Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Kirk Sheriff
Nominee to be United States District Judge for the Eastern District of California

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

   Response: I disagree with this statement. Judges are obligated to faithfully apply the law to the facts, follow all binding precedents, and set aside any personal beliefs in deciding cases. If confirmed, I would faithfully apply the law to the facts in cases before me and faithfully follow binding Supreme Court and Ninth Circuit precedent.

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

   Response: I am not familiar with this statement, and I disagree with such an approach. Judges are obligated to faithfully follow binding precedent. If I were fortunate to become a judge, I would be bound by and would faithfully apply binding Supreme Court and Ninth Circuit precedent.

3. **Since 2019 you have been a member of the American Civil Liberties Union ("ACLU") of Southern California, an organization that relentlessly attacks law enforcement and advocates for radical policies that are outside of the American mainstream.**

   a. **On October 22, 2023 the ACLU of Southern California re-posted on X that "the right to transfer to women's prison" gives "incarcerated trans women hope of safety and dignity," and lamented that transgender women are "falsely cast as 'predators' and disproportionately punished." Do these statements reflect your views? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "yes."**

      Response: No. The small contributions I made to the ACLU of Southern California do not mean that each of its statements reflect any personal views I may hold. I am not familiar with this statement or its context, and I do not have any expertise on these issues, nor have I considered them. Cases related to such matters are also currently pending or impending in the courts. As a judicial nominee, I am precluded from offering an opinion on matters that may come

before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply the law to the facts in any matter that comes before me and will faithfully follow binding Supreme Court and Ninth Circuit precedent.

b. **On August 24, 2023, the ACLU of Southern California posted on X: "Repeat after us: police do not keep us safe." Does this statement reflect your views? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "yes."**

Response: No. The small contributions I made to the ACLU of Southern California do not mean that each of its statements reflect any personal views I may hold. I am not familiar with this statement or its context. Over my years in public service, I have worked with officers whose efforts to keep the community safe were recognized in the community. Cases related to police conduct also frequently come before the courts. As a judicial nominee, I am precluded from offering an opinion on matters that may come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply the law to the facts of any matter that comes before me and will faithfully follow binding Supreme Court and Ninth Circuit precedent.

c. **The ACLU of Southern California provided door hangers, posters, and coloring sheets on its website which say, "Know your Rights" and "This is our community. We know our rights. We do not consent. ICE is not welcome here." Do these statements reflect your views? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "yes."**

Response: No. The small contributions I made to the ACLU of Southern California do not mean that each of its statements reflect any personal views I may hold. I am not familiar with this statement or its context. I recognize that ICE carries out a public safety function under federal law and has the responsibility to enforce this nation's immigration laws. Cases involving ICE also frequently come before the courts. As a judicial nominee, I am precluded from offering an opinion on matters that may come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply the law to the facts of any matter that comes before me and will faithfully follow binding Supreme Court and Ninth Circuit precedent.

4. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes, if I became aware of an applicant's public endorsement of or praise for a designated Foreign Terrorist Organization that would be disqualifying for me.

5. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes, if I became aware of an applicant's public support for or endorsement of the October 7, 2023 terrorist attack by Hamas, that would be disqualifying for me.

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

   Response: Under 28 U.S.C. § 2255, a prisoner in custody under sentence of a federal court may challenge the sentence on four grounds: (1) that the sentence was imposed in violation of the Constitution or laws of the United States, (2) that the court was without jurisdiction to impose the sentence, (3) that the sentence was in excess of the maximum authorized by law, or (4) that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A section 2255 motion is subject to a one-year period of limitations. 28 U.S.C. § 2255(f). Section 2255 motions alleging violations of federal statutory law, as opposed to a constitutional or jurisdictional error, are generally cognizable only if they involve a "fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974). A federal prisoner is barred from bringing a second or successive section 2255 motion unless the new motion is based on either (1) newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the underlying offense, or (2) a new rule of constitutional law, made retroactive by the Supreme Court to cases on collateral review, that was previously unavailable. *See Jones v. Hendrix*, 599 U.S. 465, 476 (2023); 28 U.S.C. § 2255(h).

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

   Response: In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023), the Court held that Harvard College and the University of North Carolina violated Title VI of the Civil Rights Act and the 14th Amendment's Equal Protection Clause by their use of race in the college admissions process. The standards of the Equal Protection Clause applied to Harvard through Title VI of the Civil Rights Act (as a private institution receiving federal funds). *Id.* at 198 n.2. The Court found that Students for Fair Admissions had standing to sue on behalf of its members. The Court then found that the universities' college admissions processes did not pass strict scrutiny, including because they lacked sufficiently focused and measurable objectives warranting the use of race and failed to comply with "the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *Id.* at 218.

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

   Response: Yes.

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

   Response: At the U.S. Attorney's Office, I have participated in reviewing applications and interviewing candidates for AUSA and staff positions and made recommendations to the U.S. Attorney and other senior leadership concerning hiring decisions. As an associate in private practice, I participated in interviews of applicants for associate positions.

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

   Response: No.

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

    Response: No.

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

    Response: No, not to my knowledge.

    If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

    Not applicable.

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

    Response: Yes. Government classifications on the basis of race are subject to strict scrutiny. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023); *Mitchell v. Washington*, 818 F.3d 436, 444 (9th Cir. 2016).

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

    Response: The Supreme Court held in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), that the First Amendment's Free Speech Clause prohibited the State of Colorado from compelling a website designer to create speech with which she disagreed, consisting of an original, customized wedding website endorsing a same-sex wedding. The First Amendment did not permit the government "to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." *Id.* at 602–03.

