be the most important case of their lives. I have found that being accessible to the parties for

quick conferences leading up to trials or major hearings is also productive and can help the parties narrow their differences and issues that need adjudicating.

2. **During your confirmation hearing, you were asked questions related to your approach to criminal sentencing.**

   **Please explain the obligations you have as a district court judge when making sentencing decisions and what factors you must consider when imposing a sentence on a criminal defendant.**

   Response: Whenever I impose a sentence, I am obligated to do an individualized assessment that considers factors listed at 18 U.S.C. §3553(a) and all applicable Ninth Circuit and Supreme Court precedent. Where applicable, I review all pre-sentence reports the Probation Department authored and the parties' objections thereto (if any); the parties' respective sentencing memorandums and attachments thereto, letters of support for the defendant (if any), and victim impact statements (if any), and any other materials properly before me. In imposing a sentence in the Hernandez Fields case, I followed this process reviewing all materials before me including the probation department's memorandum recommending a sentence of 66 months.

**Senator Lindsey Graham**
**Ranking Member, Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

1. **At your hearing, you received several questions about *United States v. Conrado Virgen-Mendoza*, a case in which you released an illegal alien, who was subject to deportation, from location monitoring. The defendant had been convicted for helping his brother avoid law enforcement detection for several days after the brother shot and killed a police officer during a traffic stop. In your responses, you noted that the defendant was also subject to location monitoring by U.S. Immigration and Customs Enforcement (ICE). In its opposition to the defendant's motion for revocation, the government explained that it expected Virgen-Mendoza's ICE ankle monitor to be removed:**

> **Moreover, starting next month, BI is expected to de-escalate its monitoring of aliens awaiting immigration proceedings. As part of its de-escalation, ankle monitors will be removed. Monitored aliens will receive a SmartLINK, which provides a secure platform for real-time communication between BI officers and clients. BI touts SmartLINK as the "[l]east restrictive form of supervision technology." See https://bi.com/mobile-monitoring/, last visited 2-8-23. The monitored alien will be required to check in once a month with his BI officer.[1]**

**Please explain why you did not address this issue in your decision and why you thought a hearing was not necessary to confirm whether the defendant would be subject to location monitoring going forward**.

Response: As a currently sitting federal district judge, the Code of Conduct for United States Judges limits what I can discuss about this case as Mr. Virgen-Mendoza has filed an appeal with the Ninth Circuit which has not yet been decided. As noted in Canon 3A(6), "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."

However, I can say that in every matter before me, I consider the applicable statutory law, any applicable Ninth Circuit and Supreme Court precedent, the parties' arguments, the recommendations of the Probation department (if any), the entire record, and any other materials properly before me.

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[1] *U.S. v. Virgen-Mendoza*, No. 1:19 CR 15-ADA-BAM, ECF No. 707, at *10 (E.D. Cal. Feb. 9, 2023) (United States' Opposition to Defendant's Motion for Revocation) (emphasis added).

As set out in the public docket,[2] in April 2019, another district judge ordered Mr. Virgen-Mendoza (the Defendant) released on conditions following the posting of a $25,000 bond. That district judge appointed a third party custodian for the Defendant and imposed various conditions requiring the Defendant to, among other things, report to Pretrial Services and comply with their rules and regulations, surrender his passport, reside at a location approved by Pretrial Services, and not move or be absent from his residence for more than 24 hours without prior approval of Pretrial Services, restrict his travel to the Eastern District of California unless approved in advance by Pretrial Services, and participate in a location monitoring program supervised by Pretrial Services.[3] By the time the case reached me, nearly four years later, and more than three years after the Defendant entered a plea agreement with the Government, the Defendant filed a motion seeking modification of only the location monitoring condition of release. The Court promptly set a briefing schedule for the Government's response and the Defendant's reply and scheduled a hearing on the Defendant's motion. [4]

The Defendant's motion required the Court to apply 18 U.S.C. §3142(c)(1)(B), under which a Court imposes "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." After reviewing the parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order that vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedent, and the entire record were insufficient for the Court to resolve the motion.

In resolving the motion, the Court observed, among other things, that the "Defendant has continuously complied with his conditions of release for nearly four years and has not failed to appear in court." The Court also observed that during the four years under which the Defendant had been subject to the Court imposed release conditions, the Defendant had also been concurrently monitored by Immigration and Customs Enforcement (ICE). The Court considered each of the Defendant's and Government's arguments, including the argument that the ICE location monitor may be removed. As noted in this Court's order, "[e]ven if ICE was not monitoring Defendant, Defendant's continuous compliance with the release conditions for the past four years supports a change in conditions. The Court considers Defendant's reliance on *United States v. Hutchins*, 298 F.Supp.3d 1205 (E.D. Wis. 2017), in his original motion for bail review.

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[2] *U.S. v. Virgen-Mendoza*, No. 1:19 CR 15-ADA-BAM (E.D. Cal. Feb. 9, 2023)

[3] *See* ECF Nos. 272 and 275. From April 10, 2019 through August 6, 2019, the Court also imposed home detention. However, on agreement of the Government and the Defendant, the Court modified Defendant's conditions of release, converting home detention to a curfew requiring Defendant to be home from 8:00 p.m. to 8:00 a.m. *See* ECF No. 391.

[4] *See* ECF No. 706.

(ECF No. 698 at 3.) There, the court held that '[w]hen defendants establish that they will abide by their obligation to appear in court, logic dictates that the justification for imposing the existing release condition lessens.' *Hutchins*, 298 F.Supp.3d at 1208. In other words, compliance with conditions of release over a long period of time supports that such defendant is less of a flight risk, requiring less restrictive conditions. For example, in this case, on August 6, 2019, both parties stipulated to lessen the restrictions imposed on Defendant's conditions of release. (*See* ECF No. 391.) In the stipulation and order, the Court changed Defendant's condition from home detention to curfew because he had been compliant with his release conditions for nearly four months, communicates with Pretrial Services, and provides appropriate documentation as directed. (*Id*. at 2.) The Court deemed the modification appropriate because it reflected Defendant's progress on pretrial release. (*Id*.) Nothing in the record suggests that Defendant may not be afforded another change in his conditions of release."

The Court did not alter any other condition of Defendant's release. Thus, except for location monitoring by Pretrial Services, the Defendant remains subject to Pretrial release conditions imposed in 2019, including, but not limited to, supervision by Pretrial Services, a twelve-hour curfew, a court appointed third party custodian, travel restrictions, and liability for a bond.

2. **How many motions to modify release conditions have you granted without a hearing? Please provide the Senate Judiciary Committee with the number and case citation for each case.**

   Response: In every case in which a party has filed a motion to modify release conditions the Court has set a briefing schedule and noticed a hearing date. In the Virgen Mendoza case after reviewing the parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order resolving the relevant motion and then vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedents, and the entire record were insufficient for the court to resolve the motion.

3. **How many motions to revoke release have you granted without a hearing? Please provide the Senate Judiciary Committee with the number and case citation for each case**.

   Response: In every case in which a party has filed a motion to revoke release conditions the Court has set a briefing schedule and noticed a hearing date. In the Virgen Mendoza case after reviewing the parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order resolving the relevant motion and then vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedents, and the entire record were insufficient for the court to resolve the motion.

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

   Response: Black's Law Dictionary defines ad hominem attack as "a personal dig or affront; specif,. the criticism of an adversary's character as opposed to the substance of the adversary's arguments." Ad hominem attack, Black's Law Dictionary (11th ed. 2019). By contrast, I understand a criticism to refer to analyzing or judging an opinion based on its merits or faults but not on those of its author.

5. **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: Neither the Sentencing Guidelines nor applicable Supreme Court or Ninth Circuit precedent has indicated that a specific principle is more important than another. Likewise, when I have imposed sentences on defendants in my courtroom, I do not simply look at one or two of the factors, but instead, I consider all of them when I do an individualized assessment as required by the 18 U.S.C. §3553(a) and applicable Supreme Court and Ninth Circuit precedent.

6. **In what situation(s) does qualified immunity not apply to a law enforcement officer in California?**

   Response: In *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), the Supreme Court held that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 7, citing *White v. Pauly*, 137 S. Ct. 548, 551(2017) (per curiam) (internal quotation marks omitted). The Court further elaborated that a "right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id*. citing *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (internal quotation marks omitted). Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 8.

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

   Response: I have had the great privilege of serving as a judge since 2018. In that capacity, I always approach each case with no preconceived notions, listen to the facts and arguments, and faithfully apply the law to the facts presented. I also work hard to ensure that I issue prompt, impartial, and fair decisions which are consistent with any binding precedent. If confirmed as a judge on the Ninth Circuit, I would continue to use this approach. I am not aware of a Supreme Court decision from the last 50 years that embodies this judicial philosophy.