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

    Is this a correct statement of the law?

    Response: Yes. The Supreme Court has continued to cite approvingly to this statement from *Barnette*. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2463

(2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). *Barnette* remains binding precedent.

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

Response: I would follow and apply the Supreme Court's decisions, including *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61 (2022), and Ninth Circuit precedent. Under the First Amendment, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. A law is facially content based, regardless of the government's motive, where it "targets speech based on its communicative content – that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin*, 596 U.S. at 69. A law is also content based if, even though facially content neutral, it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message the speech conveys." *Reed*, 576 U.S. at 164. Content-based restrictions on speech are subject to strict scrutiny. *Id.*

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

Response: Under the true threats doctrine, a statement is not protected speech under the First Amendment when objectively a reasonable person would consider it to be a threat to commit an act of unlawful violence, and the speaker also subjectively acts with at least reckless disregard that others would view the statement as threatening violence. *See Counterman v. Colorado*, 600 U.S. 66, 74, 78–82 (2023).

17. **Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: The Supreme Court has recognized that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). It has also noted "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). "Basic, primary, or historical facts" are generally considered to be questions of fact. *See Thompson v. Keohane*, 516 U.S. 99, 109–10 (1995). And the Ninth Circuit has noted that "[f]acts that can be found by application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

Issues of credibility and intent are also normally considered factual matters for the trier of fact. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (credibility); *Pullman-Standard*, 456 U.S. at 288 (intent). A "purely legal issue" is one "that can be resolved without reference to any disputed facts." *Dupree v. Younger*, 598 U.S. 729, 735 (2023).

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

Response: Under 18 U.S.C. § 3553(a)(2), a judge is required to consider all four of these considerations in sentencing a defendant. *See Tapia v. United States*, 564 U.S. 319, 325 (2011); 18 U.S.C. §§ 3551(a), 3553(a)(2). Courts must fashion a sentence to achieve these purposes in light of the circumstances of the specific case. Congress has not directed that any one consideration take precedence over the others. If confirmed, I would consider all the § 3553(a) factors when sentencing a defendant, including these four purposes of sentencing that are reflected in § 3553(a)(2).

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

Response: As a judicial nominee, I am precluded from offering an opinion on Supreme Court cases involving issues that may come before me if I were confirmed. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow binding Supreme Court precedent.

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

Response: As a judicial nominee, I am precluded from offering an opinion on Ninth Circuit cases involving issues that may come before me if I were confirmed. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow binding Ninth Circuit precedent.

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

Response: 18 U.S.C. § 1507 creates a Class A misdemeanor offense for picketing, parading, using a sound-truck or similar device, or otherwise demonstrating in or near a building housing a federal court, or in or near a building or residence occupied or used by a judge, juror, witness, or court officer, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing the judge, juror, witness, or court officer in the discharge of his duty.

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

Response: I am not aware of a Supreme Court or Ninth Circuit decision addressing the constitutionality of 18 U.S.C. § 1507. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court upheld a facial challenge under the First and Fourteenth Amendments to a similar state law, noting that the state law had been modeled after 18 U.S.C. § 1507. As a judicial nominee, I am precluded from offering an opinion on the constitutionality of a statute that may come before me if I were confirmed. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow binding Supreme Court and circuit precedent.

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

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

Response: Yes. As a judicial nominee, it is generally not appropriate for me to express an opinion on whether a Supreme Court case was correctly decided. However, as the matter of *de jure* racial segregation at issue in *Brown v. Board of Education* is so unlikely to ever be relitigated, I believe I can state my view that *Brown* was correctly decided.

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

Response: Yes. As a judicial nominee, it is generally not appropriate for me to express an opinion on whether a Supreme Court case was correctly decided. However, as the matter of the government ban on interracial marriage at issue in *Loving v. Virginia* is so unlikely to ever be relitigated, I believe I can state my view that *Loving* was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**
l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response to subparts c through m: As a judicial nominee, it is generally not appropriate for me to express an opinion on whether Supreme Court cases were correctly decided, because related issues may come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow binding Supreme Court and circuit precedent. In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* and they are no longer binding precedent.

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

Response: In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court instructed courts to look first to whether the Second Amendment's plain text covers the individual's conduct; if so, that conduct is presumptively protected from infringement. *Id.* at 2126, 2129–30. The government then "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* In determining whether the government has met its burden, I would follow the Court's instruction to compare the law or regulation at issue to historical regulations on the use of arms and to use analogical reasoning to determine whether the modern regulation imposes a comparable burden on the right to bear arms and whether that burden is comparably justified. *See id.* at 2132–33.

25. **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, not to my knowledge.

b. **Are you currently in contact with anyone associated with Demand Justice? If so, who?**

Response: No, not to my knowledge.

c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**

Response: No, not to my knowledge.

26. **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, not to my knowledge.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice? If so, who?**

    Response: No, not to my knowledge.

    c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**

    Response: No, not to my knowledge.

27. **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, not to my knowledge.

    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, not to my knowledge.

    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, not to my knowledge.

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, not to my knowledge.

28. **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, not to my knowledge.

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

Response: No, not to my knowledge.

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

Response: No, not to my knowledge.

29. **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, not to my knowledge.

b. **Are you currently in contact with anyone associated with Fix the Court? If so, who?**

Response: No, not to my knowledge.

c. **Have you ever been in contact with anyone associated with Fix the Court? If so, who?**

Response: No, not to my knowledge.

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

Response: On January 20, 2021, I submitted an application to the judicial screening committee for Senator Dianne Feinstein. On February 2, 2021, I interviewed with Senator Feinstein's screening committee. On February 15, 2021, I submitted an application to the judicial screening committee for Senator Alex Padilla. On February 18, 2021, I interviewed with the statewide chair of Senator Feinstein's screening committee. On March 3, 2021, I interviewed with Senator Padilla's screening committee. Thereafter, I did not further interview until 2023. On March 30, 2023, I interviewed with the statewide chair of Senator Padilla's screening committee. On June 6, 2023, I interviewed with attorneys from Senator Padilla's office. On June 8, 2023, I interviewed with Senator Padilla. On June 27, 2023, I interviewed with the statewide chair of Senator Feinstein's screening committee. On June 30, 2023, I interviewed with attorneys from the White House Counsel's Office. Beginning on that date, I had a number of communications with officials from the Office of Legal Policy at the Department of Justice. On September 5, 2023, the White House Counsel's Office contacted me regarding the President's intention to nominate me. On September 6, 2023, the President announced his intent to nominate me.

31. **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, not to my knowledge.

32. **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, not to my knowledge.

33. **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, not to my knowledge.

34. **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, not to my knowledge.

35. **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, not to my knowledge.

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

Response: No.

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

Not applicable.

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

Response: On June 30, 2023, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have had communications with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice regarding the nomination and confirmation process.

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

Response: I received these questions from the Office of Legal Policy (OLP) at the Department of Justice. I drafted the responses to the questions and then sent them to OLP. I received feedback, made minor edits, and sent the final responses to OLP.

Senate Judiciary Committee
Nominations Hearing
November 29, 2023
Questions for the Record
Senator Amy Klobuchar

For Kirk Edward Sherriff, to be United States District Court Judge for the Eastern District of California

Since 2002, you have served as an Assistant U.S. Attorney in the Eastern District of California. You have represented the United States in civil actions, and prosecuted a range of criminal matters including fraud, financial crimes, and threats to kill federal judges. Additionally, since 2015 you have served as the Chief of the Fresno office in the Eastern District of California.

- **How have these experiences shaped your career and how will they guide your service as a federal district court judge?**

  Response: It has been a privilege to represent the United States as an Assistant U.S. Attorney in the Eastern District of California for over 20 years and to work with dedicated colleagues who demonstrate every day their commitment to public service, to protecting the community, and to ensuring equal justice under the law.

  While recognizing the importance of the transition from being an advocate to being a neutral arbiter, my experiences would guide my service as a judge in several ways. First, I have gained extensive experience in federal court through handling a wide range of civil and criminal cases at all stages, from the filing of a civil complaint or the initiation of criminal charges through trial and appeal. Second, as a prosecutor and supervisor, I understand the fundamental importance of evaluating cases fairly and objectively, carefully considering and following the evidence and the law, and respecting and protecting the rights of all in every case. Third, as the Fresno Office chief, I have had the opportunity over many years to manage and work collaboratively with attorneys and staff, to review their work on the broad range of criminal matters brought in the Fresno Division of the Eastern District of California, and to mentor newer attorneys as they further develop their skills and expertise. In addition, I gained experience in complex commercial litigation matters in my prior private practice.

  My range of experience would inform my work as a judge, if I were fortunate to be confirmed.

Senator Mike Lee
Questions for the Record
Kirk Edward Sherriff, Nominee for District Court Judge for the Eastern District of California

1. How would you describe your judicial philosophy?

Response: I believe it is fundamental for judges to faithfully apply the law to the facts, follow all binding precedents, and set aside any personal beliefs in deciding cases. It is also fundamental to fully and fairly consider the parties' arguments, treat all before the court with dignity and respect, and work diligently to provide a full, impartial, and timely decision under the law.

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

Response: If there were binding Supreme Court or Ninth Circuit precedent interpreting the statute, I would faithfully follow such precedent. If there were no such precedent, I would focus on the plain meaning of the statute. When the text of a statute is unambiguous, a court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Mfrs. v. Department of Defense*, 583 U.S. 109, 127 (2018). In determining the plain meaning of the statute's text, I would consider any applicable statutory definitions and the broader context of the statute as a whole. *See McNeill v. United States*, 563 U.S. 816, 819–22 (2011). In the absence of relevant statutory definitions, I would consider dictionary definitions from the time of the statute's enactment to assist in determining the plain meaning of the statute. If the statute's text were ambiguous, I would apply applicable canons of statutory construction, consider other persuasive authority, and, in appropriate cases, consider legislative history such as committee reports.

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

Response: If confirmed, I would faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit in deciding a case that turned on the interpretation of a constitutional provision. If a matter of first impression arose with no applicable Supreme Court or Ninth Circuit precedents, I would focus on the plain meaning of the text of the constitutional provision. If the text is ambiguous, I would consider persuasive authority from other courts and follow the method of interpretation dictated by Supreme Court and Ninth Circuit precedent for matters arising under that constitutional provision.

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

Response: The Supreme Court has instructed in several contexts that original meaning should guide courts in interpretating the text of the Constitution. *See, e.g.*,

New York State Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment's Confrontation Clause). The Court noted in *Bruen* that the constitutional provision's "meaning is fixed according to the understandings of those who ratified it," though "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and apply the method of interpretation required by such precedent in reviewing a specific constitutional provision.

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

Response: I would focus on the plain meaning of the statute's text. When the text of a statute is unambiguous, a court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Mfrs. v. Department of Defense*, 583 U.S. 109, 127 (2018). In determining the plain meaning of the statute's text, I would consider any applicable statutory definitions, any related statutory provisions, and the statute as a whole. In the absence of relevant statutory definitions, I would consider dictionary definitions from the time of the statute's enactment to clarify the plain meaning of relevant terms in the statute.