**8. 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: I have had the great privilege of serving as a judge since 2018. In that capacity, I always approach each case with no preconceived notions, listen to the facts and arguments, and faithfully apply the law to the facts presented. I also work hard to ensure that I issue prompt, impartial, and fair decisions which are consistent with any binding precedent. If confirmed as a judge on the Ninth Circuit, I would continue to use this approach. I am not aware of a Ninth Circuit decision from the last 50 years that embodies this judicial philosophy.

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

Response: 18 U.S.C. § 1507, specifies that, "whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: In *Cox v. State of La*., 379 U.S. 559 (1965), the Supreme Court held that a Louisiana statute modeled on section 1507, was "on its face … a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id.* at 564.

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

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which require that a judge not make public comments on the merits of a matter pending or impending in any court. In light of the fact that the holding in this case is not likely to be relitigated, I can state that I believe the United States Supreme Court correctly decided it.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which require that a judge not make public comments on the merits of a matter pending or impending in any court. In light of the fact that the holding in this case is not likely to be relitigated, I can state that I believe the United States Supreme Court correctly decided it.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which require that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this case may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2242 (2022), the Supreme Court held that *Roe v. Wade* and *Planned Parenthood v. Casey* are overruled. The holding in *Dobbs* is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2242 (2022), the Supreme Court held that *Roe v. Wade* and *Planned Parenthood v. Casey* are overruled. The holding in *Dobbs* is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), is

binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *McDonald v. City of Chicago,* 561 U.S. 742 (2010), is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting federal district judge and circuit nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court Decision. The decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), is binding Supreme Court precedent and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to it and all applicable Supreme Court and Ninth Circuit precedent.

**12. 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.

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

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

Response: No.

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

Response: No.

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

Response: No.

14. **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.

15. **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.

16. **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.

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

    Response: On January 10, 2023, I received a telephone call from a counsel for Senator Padilla, inquiring about my interest in being considered for the Ninth Circuit Court of Appeals. On January 17, 2023, I interviewed with the chair of Senator Feinstein's Judicial Advisory Committee. On January 20, 2023, I interviewed with the Statewide Chair of Senator Padilla's Judicial Evaluation Committee. On February 6, 2023, I interviewed with attorneys from the White House Counsel's Office. Since February 6, 2023, I was in contact with officials from the Office of Legal Policy at the United States Department of Justice. On April 14, 2023, the President announced his intent to nominate me to serve on the Ninth Circuit Court of Appeals. Leading up to and after my hearing before the Senate Committee on the Judiciary on May 17, 2023, I was again in contact with officials from the Office of Legal Policy at the United States Department of Justice.

18. **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.

19. **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.

**20. 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.

**21. 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.

**22. 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.

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

Response: On January 10, 2023, I received a telephone call from a counsel for Senator Padilla, inquiring about my interest in being considered for the Ninth Circuit Court of Appeals. On January 17, 2023, I interviewed with the chair of Senator Feinstein's Judicial Advisory Committee. On January 20, 2023, I interviewed with the Statewide Chair of Senator Padilla's Judicial Evaluation Committee. On February 6, 2023, I interviewed with attorneys from the White House Counsel's Office. Since February 6, 2023, I was in contact with officials from the Office of Legal Policy at the United States Department of Justice. On April 14, 2023, the President announced his intent to nominate me to serve on the Ninth Circuit Court of Appeals. Leading up to and after my hearing before the Senate Committee on the Judiciary on May 17, 2023, I was again in contact with officials from the Office of Legal Policy at the United States Department of Justice.

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

Response: The Office of Legal Policy provided me these questions on May 24, 2023. I submitted draft responses to the Office of Legal Policy for feedback and finalized my answers for submission.

**Senator Feinstein**
**Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. **In 2022, you were confirmed to the Eastern District of California after serving as a state court judge on the California Superior Court for four years. In both of these judicial positions, you have managed very heavy caseloads involving a wide range of legal issues. Your colleagues on the bench have noted the effective transition you made to serving in both of those positions. In one letter to the Judiciary Committee, Judge Gary Orozco—who supervised you during your first two years on the state bench—noted in particular how your intellectual abilities and your strong work ethic were key to your successful transition to the bench.**

    a. **Please describe, in general terms, the volume and types of cases that you have presided over during your time as both a federal district judge and a state Superior Court judge.**

    Response: I have had the great privilege of serving the people of Fresno County as a superior court judge in a high-volume misdemeanor department and at the Juvenile Justice Center and the people of Eastern District of California as a district judge. As a superior court judge I handled a high-volume misdemeanor calendar where I routinely heard over 150 cases per day prior to the COVID pandemic. As part of that assignment, I heard motions to suppress, *Serna* motions, and *Pitchess* motions on a weekly basis. After two years in the misdemeanor department, and in light of the work I had done on the misdemeanor calendar, the Presiding Judge assigned me to work at the Juvenile Justice Center where I handled felony and misdemeanor bench trials, motions to suppress, and motions to transfer juveniles to adult court. As a federal district judge in the Eastern District of California, I inherited a docket, which at last count, had 1,156 cases. Since taking the federal bench, I have had jury trials on criminal and civil issues; imposed sentence on over 110 defendants and reviewed orders drafted by Magistrate and Bankruptcy judges. The Eastern District is one of the busiest districts in the country, serving almost eight million residents, encompassing six large urban areas, and extending over 87,000 square miles. The biggest lessons that I have learned from my work as a judge are the importance of a good judicial temperament, always being prepared, and being accessible. First, having a good judicial temperament is something that all judges should aspire to have as it really sets the tone for the courtroom and the way in which the litigants will perceive the judge and the entire legal process. Treating everyone who comes before me with respect and dignity, being patient and listening to litigants, and timely responding to requests are all things that have helped me be efficient and effective in my role in our system of justice. Second, whether it is being placed in an unfamiliar assignment, as was the case when I was placed in misdemeanors and at the Juvenile Justice Center, or in one that has over 1,100 pending cases, being prepared is

necessary to keep cases moving. My chambers staff and I are always on time, prepared, and ready to tackle whatever we have on our docket that day. We are also mindful of the fact that although it may be one of more than a thousand cases for us, for the parties it may well be the most important case of their lives. I have found that being accessible to the parties for quick conferences leading up to trials or major hearings is also productive and can help the parties narrow their differences and issues that need adjudicating.

**b. What do you believe contributed to your ability to quickly and successfully transition to both the state bench and the federal bench?**

Response: I firmly believe that as a judge, whether state or federal, my job is one of service to the litigants and community. As such, I am always on time, prepared, and respectful. I spend my time, including nights and weekends, thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding precedent. In short, I roll up my sleeves and do the work because I recognize what an honor it is to serve in this capacity and I work daily to continue to earn the privilege of sitting on the bench.

**c. How do you believe these experiences have prepared you to make a successful transition to the Ninth Circuit, if you are confirmed?**

Response: The volume of cases that I have been able to effectively handle in numerous subject areas is indicative of the fact that I am prepared to take on this new challenge. As a district judge, I regularly review orders drafted by Magistrate and Bankruptcy judges. This experience is central to the work that I would do if I were so fortunate as to be confirmed to the Ninth Circuit. Additionally, I would bring with me the same humility and dedication to the work that I brought with me to both the Fresno Superior Court and the Eastern District of California.

2. **This Committee received numerous letters of support for your nomination to the Ninth Circuit. Several of your former colleagues on the state bench highlighted your collegiality—an important trait for a judge on a federal appeals court who decides cases as part of a panel. These judges described you as "a supportive and invaluable colleague," someone who is "well liked and respected by all," and a "team player" who "makes friends easily." They also noted your deep commitment to "maintain[ing] civility even in difficult circumstances" and your "respect . . . towards the entire court family—from fellow judges, staff, and interpreters to custodial staff."**

**a. Please describe how you believe these skills would contribute to your success on the Ninth Circuit, if you are confirmed.**

Response: Unlike a district court where a federal judge and/or jury is the final decisionmaker, on a circuit court, decisions generally must be made either via a three-judge panel randomly selected by the Chief Judge or en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. The Ninth Circuit is the largest circuit

court in the United States with 29 sitting judges. Although most circuit courts hold en banc hearings with all judges in the court of appeals, due to its large number of judges, when the Ninth Circuit decides to order a hearing or rehearing en banc, only 11 randomly selected judges hear the case. Being a supportive colleague and someone who treats everyone with respect are important traits for someone seeking an appellate seat. I have a reputation as someone who is easy to get along with, someone who is hard working and willing to do the work, and someone who is respectful. These traits will make for a smooth transition to the Ninth Circuit if I am fortunate enough to be confirmed. Judges may not always agree on the outcome of a case, but it is of the utmost importance that we always maintain and demonstrate respect and civility.

**Senator Amy Klobuchar**
**Chair, Senate Judiciary Committee**
**Written Questions for Judge Ana Isabel de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**
**May 24, 2023**

**For Judge Ana de Alba, nominee to be United States Circuit Judge for the Ninth Circuit**

**Prior to your service on the U.S. District Court for the Eastern District of California you were a California Superior Court Judge in Fresno County. In these roles, you have presided over thirteen trials that went to verdict or judgment, as well as thousands of hearings in matters that were resolved before trial.**

- **How have your experiences on state and federal district courts prepared you to serve as a United States Circuit Judge on the Ninth Circuit?**

  Response: I have had the great privilege of serving the people of Fresno County as a superior court judge in a high-volume misdemeanor department and at the Juvenile Justice Center and the people of Eastern District of California as a district judge. As a superior court judge I handled a high-volume misdemeanor calendar where I routinely heard over 150 cases per day prior to the COVID pandemic. As part of that assignment, I heard motions to suppress, Serna motions, and Pitchess motions on a weekly basis. After two years in the misdemeanor department, and in light of the work I had done on the misdemeanor calendar, the Presiding Judge assigned me to work at the Juvenile Justice Center where I handled felony and misdemeanor bench trials, motions to suppress, and motions to transfer juveniles to adult court. As a federal district judge in the Eastern District of California, I inherited a docket, which at last count, had 1,156 cases. Since taking the federal bench, I have had jury trials on criminal and civil issues; imposed sentence on over 110 defendants and reviewed orders drafted by Magistrate and Bankruptcy judges. The Eastern District is one of the busiest districts in the country, serving almost eight million residents, encompassing six large urban areas, and extending over 87,000 square miles. The biggest lessons that I have learned from my work as a judge are the importance of a good judicial temperament, always being prepared, and being accessible. First, having a good judicial temperament is something that all judges should aspire to have as it really sets the tone for the courtroom and the way in which the litigants will perceive the judge and the entire legal process. Treating everyone who comes before me with respect and dignity, being patient and listening to litigants, and timely responding to requests are all things that have helped me be efficient and effective in my role in our system of justice. Second, whether it is being placed in an unfamiliar assignment, as was the case when I was placed in misdemeanors and at the Juvenile Justice Center, or in one that has over 1,100 pending cases, being prepared is necessary to keep cases moving. My chambers staff and I are always on time, prepared, and ready to

tackle whatever we have on our docket that day. We are also mindful of the fact that although it may be one of more than a thousand cases for us, for the parties it may well be the most important case of their lives. I have found that being accessible to the parties for quick conferences leading up to trials or major hearings is also productive and can help the parties narrow their differences and issues that need adjudicating.

**As a federal circuit court judge, you will be hearing and deciding cases as part of a panel.**

- **In your view, is there value to finding common ground—even if it is slightly narrower in scope—to get to a unanimous opinion on appellate courts?**

  Response: Yes, finding common ground to get to a unanimous opinion on an appellate court has an important function. Unlike a district court where a federal judge and/or jury is the final decisionmaker, on a circuit court, decisions generally must be made either via a three-judge panel randomly selected by the Chief Judge or en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. The Ninth Circuit is the largest circuit court in the United States with 29 sitting judges. Although most circuit courts hold en banc hearings with all judges in the court of appeals, due to its large number of judges, when the Ninth Circuit decides to order a hearing or rehearing en banc, only 11 randomly selected judges hear the case. Being a supportive colleague and someone who treats everyone with respect are important traits for someone seeking an appellate seat. I have a reputation as someone who is easy to get along with, someone who is hard working and willing to do the work, and someone who is respectful. These traits will make for a smooth transition to the Ninth Circuit if I am fortunate enough to be confirmed. Judges may not always agree on the outcome of a case, but it is of the utmost importance that we always maintain and demonstrate respect and civility.

**Senator Mike Lee**
**Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

1. **In U.S. v. Conrado Virgen-Mendoza, the defendant was accused of helping his brother evade police after he shot and killed Police Officer, Ronil Singh, during a routine traffic stop. The defendant, an illegal immigrant, was in removal proceedings. The district court initially refused to grant pre-trial release to the defendant, but later did grant release based, in part, on the condition of location monitoring. You seem to have found the location monitoring duplicative of a similar type of location monitoring required by Immigration and Customs Enforcement. However, the government's opposition motion clearly informed you that it was likely ICE would be removing ankle monitors from those awaiting immigration proceedings in the near future. You made the decision to remove the location monitoring without even holding a hearing.**

    a. **What impact did the government's disclosure of the imminent removal of the ICE monitor have on your decision?**

    Response: As a currently sitting federal district judge, the Code of Conduct for United States Judges limits what I can discuss about this case as Mr. Virgen-Mendoza has filed an appeal with the Ninth Circuit which has not yet been decided. As noted in Canon 3A(6), "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."

    However, I can say that in every matter before me, I consider the applicable statutory law, any applicable Ninth Circuit and Supreme Court precedent, the parties' arguments, the recommendations of the Probation department (if any), the entire record, and any other materials properly before me.

    As set out in the public docket,[1] in April 2019, another district judge ordered Mr. Virgen-Mendoza (the Defendant) released on conditions following the posting of a $25,000 bond. That district judge appointed a third party custodian for the Defendant and imposed various conditions requiring the Defendant to, among other things, report to Pretrial Services and comply with their rules and regulations, surrender his passport, reside at a location approved by Pretrial Services, and not move or be absent from his residence for more than 24 hours without prior approval of Pretrial Services, restrict his travel to the Eastern District of California unless approved in advance by

[1] *U.S. v. Virgen-Mendoza*, No. 1:19 CR 15-ADA-BAM (E.D. Cal. Feb. 9, 2023)

Pretrial Services, and participate in a location monitoring program supervised by Pretrial Services.[2] By the time the case reached me, nearly four years later, and more than three years after the Defendant entered a plea agreement with the Government, the Defendant filed a motion seeking modification of only the location monitoring condition of release. The Court promptly set a briefing schedule for the Government's response and the Defendant's reply and scheduled a hearing on the Defendant's motion.

The Defendant's motion required the Court to apply 18 U.S.C. §3142(c)(1)(B), under which a Court imposes "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." After reviewing the parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order that vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedent, and the entire record were insufficient for the Court to resolve the motion.[3]

In resolving the motion, the Court observed, among other things, that the "Defendant has continuously complied with his conditions of release for nearly four years and has not failed to appear in court." The Court also observed that during the four years under which the Defendant had been subject to the Court imposed release conditions, the Defendant had also been concurrently monitored by Immigration and Customs Enforcement (ICE). The Court considered each of the Defendant's and Government's arguments, including the argument that the ICE location monitor may be removed. As noted in this Court's order, "[e]ven if ICE was not monitoring Defendant, Defendant's continuous compliance with the release conditions for the past four years supports a change in conditions. The Court considers Defendant's reliance on *United States v. Hutchins*, 298 F.Supp.3d 1205 (E.D. Wis. 2017), in his original motion for bail review. (ECF No. 698 at 3.) There, the court held that '[w]hen defendants establish that they will abide by their obligation to appear in court, logic dictates that the justification for imposing the existing release condition lessens.' *Hutchins*, 298 F.Supp.3d at 1208. In other words, compliance with conditions of release over a long period of time supports that such defendant is less of a flight risk, requiring less restrictive conditions. For example, in this case, on August 6, 2019, both parties stipulated to lessen the restrictions imposed on Defendant's conditions of release. (*See* ECF No. 391.) In the stipulation and order, the Court changed

[2] *See* ECF Nos. 272 and 275. From April 10, 2019 through August 6, 2019, the Court also imposed home detention. However, on agreement of the Government and the Defendant, the Court modified Defendant's conditions of release, converting home detention to a curfew requiring Defendant to be home from 8:00 p.m. to 8:00 a.m. *See* ECF No. 391.

[3] *See* ECF No. 706.

Defendant's condition from home detention to curfew because he had been compliant with his release conditions for nearly four months, communicates with Pretrial Services, and provides appropriate documentation as directed. (*Id*. at 2.) The Court deemed the modification appropriate because it reflected Defendant's progress on pretrial release. (*Id*.) Nothing in the record suggests that Defendant may not be afforded another change in his conditions of release."

The Court did not alter any other condition of Defendant's release. Thus, except for location monitoring by Pretrial Services, the Defendant remains subject to Pretrial release conditions imposed in 2019, including, but not limited to, supervision by Pretrial Services, a twelve-hour curfew, a court appointed third party custodian, travel restrictions, and liability for a bond.

**b. Were you not concerned at all that a defendant, to whom the court had previously declined to grant release because he had little incentive to remain in the United States, would be left without any location monitoring whatsoever?**

Response: Please see response to question 1(a).