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

Response: The plain meaning of a statute refers to the ordinary public meaning of the relevant language at the time of its enactment. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020); *see also Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). A court should generally interpret a statute's words "as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Wisconsin Central*, 138 S. Ct. at 2074. The plain meaning of a statute may at times apply to circumstances not anticipated by the statute's enactors. *See Bostock*, 140 S. Ct. at 1737. The Court has similarly noted that a constitutional provision's "meaning is fixed according to the understandings of those who ratified it," though "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

7. What are the constitutional requirements for standing?

Response: To state a case or controversy under Article III of the Constitution, plaintiffs must establish standing, which requires plaintiffs to demonstrate that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*

Coll., 600 U.S. 181, 199 (2023). An "injury in fact" is a "concrete and imminent harm to a legally protected interest, like money or property." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

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

Response: The Constitution creates a federal government of limited, enumerated powers: "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). The Necessary and Proper Clause authorizes Congress "[t]o make all laws which shall be necessary and proper for carrying into execution" the powers vested in it by the Constitution. U.S. Const., art. I, § 8; *McCulloch v. Maryland*, 17 U.S. 316, 324–26 (1819). In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 560 (2012), the Court recognized that cases upholding laws under the Necessary and Proper Clause involved Congressional "exercises of authority derivative of, and in service to, a granted power."

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

Response: The Supreme Court has held that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012). If confirmed, and if I were presented with a case challenging the constitutionality of a law Congress enacted without reference to a specific enumerated power, I would consider potential enumerated powers and faithfully follow binding Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that, in addition to the fundamental rights enumerated in the Bill of Rights that are incorporated through the Due Process Clause of the 14th Amendment, certain unenumerated fundamental rights and liberty interests are also protected through the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). These include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. 644 (2015); 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, *id.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

11. What rights are protected under substantive due process?

Response: The rights protected under substantive due process through the Due Process Clause of the 14th Amendment include most of the rights guaranteed by the first eight Amendments in the Bill of Rights, as well as certain unenumerated fundamental rights and liberty interests. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022). Please also see my response to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, 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: If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedent as to the rights protected by substantive due process under the Due Process Clause of the 14th Amendment. The Supreme Court has held that certain fundamental rights and liberty interests are protected by the Due Process Clause such that government restrictions on those rights are subject to strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Please also see my response to Question 10. The Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), rejected the doctrine reflected in *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court has since then applied rational basis review to such economic legislation. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

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

Response: The Commerce Clause authorizes Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art. I, § 8. Congress has broad authority under the Commerce Clause (1) to "regulate the channels of interstate commerce," (2) "to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552–58 (2012), the Supreme Court found that Congress did not have authority under the Commerce Clause to impose an individual insurance mandate that required individuals to take action to become active in commerce by purchasing a product.

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

Response: The Supreme Court has held that race, alienage, national origin, and religion are suspect classifications and laws based on such classifications are subject to strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Court has observed that a suspect class is one that has been "as a historical matter . . . subjected to

discrimination"; exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and is "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

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

Response: The Constitution's separation of powers among the three branches of the federal government ensured that power would not be consolidated in any one branch or person and established important checks by the branches on each other. These features also protect individual liberty. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others," yet those "structural principles . . . protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty," and "[t]heir solution to governmental power and its perils was simple: divide it." *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2202 (2020).

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

Response: If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedent concerning any separation of powers case that came before me. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183 (2020) (statute limiting President's removal powers); *INS v. Chadha*, 462 U.S. 919 (1983) (one-House legislative veto). In *Chadha*, the Court noted that "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Chadha*, 462 U.S. at 959.

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

Response: A judge's personal views are irrelevant in interpreting and applying the law, and empathy should not play a role in the judge's application of the law to the facts of a case. A judge should treat all persons before the court with respect and ensure that parties have a full and fair opportunity to be heard, and empathy may assist in that regard in understanding and paying attention to the positions and experience of those before the court.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both are to be avoided and a judge should strive to avoid either outcome by faithfully applying the law and following binding precedent.

19. 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 am generally aware that the Supreme Court struck down few federal laws as unconstitutional before the Civil War, but I have not studied this issue or data on the frequency of the Court's exercise of judicial review. The federal courts must decide only the cases or controversies brought before them. If confirmed, I would follow all binding precedent of the Supreme Court and Ninth Circuit if a matter came before me regarding the constitutionality of a federal statute.

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

Response: Judicial review includes the power of a court, in a case or controversy before it under Article III, to review legislative or executive acts to determine their constitutionality, as reflected in *Marbury v. Madison*, 5 U.S. 137 (1803). Black's Law Dictionary (11th ed. 2019) defines judicial review as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary defines judicial supremacy as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

21. 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: All elected officials take an oath to support the Constitution and have an independent obligation to follow it. *See* U.S. Const., art. 2, § 1, art. 6. They are also bound by Article VI and the rule of law to comply with duly rendered decisions of the federal courts. *See Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958). Elected officials may also, where otherwise consistent with constitutional requirements, enact by statute greater protections than found by the Court under the Constitution. *See, e.g.*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*; *Holt v. Hobbs*, 574 U.S. 352, 356–58 (2015).

22. 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: It is important to keep in mind that courts have the limited role of interpreting and applying the law in the cases or controversies before them, while the legislative and executive branches have the power to make and enforce laws, respectively. Article VI and the rule of law require compliance with duly rendered decisions of the courts, *see Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958), but courts are reliant on the executive branch to enforce their judgments.