**2. Judge de Alba, you denied a motion to recuse yourself in Martinez-Sanchez v. Anthony Vineyards. Without taking a position on your decision not to recuse yourself in this particular case, I do find the some of the rhetoric you used to justify yourself revealing.**

**For example, you wrote, "Defendants' objections simply amount to a discomfort with the undersigned's lived and professional experience."**

**Would it violate the due process rights of a litigant to come before a judge who may be unduly biased by the "lived and professional experience" of the one deciding the case?**

Response: Yes. "Due process of law requires that the proceedings shall be fair." *Snyder v. Massachusetts*, 291 U.S. 97, 166 (1934).

**a. Should cases turn on the "lived and professional experience" of the judge hearing them? Should those experiences influence a judge's decision at all?**

Response: No.

**b. Is political ignorance a prerequisite for judicial impartiality and elevate naiveté over knowledge." I happen to agree with you on that. In my experience, what keeps someone with keen lived and professional experience in a particular social, cultural, or political ideology tied to the law is their judicial philosophy. How would you describe your judicial philosophy**

Response: I have had the great privilege of serving as a judge since 2018. In that capacity, I approach each case with no preconceived notions, listen to the facts and arguments, and faithfully apply the law to the facts presented. I also work hard to ensure that I issue prompt, impartial, and fair decisions which are consistent with any binding Supreme Court and Ninth Circuit precedent. If I am fortunate enough to be confirmed to the Ninth Circuit, I would continue to approach cases in this manner.

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

Response: I would look to see if the Supreme Court or the Ninth Circuit have issued binding precedent related to the interpretation of that statute. If not, I would then look at the language of the federal statute itself. If it is clear, then I would interpret it as it is stated. If the statute is ambiguous, I would look to any statutory definitions and canons of construction as well as any non-binding, but persuasive, precedent related to the provisions by other federal courts. If the statute's interpretation was still ambiguous, I would look to legislative history, but with Supreme Court's caution in *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546 (2005) that "[n]ot all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms." *Id*. at 568. The first is that "legislative history is itself often murky, ambiguous, and contradictory" and the second is that reliance on committee reports may give unrepresented committee members the incentive to manipulate legislative history since they are not subject to Article I. *Id*. Because of issues as noted above, the Supreme Court has treated Committee Reports on the bill as more probative than floor statements by individual legislatures. *Zuber v. Allen*, 396 U.S. 168, 186 (1969). I would follow their lead and do the same.

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

Response: I would first look to see if the Supreme Court or the Ninth Circuit have issued binding precedent related to the interpretation of that provision. If, as a circuit court judge, I were presented with a constitutional issue of first impression, I would look to the methods of interpretation the Supreme Court or Ninth Circuit have used that would be most analogous to the issue presented.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Originalism, Black's Law Dictionary (11th ed. 2019). Analyzing the original public meaning of a

constitutional provision is one method of interpretation that the Supreme Court has used. If, as a circuit court judge, I were presented with a constitutional issue of first impression, I would look to the methods of interpretation the Supreme Court or Ninth Circuit have evaluated that would be most analogous to the issue presented. If those courts used the original public meaning in the analogous decision, I would follow their lead.

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

   Response: In *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), the Supreme Court stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Id*. at 1738. If I am confirmed as a Circuit Court Judge, I would steadfastly adhere to any applicable precedent regarding this issue.

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

      Response: Please see responses to Question 4.

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

   Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 560-561.

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

   Response: Yes, in *M'Culloch v. State*, 17 U.S. 316 (1819), the Supreme Court held that "[e]ven without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted." *Id*. at 323-24. The Supreme Court further noted that "[i]f the end be legitimate, and within the scope of the constitution, all the means which are appropriate,

which are plainly adapted that end, and which are not prohibited, may constitutionally be employed to carry it into effect." *Id*.

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

   Response: I would first look to see if the Supreme Court or the Ninth Circuit have issued binding precedent related to the interpretation of that provision. Without more, the failure of the law to reference a specific Constitutional enumerated power is not dispositive. The Supreme Court noted that "[i]f the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted that end, and which are not prohibited, may constitutionally be employed to carry it into effect." *M'Culloch v. State*, 17 U.S. 316, 323-24 (1819). If I am confirmed as a Circuit Judge, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent regarding this issue.

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

   Response: The due process clause is found in the 5th and 14th amendments of the United States Constitution. The due process clause relates to the fairness of the procedure used to deprive a person of life, liberty, or property. The Supreme Court has held that the due process clause also protects against certain substantive fundamental rights and liberty interests regardless of the fairness of the procedure used to deprive that person of that liberty. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court noted that their analysis regarding substantive due process has two primary features. *Id*. at 720-21. First, the asserted right must be deeply rooted in the nation's history and tradition; and second, the asserted right must be carefully described and defined. Id. If the government seeks to infringe on a fundamental liberty interest, the infringement must be narrowly tailored to serve a compelling state interest. *Id*. at 721.

9. **What rights are protected under substantive due process?**

   Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court noted that "… in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278–279." *Id*. at 720.

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

Response: The Supreme Court distinguished these types of rights when it abrogated *Lochner v. New York* in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) by stating "[t]he guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.'" Id. at 392. To date, the right to abortion is still binding precedent under both *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). If I am confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable precedent.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995) the Supreme Court identified three categories of activity that Congress may regulate subject to the Commerce Clause. Id. at 558-59 citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-77 (1981). These include: (1) use of the channels of interstate commerce (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) activities that are substantially related to interstate commerce. Id. at 558-59. If regulation does not fit within any of the above three categories, the Supreme Court is likely to find that Congress has exceeded its authority under the Commerce Clause.

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

Response: Race, religion, national origin, and alienage are considered "suspect classes." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Specifically, the Supreme Court has defined a suspect class as having an "immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). It is also described as one "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." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

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

Response: The role of checks and balances and separation of powers is one of the main tenants of our Constitution's structure. As the Supreme Court noted in *Morrison v. Olson*, 487 U.S. 654, 693 (1988) "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" Id. at 693, quoting *Buckley v. Valeo*, 424 U.S. 1 (1976).

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

Response: I would look to the Ninth Circuit and Supreme Court to see if they had any relevant precedent related to whether the usurped authority was in excess of their power conferred by the Constitution. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable precedent that would guide this analysis.

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

Response: None.

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

Response: Both of these outcomes are undesirable and if I am fortunate enough to be confirmed to the Ninth Circuit, I would strive daily to try to avoid either outcome.

**17. 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 any trends in Supreme Court decisions so I am an unfamiliar with the issue presented in this question. As a general proposition, however, I believe that one downside to both aggressive and passive judicial review is that it begins to encroach on the separation of powers which is at the very core of our Constitution and system of government. Aggressive review may find that judges begin to encroach on the legislature's job of making law and passive review may mean that judges are not ensuring that laws do not violate the Constitution.

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

Response: In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court established judicial review finding that the judiciary is tasked with assessing whether executive or legislative action has violated the United States Constitution. My understanding of judicial supremacy is that it refers to the idea that the Supreme Court gets the final say on whether something is Constitutional. The only way that the Supreme Court's finding of Constitutionality may be changed is by Constitutional amendment or the Court overturning a prior decision.

19. **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: Legislatures and judges take an oath to be bound to uphold the United States Constitution pursuant to Article VI. The Supreme Court has also held that legislators are required to follow its decisions. See Cooper v. Aaron, 358 U.S. 1 (1958). Elected officials have an obligation to pass laws that do not violate the United States Constitution and judges have to serve as a check on that power.

20. **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: As a judge, it is of utmost importance to understand that one's personal views and values have no place in the courtroom. I have done that in my capacity as a Superior Court judge in Fresno County and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable precedent irrespective of any personal views I may have regarding the issues presented.

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

    Response: As a judge, it is of utmost importance to understand that one's personal views and values have no place in the courtroom. I have done that in my capacity as a Superior Court judge in Fresno County, a federal judge in the Eastern District of California and if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any

applicable Supreme Court and Ninth Circuit precedent irrespective of whether I believed that it "has questionable constitutional underpinnings." If there was no precedent on point, I would interpret the text in a manner consistent with the methods of interpretation the Supreme Court has used.

**22. 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: 18 U.S.C. §3553 governs what factors a federal judge is to look to when sentencing criminal defendant. As a district judge in California's Eastern District, I have done individualized assessments of every defendant applying the sentencing factors as well as any applicable Supreme Court and Ninth Circuit precedent on that issue in every sentence I have imposed.

**23. 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 unfamiliar with the Biden Administration's quote and I do not have a personal definition of equity. I have looked to Black's Law Dictionary which defines "equity" as "[f]airness; impartiality; evenhanded dealing." Equity, Black's Law Dictionary (11th ed. 2019). Any issues related to equity are important decisions that are best left to policymakers because if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable precedent irrespective of any personal views I may hold.