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

Response: A district court judge has the duty to faithfully follow binding Supreme Court and circuit court precedent. The Supreme Court may overturn its own precedent or may overrule a circuit decision, and the Ninth Circuit en banc may overturn its own precedent. But a lower court judge is duty bound to follow binding Supreme Court and circuit precedent, and I would faithfully do so if confirmed.

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

Response: None.

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

Response: I am not familiar with the referenced statement or with the definition set out in the question. Black's Law Dictionary (11th ed. 2019) defines equity, among other definitions, as "Fairness; impartiality; evenhanded dealing."

26. Without citing Black's Law Dictionary, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: One definition of equality is "Equal Justice Under Law" as set out above the entrance to the Supreme Court. As set out in the response to Question 25, equity seems to refer to considering matters fairly, impartially, and evenhandedly. A judge's duty to provide equal justice under the law to all who come before the court is consistent with considering matters fairly, impartially, and evenhandedly.

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

Response: The 14th Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The text of the 14th Amendment refers to equal protection; it does not refer to equity. If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedents interpreting the Equal Protection Clause.

28. Without citing Black's Law Dictionary, how do you define "systemic racism?"

Response: I do not have a definition of systemic racism, and I understand that different people may have different definitions of such a term. Merriam-Webster dictionary (2023) defines systemic racism as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)."

29. Without citing Black's Law Dictionary, how do you define "critical race theory?"

Response: I do not have any background in or experience with critical race theory, and I do not have a definition for it. My general understanding is that critical race theory is an academic approach to analyzing the role of race in society.

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

Response: Please see my answers to Questions 28 and 29.

Senator Josh Hawley
Questions for the Record

Kirk Edward Sherriff
Nominee, U.S. District Judge for the Eastern District of California

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

   Response: No.

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

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

   Response: The Supreme Court has instructed in several contexts that original meaning should guide courts in interpretating the text of the Constitution. *See, e.g.*, *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment's Confrontation Clause). The Court noted in *Bruen* that the constitutional provision's "meaning is fixed according to the understandings of those who ratified it," though "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and apply the method of interpretation required by precedent in reviewing a specific constitutional provision.

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

   Response: The text of the statute controls and the Supreme Court has instructed that "reference to legislative history is inappropriate when the text of a statute is unambiguous." *HUD v. Rucker*, 535 U.S. 125, 132 (2002). Additionally, post-enactment legislative history "is not a legitimate tool of statutory interpretation" because it "by definition could have no effect on the congressional vote." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). To the extent a statute's text is ambiguous, pre-enactment committee reports may shed some light on the understanding at the time of the statute's enactment. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . .").

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: Please see my response to Question 3. Committee reports are considered more probative of legislative intent than other legislative history. *See Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: If confirmed, I would faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit in deciding a case that turned on the interpretation of a constitutional provision. I would consider foreign law only if Supreme Court or Ninth Circuit precedents instructed that it was appropriate to do so. For example, the Supreme Court has looked to the historical laws of England when interpreting certain constitutional provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Court referenced foreign law in *Roper v. Simmons*, 543 U.S. 551, 575 (2005), as "instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments," but noted that it was not controlling.

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

Response: The Supreme Court has held that an inmate challenging a method of execution as cruel and unusual punishment under the Eighth Amendment must satisfy two requirements: "First, he must establish that the State's method of execution presents a 'substantial risk of harm' – severe pain over and above death itself." *Nance v. Ward*, 597 U.S. 159, 164 (2022); *see also Glossip v. Gross*, 576 U.S. 863, 877 (2015). "Second, . . . he must identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance*, 597 U.S. at 164; *see also Glossip*, 576 U.S. at 877.

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

Response: Yes, under *Glossip v. Gross*, 576 U.S. 863, 877 (2015), "prisoners must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain."

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

   Response: The Supreme Court has found that a prisoner in a post-conviction proceeding does not have a substantive due process right under the 14th Amendment's Due Process Clause to access to DNA evidence for testing, and that the state's procedures in that case complied with procedural due process. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72–74 (2009). The Ninth Circuit has held that "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." *Morrison v. Peterson*, 809 F.3d 1059, 1065 (9th Cir. 2015).

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

   Response: No.

8. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

   Response: The Supreme Court has held that state "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878–82 (1990)). Laws or regulations are "not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see also Fulton*, 141 S. Ct. at 1877; *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 686 (9th Cir. 2023). A law is also not generally applicable "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877; *see also Fellowship of Christian Athletes*, 82 F.4th at 686. Where the state has set up such a system of individual exemptions, "it may not refuse to extend that system to cases of religious hardship without compelling reason." *Fulton*, 141 S. Ct. at 1877; *Smith*, 494 U.S. at 884. Even when a law is facially neutral, a government fails to act with neutrality and its action is subject to strict scrutiny "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–32 (2018); *Fellowship of Christian Athletes*, 82 F.4th at 686.

As to the federal government, the Religious Freedom Restoration Act applies strict scrutiny to government action substantially burdening a person's exercise of religion, even if the burden results from a rule that is neutral and of general applicability. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95 (2014).

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

Response: Please see my response to Question 8. Government actions discriminating against a religious group or religious belief are subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). A government policy also is subject to strict scrutiny, "if it is specifically directed at religious practice." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022); *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). And a State "violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022); *see also Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: The Supreme Court has held that it is not for a court to consider the merits of a religious belief; rather, the court's "narrow function" in determining whether a person's religious belief is held sincerely is to determine whether it reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). In the Ninth Circuit, whether a religious belief is sincerely held is a question of fact. *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007).

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

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment confers an individual right to bear arms. The Court found that the District of Columbia's ban on handgun possession within the home, and its prohibition on rendering a firearm in the home operable for the purpose of self-defense, violated the Second Amendment. *Id.* at 635.

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

Response: No.

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

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

Response: I understand this statement to reflect Justice Holmes' view that the "Constitution is not intended to embody a particular economic theory" and judges should not decide cases based on a personal view of economic theory. *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedent regarding the 14th Amendment and apply the law to the facts of a case without regard to any personal views.

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

Response: As a judicial nominee, it is generally not appropriate for me to express an opinion on whether a Supreme Court case was correctly decided, because related issues may come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). The Supreme Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), rejected the doctrine reflected in *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court has since applied rational basis review to such economic legislation. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

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

Response: I understand the Court's statement in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), to indicate there was widespread agreement that the *Korematsu* decision was wrongly decided.

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

Response: I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court but that are no longer considered good law under binding precedent of the Supreme Court. If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedent.

a. If so, what are they?

Response: Not applicable.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: In *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court found that a company's control of "nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes" was sufficient to survive summary judgment as to whether there was a monopoly under Section 2 of the Sherman Anti-Trust Act. The Court also cited to prior cases finding that 87% of a market, and over two-thirds of a market, constituted a monopoly. *Id.* The Ninth Circuit has held that "[a] market share of sixty-five percent or more usually establishes a prima facie case of monopoly power in Section 2 contexts." *Optronic Technologies, Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021). If confirmed, I will faithfully follow all binding Supreme Court and Ninth Circuit precedent regarding what constitutes a monopoly.

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

Response: Not applicable. Please see my response to Question 15.a.

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: Please see my response to Question 15.a. The Ninth Circuit has noted that "courts have struggled with the question of the minimum market share necessary to establish monopoly power." *Syufy Enter. v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986).

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

Response: The Supreme Court held in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law." In suits in diversity jurisdiction, federal courts follow state substantive law. *See American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). The Court has indicated that federal common law still exists in narrow areas such as "subjects within national legislative power where Congress has so directed" or "where the basic scheme of the Constitution so demands." *Id.* The Court has noted that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: In our federal system, a state's highest court is the authoritative interpreter of the state constitution. The Supreme Court has repeatedly noted that "[i]t is fundamental that state courts be left free and unfettered by [the Court] in interpreting their state constitutions." *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). If confirmed, I will faithfully follow all binding precedent should a matter involving the scope of a state constitutional right come before me.

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

Response: Please see my response to Question 17. In our federal system, the state's highest court is the authoritative interpreter of the state constitutional provision, even if it is worded identically to a federal constitutional provision.

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

Response: The Supreme Court has noted that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v.*

Evans, 514 U.S. 1, 8 (1995); *see also Virginia v. Moore* 553 U.S. 164, 171 (2008) (States remain free "to impose higher standards on searches and seizures than required by the Federal Constitution").

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

Response: As a judicial nominee, it is generally not appropriate for me to express an opinion on whether a Supreme Court case was correctly decided. However, as the matter of *de jure* racial segregation at issue in *Brown v. Board of Education* is so unlikely to ever be relitigated, I believe I can state my view that *Brown* was correctly decided.

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

Response: The Ninth Circuit has held that there is no bar against nationwide injunctive relief in federal district court, but that "such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020).

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

Response: I am aware that concerns have been expressed about the scope of district courts' equitable powers under Article III to issue a nationwide or universal injunction. *See, e.g.*, *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring in grant of stay). Under Article III, the judicial power extends to cases in equity arising under the Constitution and the laws of the United States. Rule 65 of the Federal Rules of Civil Procedure provides authority for a district court to issue preliminary or permanent injunctions.

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

Response: As noted above, the Ninth Circuit has held that there is no bar against nationwide injunctive relief in federal district court, but that "such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020) (overturning nationwide injunction but upholding statewide injunction). An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Id.* at 765. In considering a request for a nationwide injunction, a district court must consider factors including the need to tailor the scope of the injunctive remedy to fit the nature and extent of the violation, and whether the plaintiffs will continue to suffer their alleged injuries without a nationwide injunction. *Id.* at 765–66.

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

Response: The Ninth Circuit has held that there is no bar against nationwide injunctive relief in federal district court, but that "such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020). An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Id.* at 765. In considering a request for a nationwide injunction, a district court must consider factors including the need to tailor the scope of the injunctive remedy to fit the nature and extent of the violation, and whether the plaintiffs will continue to suffer their alleged injuries without a nationwide injunction. *Id.* at 765–66. If confirmed, I will faithfully follow binding Supreme Court and Ninth Circuit precedent.

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

Response: Our constitutional system allocates power among state and federal governments, establishing a federal government of limited, enumerated powers, while reserving to the States those powers not delegated to the federal government by the Constitution nor prohibited by it to the States. The Supreme Court has noted that this federal structure of joint sovereigns ensures numerous advantages: "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: The Supreme Court has identified several abstention doctrines that reflect concerns of federalism and judicial comity. "[A]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 82 (2013).

Younger abstention may apply when a federal suit that seeks injunctive or declaratory relief on federal constitutional grounds would interfere with an ongoing state proceeding in which the litigant can raise the constitutional claim. *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). The Ninth Circuit has held that "*Younger* abstention is appropriate when: (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical

effect of enjoining the ongoing state judicial proceeding. *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018).