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

Response: As I do not have a personal definition of either, I have looked to Black's Law Dictionary which defines "equity" as "[f]airness; impartiality; evenhanded dealing," and "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Equity and Equality, Black's Law Dictionary (11th ed. 2019).

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

Response: I am unfamiliar with the Biden Administration's quote. Any issues related to equity are important decisions that are best left to policy makers because if I am fortunate

enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable precedent irrespective of any personal views I may hold.

**26. How do you define "systemic racism?"**

Response: I do not have a definition of "systemic racism." I believe that questions related to "systemic racism" are important issues for policymakers. If faced with a case where the question of whether a particular set of facts constituted discrimination on the basis of race in violation of the United States Constitution or federal or state laws, I would address that case as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding precedent.

**27. How do you define "critical race theory?"**

Response: Black's Law Dictionary defines "critical race theory" as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Critical Race Theory, Black's Law Dictionary (11th ed. 2019).

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

Response: I would note the definitions offered in response to Questions 27 and 28.

**Senator Cruz**
**Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

**Questions for the Record for Ana de Alba, nominated to be United States Circuit Judge for the Ninth Circuit**

## I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

## II. Questions

**At your May 17, 2023 nomination hearing, I asked you about the case of *United States v. Conrado Virgen-Mendoza*, in which the defendant—an illegal alien subject to deportation—assisted his brother evade law enforcement for several days after that brother shot and killed a police officer during a routine traffic stop. The defendant's role included: (1) concealing the truck that the killer was driving when he killed the officer; (2) helping dispose of the loaded firearm the killer used to murder the officer; (3) driving the killer through Stanislaus, San Joaquin, and Merced Counties to find a place to conceal him; and (4) lying to and delaying law enforcement efforts to locate the killer as he moved closer to Mexico.**

**By the defendant's own admission, he was a Mexican citizen, with close family members in Mexico, he was illegally in the United States, and he had been previously encountered and removed from the southern border. In short, he had every incentive to flee to Mexico rather than stay and face certain conviction.**

1. **Before granting the motion, did you hold a hearing? If not, why not?**

   Response: As a currently sitting federal district judge, the Code of Conduct for United States Judges limits what I can discuss about this case as Mr. Virgen-Mendoza has filed an appeal with the Ninth Circuit which has not yet been decided. As noted in Canon 3A(6), "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."

   However, I can say that in every matter before me, I consider the applicable statutory law, any applicable Ninth Circuit and Supreme Court precedent, the parties' arguments, the recommendations of the Probation department (if any), the entire record, and any other materials properly before me.

   As set out in the public docket,[1] in April 2019, another district judge ordered Mr. Virgen-Mendoza (the Defendant) released on conditions following the posting of a $25,000 bond. That district judge appointed a third party custodian for the Defendant and imposed various conditions requiring the Defendant to, among other things, report to Pretrial Services and comply with their rules and regulations, surrender his passport, reside at a location approved by Pretrial Services, and not move or be absent from his residence for more than 24 hours without prior approval of Pretrial Services, restrict his travel to the Eastern District of California unless approved in advance by Pretrial Services, and participate in a location

[1] U.S. v. Virgen-Mendoza, No. 1:19 CR 15-ADA-BAM (E.D. Cal. Feb. 9, 2023)

monitoring program supervised by Pretrial Services.[2] By the time the case reached me, nearly four years later, and more than three years after the Defendant entered a plea agreement with the Government, the Defendant filed a motion seeking modification of only the location monitoring condition of release. The Court promptly set a briefing schedule for the Government's response and the Defendant's reply and scheduled a hearing on the Defendant's motion.[3]

The Defendant's motion required the Court to apply 18 U.S.C. §3142(c)(1)(B), under which a Court imposes "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." After reviewing the parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order that vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedent, and the entire record were insufficient for the Court to resolve the motion.

In resolving the motion, the Court observed, among other things, that the "Defendant has continuously complied with his conditions of release for nearly four years and has not failed to appear in court." The Court also observed that during the four years under which the Defendant had been subject to the Court imposed release conditions, the Defendant had also been concurrently monitored by Immigration and Customs Enforcement (ICE). The Court considered each of the Defendant's and Government's arguments, including the argument that the ICE location monitor may be removed. As noted in this Court's order, "[e]ven if ICE was not monitoring Defendant, Defendant's continuous compliance with the release conditions for the past four years supports a change in conditions. The Court considers Defendant's reliance on *United States v. Hutchins*, 298 F.Supp.3d 1205 (E.D. Wis. 2017), in his original motion for bail review. (ECF No. 698 at 3.) There, the court held that '[w]hen defendants establish that they will abide by their obligation to appear in court, logic dictates that the justification for imposing the existing release condition lessens.' *Hutchins*, 298 F.Supp.3d at 1208. In other words, compliance with conditions of release over a long period of time supports that such defendant is less of a flight risk, requiring less restrictive conditions. For example, in this case, on August 6, 2019, both parties stipulated to lessen the restrictions imposed on Defendant's conditions of release. (*See* ECF No. 391.) In the stipulation and order, the Court changed Defendant's condition from home detention to curfew because he had been compliant with his release conditions for nearly four months, communicates with Pretrial Services, and provides appropriate documentation as directed.

[2] *See* ECF Nos. 272 and 275. From April 10, 2019 through August 6, 2019, the Court also imposed home detention. However, on agreement of the Government and the Defendant, the Court modified Defendant's conditions of release, converting home detention to a curfew requiring Defendant to be home from 8:00 p.m. to 8:00 a.m. *See* ECF No. 391.

[3] *See* ECF No. 706.

(*Id*. at 2.) The Court deemed the modification appropriate because it reflected Defendant's progress on pretrial release. (*Id*.) Nothing in the record suggests that Defendant may not be afforded another change in his conditions of release."

The Court did not alter any other condition of Defendant's release. Thus, except for location monitoring by Pretrial Services, the Defendant remains subject to Pretrial release conditions imposed in 2019, including, but not limited to, supervision by Pretrial Services, a twelve-hour curfew, a court appointed third party custodian, travel restrictions, and liability for a bond.

2. **At the May 17, 2023 nomination hearing, you stated that your decision to remove the defendant's ankle monitor was motivated, in part, by the fact that he already had an ICE monitor on his person as well. You also stated that you "doubted" that the defendant could return to Mexico after you ordered his pretrial ankle monitor removed because he would continue to have the ICE monitor on him.**

   **a. Were you aware at the time you entered your order removing the defendant's pretrial ankle monitor that ICE's monitoring contractor, BI Incorporated, was expected to remove ankle monitors as part of ICE's policy of "de-escalation?"**

   Response: Please see response to question 1.

   **b. Were you aware of these facts at the time you gave your May 17, 2023 sworn testimony to this Committee, where you stated that the defendant would retain an ICE ankle monitor even after you ordered his pretrial ankle monitor removed?**

   Response: Please see response to question 1.

   **c. If not, does knowing these facts change how you would have ruled in regard to removing the defendant's ankle monitor?**

   Response: Please see response to question 1. As a currently sitting federal district judge, the Code of Conduct for United States Judges limits what I can discuss about this case as Mr. Virgen-Mendoza has filed an appeal with the Ninth Circuit which has not yet been decided. As noted in Canon 3A(6), "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."

**d. Was removing the defendant's ankle monitor a mistake?**

Response: Please see answer to question 2(c) above.

3. **I ask the next question because Biden nominees appear to be of mixed mind on this: should convicted child molesters be able to live next to a day care center or elementary school?**

Response: California law imposes restrictions on where and how registered sex offenders can live. *See e.g. People v. Sup. Ct. (Cheek)*, 87 Cal.App.5th at *24 (Jan. 6, 2023) (observing that "section 6608.5f was to create zones of exclusion around schools to prevent sex offenders from living near where our children learn and play.")(internal quotation marks omitted). I am not aware of any Ninth Circuit case that has specifically considered section 6608.5f or similar legislation. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court or Ninth Circuit precedent.

**Senator Cotton**
**Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

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

   Response: No.

2. **In *U.S. v. Tanner Joel Hernandez-Fields*, a pedophile pled guilty to receipt and distribution of child pornography. Federal prosecutors requested a sentence of 97 months of incarceration, followed by a lifetime term of supervised release, noting that "[t]he nature of this material is extremely disturbing," including "images of toddlers" and "sadomasochistic conduct." The prosecution also noted that the defendant "acted on his sexual interest in children by sexually assaulting a minor." Despite the horrific nature of the crimes, you sentenced the defendant to 66 months in prison and 15 years of supervised release, far less than the government's requested sentence of 97 months in prison and a lifetime term of supervised release. In a different case, the Biden DOJ has recently requested a much lengthier sentence of 10 years in prison for a social media user who tweeted "vote for Hillary by text message." As a judge, how would you determine the appropriate sentence in a case where the Department of Justice seeks a lengthier sentence for someone who tweets a common election joke than for a pedophile who the government itself describes as an "extreme risk to minors"?**

   Response: Whenever I impose a sentence, I am obligated to do an individualized assessment that takes into account factors listed at 18 U.S.C. §3553 and all applicable Ninth Circuit and Supreme Court precedent. Where applicable, I review all pre-sentence reports the Probation Department authored and the parties' objections thereto (if any); the parties' respective sentencing memorandums and attachments thereto, letters of support for the defendant (if any), and victim impact statements (if any), and any other materials properly before me. In imposing a sentence in the Hernandez Fields case, I followed this process reviewing all materials before me including the probation department's memorandum recommending a sentence of 66 months. As it relates to the Biden DOJ request outlined in your question, I am not familiar with that case and as a currently sitting federal district judge and a circuit nominee, it would be inappropriate for me to comment on the DOJ's decision-making, especially as it relates to a pending case. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this case may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

3. **When you were on the board of the California Bar Foundation, the board discussed its recruitment priorities for new board members. According to the meeting minutes, "The Board agreed" that "gender, racial and ethnic diversity" were "overarching recruitment priorities," ahead of more practical concerns like "technical expertise," "legal practice," and "fundraising." When you are hiring law clerks, do you treat an applicant's skin color as more important than their "technical expertise" and legal skills?**

   Response: I served on the board of California Bar Foundation nearly ten years ago from 2013-2014. I am not familiar with the policy cited in your question. In any event, the Foundation's recruitment priorities for new board members have nothing to do with my process for hiring law clerks. When hiring clerks, I follow all applicable laws and human resources policies of the federal court and I do not treat an applicant's skin color as more important than their technical expertise and legal skills.

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

   Response: As a currently sitting federal district judge and a circuit nominee, it would be inappropriate for me to comment on the correctness of any Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this case may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

   Response: In *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Supreme Court held that the right to bear arms is an individual right and in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), held that this right applies to the states.

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

   Response: Yes. In *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court held that courts must analyze the Second Amendment's scope through the lens of history and tradition without regard to means-end scrutiny. *Id.* at 2128; *see also Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."). The Court then articulated the proper method by which to assess the constitutionality of laws burdening the Second Amendment. First, determine whether the plain text of the Second Amendment governs the regulated conduct. If it does, then the Constitution presumptively protects the conduct, requiring the government to justify the law "by demonstrating that it is consistent with the Nation's historical tradition

of firearm regulation." *Id.* at 2126. The framework articulated in *Bruen* overturned the Ninth Circuit's precedent in *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

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

   Response: Under the *Bruen* framework, if the plain text of the Second Amendment protects the conduct being regulated, the government bears the burden to show that the prohibition at issue is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. As stated by the Supreme Court, this inquiry will be straightforward in some cases while in others it "will often involve reasoning by analogy." *Id.* at 2131. The Supreme Court explained that the inquiry for analogies is not intended to impose a "regulatory straitjacket," but rather, it requires "that the government identify a well-established and representative historical analogue." *Id.* at 2133. In determining whether the regulation at issue and the historical regulation are "relevantly similar" courts should consider "at least two metrics: how and why the regulation burden a law-abiding citizen's right to armed self-defense." *Id*.

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

   Response: Yes.

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

   Response: Yes, there are many reasons why finality and predictability are important factors in criminal sentencing. Among other things there are numerous financial costs, including those born by the government, involved in having to relitigate a sentence. Finality and predictability are also essential to crime victims who benefit from the courts having provided an ultimate resolution.

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

    Response: As a sitting federal district judge and a circuit nominee, it would be inappropriate for me to comment on this question because cases regarding immigration laws may come before me. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly

applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: The Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

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

Response: Please see my response to question 11. As a sitting federal district judge and circuit nominee, it would be inappropriate for me to comment additionally on this question because cases regarding birthright citizenship may come before me. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: A host of federal immigration laws prohibit individuals from concealing, shielding or harboring individuals who come into or remain in the United States without authorization. *See e.g*. 8 U.S.C. §1324. As a sitting federal district judge and circuit nominee, it would be inappropriate for me to comment additionally on this question because cases regarding the application of federal immigration laws may come before me. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: A host of federal immigration laws prohibit individuals from concealing, shielding or harboring individuals who come into or remain in the United States without authorization. *See e.g*. 8 U.S.C. §1324. As a sitting federal district judge and circuit nominee, it would be inappropriate for me to comment additionally on this question because cases regarding the application of federal immigration laws may come before me. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues,

listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

**15. Please describe what you believe to be the Supreme Court's holding in *Twitter, Inc. v. Taamneh*, 598 U.S. ____ (2023).**

Response: In *Twitter, Inc. v. Taamneh*, 2023 U.S. LEXIS 2060 (2023) the Supreme Court held that "plaintiffs' allegations that these social-media companies aided and abetted ISIS in its terrorist attack on the Reina nightclub fail to state a claim under 18 U.S.C. §2333(d)(2)." *Id.* at *2.

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

Response: In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court held that the major questions doctrine requires the government to point to "clear congressional authorization" to devise carbon emission caps based on a generation shifting approach in Section 111 of the Clean Air Act. In his concurrence, Justice Gorsuch, with whom Justice Alito joins, states that administrative agencies must be able to point to "'clear congressional authorization'" when they claim the power to make decisions of vast "'economic and political significance,'" under the major questions doctrine. *Id.* at 2616.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court held that the United States Constitution does not confer a right to an abortion, and instead, the authority to regulate abortion must be returned to the people and their elected representatives.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) the Supreme Court granted plaintiff's application for preliminary injunction on whether California's restrictions on religious gatherings passed constitutional muster. The Ninth Circuit's failure to grant an injunction was erroneous because the Supreme Court had previously made it clear that any government regulation is not considered neutral and generally applicable if it treats a comparable secular activity more favorably than a religious one. *Id.* at 1296. As the law in question in *Tandon* was neither neutral nor generally applicable, it triggered strict scrutiny

analysis. *Id.* Additionally, to determine whether activities are "comparable" for this purpose, the Supreme Court held that they must be judged "against the asserted government interest that justifies the regulation at issue." *Id.* Finally, it is the government who bears the burden to establish that the challenged law satisfies strict scrutiny. *Id.*

**19. Please describe what you believe to be the Ninth Circuit's holding in *United States v. Carrillo-Lopez*, No. 21-10233, 2023 WL 3587596 (9th Cir. May 22, 2023).**

Response: The issue before the Ninth Circuit in *United States v. Carrillo-Lopez*, was whether 8 U.S.C. § 1326 violates the equal protection guarantee of the Fifth Amendment and is therefore, facially invalid. *United States v. Carrillo-Lopez*, 2022 U.S. App. LEXIS 37729, *1. In holding in favor of the United States, the Ninth Circuit held that "Carrillo-Lopez did not carry his burden of proving that § 1326 was enacted with the intent to be discriminatory towards Mexicans and other Central and South Americans." *Id.*

**20. Please describe what you believe to be the Ninth Circuit's holding in *Keene v. City & Cnty. of San Francisco*, No. 22-16567, 2023 WL 3451687 (9th Cir. May 15, 2023).**

Response: In *Keene v. City & Cnty. of San Francisco*, 2023 U.S. App. LEXIS 11807 (9th Cir. May 15, 2023), the Ninth Circuit reversed and remanded a district court order denying preliminary injunctive relief to Plaintiffs who alleged they were improperly denied religious exemptions to a COVID-19 vaccination requirement. The Ninth Circuit found that the district court: (1) made a factual error regarding whether the vaccine contained fetal cells (*Id.* at *4); (2) wrongly interpreted Title VII to require that a religious belief be consistent or rational to be accepted (*Id.* at *5); (3) wrongly interpreted Appellants' "loss of employment" as not constituting irreparable harm, when the Ninth Circuit considers it Appellants' losing an opportunity at their "chosen profession," which can be irreparable (*Id.* at *6); and (4) failed to properly balance the equities and evaluate the public interest (*Id.* at *7).