Pullman abstention may apply when the resolution of a federal constitutional claim is dependent on a significant unsettled question of state law and the federal court abstaining would provide the state courts an opportunity to settle the underlying state law question and potentially avoid the unnecessary deciding of a federal constitutional issue. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Ninth Circuit has held that *Pullman* abstention is appropriate only when three criteria are met: "(1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear." *United States v. Morros*, 268 F.3d 695, 703–04 (9th Cir. 2001).

Burford abstention may apply when a federal court is asked to review local state agency action implicating a complicated state regulatory scheme. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). "Under *Burford*, a court may decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 376 (9th Cir. 1982).

The Supreme Court has also recognized other narrow circumstances in which "wise judicial administration" may counsel against concurrent federal proceedings. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–20 (1976).

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

Response: Damages are generally a remedy to a past harm, while injunctive relief is intended to prevent ongoing and future harm. Whether damages or injunctive relief are appropriate in a specific case depends on the claims and the facts of the case. The Supreme Court has held that "[a]n injunction should issue only where the intervention of a court of equity is essential" to protect rights against "injuries otherwise irremediable." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The Court noted in *Weinberger* that "the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Id.*

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

Response: The rights protected under substantive due process include most of the rights guaranteed by the first eight Amendments in the Bill of Rights, as well as certain unenumerated fundamental rights and liberty interests. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Unenumerated fundamental rights include the right to marry, *Loving v.*

Virginia, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. 644 (2015); 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, *id.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

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

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

Response: Please see my responses to Questions 8 and 9.

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

Response: The Free Exercise Clause protects the right to worship in religious services but also protects the free exercise of religion more broadly. The Free Exercise Clause protects "religious exercises, whether communicative or not," including "not only the right to harbor religious beliefs inwardly," but also "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022).

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

Response: Please see my responses to Questions 8 and 9.

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

Response: Please see my response to Question 10.

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

Response: The Religious Freedom Restoration Act (RFRA) applies strict scrutiny to federal government action substantially burdening a person's exercise of religion, even if the burden results from a rule that is neutral and of general applicability. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95

(2014). If a federal rule substantially burdens a person's exercise of religion, the person is entitled to an exemption from the rule unless the government demonstrates that application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020), the Court noted, but did not decide, that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."

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

Response: No.

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

Response: Ninth Circuit Model Criminal Jury Instruction 6.5 (2022 ed.) sets out a definition of reasonable doubt, and it does not define the term by reference to a numerical scale or percentage. The Ninth Circuit has repeatedly upheld the model instruction. *See, e.g.*, *United States v. Mikhel*, 889 F.3d 1003, 1051–52 (9th Cir. 2018). I am not aware of any Supreme Court or Ninth Circuit precedent approving a definition of beyond a reasonable doubt using a numerical scale or percentage. If confirmed, I would instruct juries in criminal cases consistent with applicable binding precedent.

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

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

Response: This issue may arise in matters filed before the court under 28 U.S.C. § 2254. As a judicial nominee, it is not appropriate for me to comment on issues that may arise in matters that may come before the courts. *See* Code of Conduct

for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow all binding Supreme Court and Ninth Circuit precedents regarding § 2254 cases.

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

Response: This issue may arise in matters filed before the court under 28 U.S.C. § 2254. As a judicial nominee, it is not appropriate for me to comment on issues that may arise in matters that may come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow all binding Supreme Court and Ninth Circuit precedents regarding § 2254 cases.

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

Response: Please see my response to Questions 27.a and 27.b.

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

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?
b. If yes, please explain if and how you believe this practice is consistent with the rule of law.
c. If confirmed, would you treat unpublished decisions as precedential?
d. If not, how is this consistent with the rule of law?
e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?
f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.
g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: Ninth Circuit Rule 36-1 provides that all Ninth Circuit opinions are published but also authorizes unpublished memorandum dispositions and orders. Ninth Circuit Rule 36-2 sets out the criteria for designating a decision as an opinion. Ninth Circuit Rule 36-3 provides that unpublished dispositions and orders of the Ninth Circuit are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. Circuit Rule 36-3 also provides that unpublished dispositions and orders issued on or after January 1, 2007 may be cited in accordance with Federal Rule of Appellate Procedure 32.1. As a judicial nominee, it is not appropriate for me to opine on the correctness of circuit rules or circuit precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will follow the

Ninth Circuit Rules and all other binding precedent and rules concerning unpublished decisions.

29. In your legal career:

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

Response: 7 federal jury trials.

b. How many have you tried as second chair?

Response: 5 federal jury trials; 1 state bench trial; and 3 arbitration cases (one international arbitration and two domestic arbitrations)

c. How many depositions have you taken?

Response: I estimate more than 30.

d. How many depositions have you defended?

Response: I estimate more than 30.

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

Response: I have presented oral argument in eight appeals before the Ninth Circuit. I have briefed ten appeals to the Ninth Circuit.

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

Response: 0

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

Response: Two times, to the best of my recollection, in a pro bono capacity while in private practice.

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

Response: I estimate 30 to 40.

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

Response: I estimate more than 50.

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

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

Response: When I was in private practice as an associate prior to 2002, to the best of my recollection the maximum number of hours that I billed in a single year was approximately 2000 hours.

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

Response: To the best of my recollection, I would estimate that 50 – 100 hours that year were on pro bono matters.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a judge's duty is to interpret the law as written and to rule based on the law and not on any personal view.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges must faithfully apply the law and binding precedent and render decisions on that basis.

b. Do you agree or disagree with this statement?

Response: I agree with this statement. If confirmed as a district court judge, I would faithfully apply the law and follow binding precedent and render decisions accordingly.

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

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

Response: I understand this statement to mean a judge's role is to faithfully apply the law to the facts in cases that come before the court.