**21. Please describe your understanding of the notice requirements imposed on the Internal Revenue Service under 26 U.S.C. § 7609 in light of the Supreme Court's recent ruling in *Polselli v. IRS*, 598 U.S. _____ (2023).**

Response: At issue in *Polselli* was "whether the exception to the notice requirement in §7609(c)(2)(D)(i) applies only where a delinquent taxpayer has a legal interest in accounts or records summoned by the IRS under §7602(a)." *Polselli v. IRS,* 2023 LEXIS 2056, *10 (2023). There the Supreme Court held that a "straightforward reading of the statutory text supplies a ready answer: The notice exception does not contain such a limitation." *Id.*

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

Response: The Investment Advisers Act of 1940 states that an investment adviser is a fiduciary who owes to its client a duty of care and a duty of loyalty. *Sec. & Exch. Comm'n v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963). As fiduciaries, investment advisors have an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." *Id.* If faced with a case concerning the fiduciary duties owed by investment firms to their investors, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: 21 U.S.C. §903 of the Controlled Substances Act states that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has stated that the attorney-client privilege "is one of the oldest recognized privileges for confidential communications.' *Swidler & Berlin v. United States,* 524 U.S. 399, 403 (1998). By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). However, there are recognized exceptions to the attorney client privilege. These include the crime fraud exception, which does not extend the privilege to communications made for the "purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554 (1989). Additionally, the testamentary exception does not allow for attorney-client privilege when a communication is relevant to an issue between parties regarding a claim for the same deceased client. The rationale for such disclosure is that it furthers the client's intent. *Swidler & Berlin*, 524 U.S. 399 at 403. If faced with an issue raising the attorney-client privilege, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts

presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that executive privilege derives from the constitutional separation of powers and from the idea that to make judgments and reach decisions, a President must be able to discuss issues candidly with his or her advisors without fear that such discussions will be made public. *United States v. Nixon*, 418 U.S. 683, 711 (1974); *see also, Trump, et al. v. Mazars USA, LLP et al*. 140 S. Ct. 2019 (2020). If faced with a case raising the President's executive privilege, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

**26. Please describe your understanding of the doctrine of "fair use" in light of the Supreme Court's recent holding in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. ____ (2023**).

Response: The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* 2023 U.S. LEXIS 2061, *26. The fair use provision, in turn, "set[s] forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances." *Id*. In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 2023 U.S. LEXIS 2061, *15, the issue before the Supreme Court was "whether the first fair use factor, 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,' §107(1), weighs in favor of [Andy Warhol Foundation]'s recent commercial licensing to Condé Nast." *Id.* The Court held that that it did not constitute fair use. *Id.*

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

Response: 18 U.S.C. § 1951 defines a Hobbs Act Robbery as one where "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." In *United States v. Taylor*, 142 S. Ct. 2015, 2017 (2022), the Supreme Court held that because a guilty finding under the Hobbs Act does not require the government to prove--as an element of its case--the use, attempted use, or threatened use of force, it is not a crime of violence under §924(c)(3)(A). If faced with such

a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: Generally, all court orders should be enforced. As a sitting federal district judge and circuit nominee, it would be inappropriate for me to comment additionally on this question because cases regarding immigration laws may come before me. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: The Federal Arbitration Act is described as "embod[ying] [a] national policy favoring arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, (2006). The FAA is considered "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Hall Street Assocs*. *LLC v. Mattel, Inc.*, 552 U.S., 576, 581 (2008). Likewise, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-346 (2011), the Supreme Court once again reiterated the federal policy favoring arbitration agreements. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), the Supreme Court held that the First Amendment's Free Speech and Free Exercise clauses prohibit the government from punishing an individual engaging in a personal religious observance. If faced with such a case, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

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

Response: In *Torres v. Texas Dept. of Public Safety*, 142 S. Ct. 2455 (2022), the Supreme Court held that states may not raise sovereign immunity as a legal defense to impede suits

brought against them under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C.S. § 4301 et seq. *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. at 2457. The Court reasoned that by ratifying the Constitution, the states had agreed to limited abrogation of sovereign immunity with respect to the national power to raise and support the armed forces.

**32. Do parents with custody of their minor children have a right to know what names and pronouns school officials use to refer to said children when at school?**

Response: I am not familiar with any Supreme Court or Ninth Circuit precedent resolving this question. As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment additionally on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

**33. Please describe your understanding of the application of obscenity laws to lewd and obscene materials available to children at public schools and libraries.**

Response: In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court upheld the constitutionality of a New York criminal statute that prohibited the sale to minors of material that was obscene even if the same material would not be considered obscene to adults. *Id.* at *636. In so holding, the Supreme Court noted that "[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." *Id.* If faced with a case raising questions about obscenity laws, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

**34. Please describe your understanding of the application of obscenity laws to lewd or indecent performances targeted toward children in publicly-funded places such as public libraries.**

Response: In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court upheld the constitutionality of a New York criminal statute that prohibited the sale to minors of material that was obscene even if the same material would not be considered obscene to adults. *Id.* at *636. In so holding, the Supreme Court noted that "[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." *Id.* If faced with a case raising questions about obscenity laws, I would address it as I do all other cases before me by thoroughly researching the issues, listening to the arguments and facts presented, and strictly applying the law to the facts consistent with any binding Supreme Court and Ninth Circuit precedent.

**35. Do federal law enforcement officials have a legal duty to report alleged "disinformation" to social media providers with the intent of having the content removed or the content provider banned from the platform?**

Response: I am not familiar with any Supreme Court or Ninth Circuit precedent resolving this question. As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court or Ninth Circuit precedent.

**36. If a federal law enforcement official reports to a social media platform lawful conduct that allegedly violates private terms of service with the intent of having the individual removed from the social media platform or otherwise subjected to adverse action, does the social media platform act as a state actor for purposes of that complaint? How would you analyze such a question under the law?**

Response: I am not familiar with any Supreme Court or Ninth Circuit precedent resolving this question. As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by

the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court or Ninth Circuit precedent.

**37. Does it violate the United States Constitution for a state government to impose penalties on employers for employing illegal aliens in violation of state and federal law?**

Response: Employers are subject to civil and criminal liability if they employ undocumented workers knowing of their undocumented status. The term "knowing" includes constructive knowledge. 8 U.S.C. § 1324a(a)(1),(2); 8 C.F.R. §274a.1(l). Congress enacted the Immigration Reform and Control Act of 1986 which prohibited the employment of illegal aliens in the United States. § 101(a)(1), 100 Stat. 3360, 8 U.S.C. § 1324a. IRCA created an "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3). "To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1)." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-149 (2002). As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court or Ninth Circuit precedent.

**38. Does the United States Constitution allow universities to hold separate graduation ceremonies for graduates based on their skin color?**

Response: The 14th Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment additionally on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter

pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

**39. Based on your understanding of the law, what are the reciprocal duties and obligations of United States citizenship?**

Response: In *Trop v. Dulles*, 356 U.S. 86 (1958) the Supreme Court noted that "[t]he duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country." *Id.* at 92.

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

Response: The Office of Legal Policy provided me these questions on May 24, 2023. I submitted draft responses to the Office of Legal Policy for feedback and finalized my answers for submission.

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

Response: No, please see answer to question 40.

**Senator Tillis**
**Senate Judiciary Committee**
**Written Questions for Ana de Alba**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

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: My understanding of judicial activism is that it is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial Activism, *Black's Law Dictionary* (11th ed. 2019). I do not consider judicial activism appropriate because a judge's personal views and values have no place in the courtroom. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent irrespective of any personal views I may have regarding the issues presented.

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

   Response: Impartiality is an expectation.

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

   Response: No, a judge's personal views and values have no place in the courtroom. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent irrespective of any personal views I may have regarding the issues presented.

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

   Response: Yes, there will be times when applying a particular law may be undesirable given a judge's personal views and values. As a judge, I know that my personal views and values have no place in the courtroom as they have had no place in my courtroom as a Fresno County Superior Court judge for the last three and a half years. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent irrespective of any personal views I may have regarding the issues presented.

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

Response: No.

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

Response: I would scrupulously apply binding Supreme Court and Ninth Circuit precedent. Under the *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen* framework, if the plain text of the Second Amendment protects the conduct being regulated, the government bears the burden to show that the prohibition at issue is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. This inquiry will be straightforward in some cases while in others it "will often involve reasoning by analogy." *Id.* at 2131. The Supreme Court explained that the inquiry for analogies is not intended to impose a "regulatory straitjacket," but rather, it "requires only that the government identify a well-established and representative *historical analogue, not a historical twin*." *Id.* at 2133 (emphasis added). In determining whether the regulation at issue and the historical regulation are "relevantly similar" courts should consider "at least two metrics: how and why the regulation burden a law-abiding citizen's right to armed self-defense." *Id*.

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

Response: As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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: In *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), the Supreme Court held that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 7, citing *White v. Pauly*, 137 S. Ct. 548, 551(2017) (per curiam) (internal quotation marks omitted). The Court further elaborated that a "right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* citing *Mullenix v. Luna,* 577 U.S. 7, 11 (2015) (per curiam) (internal quotation marks omitted). Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 8. If I am fortunate

enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable 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 currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

Response: Any issues related to the proper scope of qualified immunity protections are important decisions that are best left to policymakers because if I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent irrespective of any personal views I may hold.

**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: Issues involving intellectual property and our patent systems are very important. In my 11 years as a practicing lawyer and four and a half years on the bench, I have not had occasion to handle intellectual property cases, but if confirmed to the Ninth Circuit, I can assure you that I would take these cases and the importance of getting up to speed on these issues very seriously. I would also rigorously follow Supreme Court precedent regardless of my views whether the precedent provided sufficient clarity.

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

Response: As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me

to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

**a. What experience do you have with copyright law?**

Response: In my nearly 11 years of practice and four and a half years on the bench, I have not had experience with copyright law. If I am fortunate enough to be confirmed to the Ninth Circuit, I would do the necessary research to get up to speed and would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

Response: In my nearly 11 years of practice and four and a half years on the bench, I have not had experience involving the Digital Millennium Copyright Act. If I am fortunate enough to be confirmed to the Ninth Circuit, I would do the necessary research to get up to speed and would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

Response: In my nearly 11 years of practice and four and a half years on the bench, I have not had experience with intermediary liability for online service providers. If I am fortunate enough to be confirmed to the Ninth Circuit, I would do the necessary research to get up to speed and would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

Response: In my nearly 11 years of practice and four and a half years on the bench, I have not had experience addressing free speech and intellectual property issues including copyright. If I am fortunate enough to be confirmed to the Ninth Circuit, I would do the necessary research to get up to speed and would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

**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 recently reported 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 the legislative text is unclear and there is no controlling Supreme Court or Ninth Circuit precedent, I would look to legislative history, but with Supreme Court's caution in *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546 (2005) that "[n]ot all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms." *Id*. at 568. The first is that "legislative history is itself often murky, ambiguous, and contradictory" and the second is that reliance on committee reports may give unrepresented committee members the incentive to manipulate legislative history since they are not subject to Article I. *Id.* Because of issues as noted above, the Supreme Court has treated Committee Reports on the bill as more probative than floor statements by individual legislatures. *Zuber v. Allen,* 396 U.S. 168, 186 (1969). I would follow their lead and do the same.

**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: As noted by the Supreme Court in *Christensen v. Harris Cty*., 529 U.S. 576 (2000), interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines do not warrant *Chevron*-style deference and are instead, "entitled to respect," but only to the extent that they have the "power to persuade." *Id*. at 587 citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Deference does apply to an agency interpretation contained in a regulation, but only when the regulation's language is ambiguous." *Id*. at 588 citing *Auer v. Robbins*, 519 U.S. 452 (1997).

**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 currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to comment on this hypothetical legal scenario. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this hypothetical may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

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

    Response: Judges should steadfastly adhere to any applicable Supreme Court and appropriate circuit court precedent.

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

    Response: Judges should steadfastly adhere to any applicable Supreme Court and appropriate circuit court precedent.

17. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

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

    Response: I am not familiar with this issue and since California's Eastern District does not have a single-judge division, it is not one to which I would be exposed.

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

Response: If I am confirmed to the Ninth Circuit, I would faithfully apply all Supreme Court precedent regarding issues of venue and would also adhere to any local circuit rules regarding the assignment of matters.

**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: Canon 2(A) of the Code of Conduct for United States Judges requires a federal judge to "respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." If a judge is engaging in "forum selling" then that may erode public confidence in the integrity and impartiality of the judiciary.

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

Response: If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court precedent as well as all applicable Code of Conduct for United States Judges.

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

Response: As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to opine on this issue. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a currently sitting federal district judge and as a circuit nominee, it would be inappropriate for me to opine on this issue. If I am fortunate enough to be confirmed to the Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent.

**20. Do you believe that sanctuary cities are a danger to public safety? If not, can you please explain why not.**

Response: Any issues related to the safety or dangerousness of cities are important decisions that are best left to policymakers to decide. If I am fortunate enough to be confirmed to the

Ninth Circuit, I would steadfastly adhere to any applicable Supreme Court and Ninth Circuit precedent irrespective of any personal views I may hold.

**21. Can you please explain to me your reasoning in *U.S. v. Conrado Virgen-Mendoza*? What led you to believe that an accomplice to the slaughter of a law enforcement officer should not be under electronic monitoring by the U.S. Department of Justice?**

Response: As a currently sitting federal district judge, the Code of Conduct for United States Judges limits what I can discuss about this case as Mr. Virgen-Mendoza has filed an appeal with the Ninth Circuit which has not yet been decided. As noted in Canon 3A(6), "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."

However, I can say that in every matter before me, I consider the applicable statutory law, any applicable Ninth Circuit and Supreme Court precedent, the parties' arguments, the recommendations of the Probation department (if any), the entire record, and any other materials properly before me.

As set out in the public docket,[1] in April 2019, another district judge ordered Mr. Virgen-Mendoza (the Defendant) released on conditions following the posting of a $25,000 bond. That district judge appointed a third party custodian for the Defendant and imposed various conditions requiring the Defendant to, among other things, report to Pretrial Services and comply with their rules and regulations, surrender his passport, reside at a location approved by Pretrial Services, and not move or be absent from his residence for more than 24 hours without prior approval of Pretrial Services, restrict his travel to the Eastern District of California unless approved in advance by Pretrial Services, and participate in a location monitoring program supervised by Pretrial Services.[2] By the time the case reached me, nearly four years later, and more than three years after the Defendant entered a plea agreement with the Government, the Defendant filed a motion seeking modification of only the location monitoring condition of release. The Court promptly set a briefing schedule for the Government's response and the Defendant's reply and scheduled a hearing on the Defendant's motion.[3]

The Defendant's motion required the Court to apply 18 U.S.C. §3142(c)(1)(B), under which a Court imposes "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." After reviewing the

[1] *U.S. v. Virgen-Mendoza*, No. 1:19 CR 15-ADA-BAM (E.D. Cal. Feb. 9, 2023)
[2] *See* ECF Nos. 272 and 275. From April 10, 2019 through August 6, 2019, the Court also imposed home detention. However, on agreement of the Government and the Defendant, the Court modified Defendant's conditions of release, converting home detention to a curfew requiring Defendant to be home from 8:00 p.m. to 8:00 a.m. *See* ECF No. 391.
[3] *See* ECF No. 706.

parties' detailed written filings, the applicable statutes, relevant precedents, and the entire record, the Court issued its order that vacated the previously noticed hearing date. Following the issuance of the Court's order, neither the Government nor Defendant sought reconsideration and neither asserted that the parties' detailed written filings, the applicable statutes, the relevant precedent, and the entire record were insufficient for the Court to resolve the motion.

In resolving the motion, the Court observed, among other things, that the "Defendant has continuously complied with his conditions of release for nearly four years and has not failed to appear in court." The Court also observed that during the four years under which the Defendant had been subject to the Court imposed release conditions, the Defendant had also been concurrently monitored by Immigration and Customs Enforcement (ICE). The Court considered each of the Defendant's and Government's arguments, including the argument that the ICE location monitor may be removed. As noted in this Court's order, "[e]ven if ICE was not monitoring Defendant, Defendant's continuous compliance with the release conditions for the past four years supports a change in conditions. The Court considers Defendant's reliance on *United States v. Hutchins*, 298 F.Supp.3d 1205 (E.D. Wis. 2017), in his original motion for bail review. (ECF No. 698 at 3.) There, the court held that '[w]hen defendants establish that they will abide by their obligation to appear in court, logic dictates that the justification for imposing the existing release condition lessens.' *Hutchins*, 298 F.Supp.3d at 1208. In other words, compliance with conditions of release over a long period of time supports that such defendant is less of a flight risk, requiring less restrictive conditions. For example, in this case, on August 6, 2019, both parties stipulated to lessen the restrictions imposed on Defendant's conditions of release. (*See* ECF No. 391.) In the stipulation and order, the Court changed Defendant's condition from home detention to curfew because he had been compliant with his release conditions for nearly four months, communicates with Pretrial Services, and provides appropriate documentation as directed. (*Id*. at 2.) The Court deemed the modification appropriate because it reflected Defendant's progress on pretrial release. (*Id*.) Nothing in the record suggests that Defendant may not be afforded another change in his conditions of release."

The Court did not alter any other condition of Defendant's release. Thus, except for location monitoring by Pretrial Services, the Defendant remains subject to Pretrial release conditions imposed in 2019, including, but not limited to, supervision by Pretrial Services, a twelve-hour curfew, a court appointed third party custodian, travel restrictions, and liability for a bond.

**22. Why did you think only U.S. Immigration and Customs Enforcement (ICE) monitoring was sufficient by itself? Doesn't the Pretrial Services Office have more tools at its disposal to monitor defendants?**

Response: Please see answer to question 21 above.

**23. Did you consider the risk that the defendant might be released by ICE, due to California's status as a sanctuary state?**

Response: Please see answer to question 21 above.

**24. Did you take any actions to ensure that ICE would be able to properly monitor the defendant despite the lower level of monitoring?**

Response: Please see answer to question 21 above.