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

Response: Yes, I agree a judge must faithfully apply the law to the facts in cases that come before the court. If confirmed as a district court judge, I would faithfully apply the law and follow binding precedent.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

36. What were the last three books you read?

Response: Sam Quinones, *The Least of Us: True Tales of America and Hope in the Time of Fentanyl and Meth*; Irene Nemirovsky, *Suite Francaise*; Benoit Mandelbrot & Richard Hudson, *The (Mis)Behavior of Markets: A Fractal View of Financial Turbulence*

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

Response: I have dedicated most of my career to working in public service because of my appreciation for and belief in our country's ideals such as equal justice. Our country has confronted and worked to overcome past *de jure* discrimination that treated people differently on the basis of race. Policy makers and litigants in cases frequently address and debate the extent to which this history has ongoing impacts. As a judicial nominee, it would not be appropriate for me to comment on issues that may arise in matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: I am proud of the work of the Office during the time that I have been privileged to be the Fresno Office chief, and I am proud of having had the opportunity to represent the United States for over 20 years.

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

Response: Yes.

a. How did you handle the situation?

Response: As an advocate, I evaluated matters objectively under the law and advocated vigorously in the client's interest, consistent with all applicable ethical and professional rules, setting aside any personal views.

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

Response: Yes.

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

Response: I do not regularly read the works of any specific law professors. I typically read treatises and law review articles when researching legal issues in specific cases, and I generally focus on the relevance of the topic rather than the specific author.

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

Response: No Federalist Paper has shaped my views more than any other.

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

Response: I cannot point to a single opinion or article that by itself changed my mind, but I thoroughly review the case law and secondary sources when legal issues arise, keep abreast of significant legal developments, and keep an open mind and consider alternative legal perspectives.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), the Supreme Court returned to the people and their elected representatives the authority to regulate abortion. The Court noted that its decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests." *Id.* at 254. As a judicial nominee, I am precluded from expressing an opinion on issues that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: Yes (Meta Platforms, Inc. stock).

e. Twitter?

Response: No.

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

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

Response: I have worked at the U.S. Attorney's Office for over twenty years and served as a supervisor for many years. In that capacity, I have frequently reviewed colleagues' work and provided edits on briefs that were filed in federal court but not filed in my name. It would not be possible for me to identify all such briefs. To the extent I was actively working on the case with co-counsel, I believe my name would appear on the briefs filed by co-counsel or would otherwise be listed on the district court or Ninth Circuit docket for the case.

48. Have you ever confessed error to a court?

Response: No, to the best of my recollection.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: Judicial nominees take an oath to testify truthfully and have a duty of candor when testifying before the Senate Judiciary Committee.

Senator John Kennedy
Questions for the Record

Kirk Sherriff

1. **Are there any circumstances under which it is justifiable to sentence a criminal defendant to death? Please explain.**

   Response: Congress has enacted a number of criminal statutes that are subject to the death penalty. *See, e.g.*, 18 U.S.C. § 1111 (first-degree murder within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 1201 (murder during kidnapping); 18 U.S.C. § 1958 (use of interstate commerce facilities in commission of murder for hire); 18 U.S.C. § 2245 (murder in connection with sex abuse offenses). The death penalty may not be imposed on minors or mentally-disabled individuals. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). The Federal Death Penalty Act provides that, at the sentencing phase of a capital trial, the parties may present proof to the jury of mitigating and aggravating factors. *See* 18 U.S.C. § 3593(c). Capital punishment may be imposed in a murder case if the sentencing jury finds the defendant acted with life-threatening intent and concludes that the aggravating circumstances outweigh the mitigating circumstances. If the sentencing jury recommends the death penalty, the court must impose it. 18 U.S.C. § 3594.

   a. **Should a judge's opinions on the morality of the death penalty factor into the judge's decision to sentence a criminal defendant to death in accordance with the laws prescribed by Congress and the Eighth Amendment?**

      Response: No.

2. **Except when a statutory maximum controls, when is it appropriate for a sentencing judge to impose a sentence below the range provided by the Sentencing Guidelines?**

   Response: A sentencing court must consider the applicable Sentencing Guidelines and must correctly calculate the applicable Guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008). The "Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49; *see also Carty*, 520 F.3d at 991. However, the Supreme Court has instructed that a district court may not presume that the Guidelines range is reasonable. *Gall*, 552 U.S. at 50; *Carty*, 520 F.3d at 991. In determining the sentence, the court must consider all the factors set forth in 18 U.S.C. § 3553(a), including the applicable Guidelines range, and make an individualized assessment based on the facts. *Gall*, 552 U.S. at 49–50; *Carty*, 520 F.3d at 991–92. In some circumstances, a below-Guidelines sentence may be warranted where the government has made a motion under USSG § 5K1.1 based on the

defendant's substantial assistance in the prosecution of another person who has committed an offense.

3. **Is the U.S. Supreme Court a legitimate institution?**

   Response: Yes.

4. **Is the current composition of the U.S. Supreme Court legitimate?**

   Response: Yes.

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

   Response: I believe it is fundamental for judges to faithfully apply the law to the facts, follow all binding precedents, and set aside any personal beliefs in deciding cases. It is also fundamental to fully and fairly consider the parties' arguments, treat all before the court with dignity and respect, and work diligently to provide a full, impartial, and timely decision under the law.

6. **Is originalism a legitimate method of constitutional interpretation?**

   Response: The Supreme Court has instructed in several contexts that original meaning should guide courts in interpretating the text of the Constitution. *See, e.g.*, *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment's Confrontation Clause). The Court noted in *Bruen* that the relevant constitutional provision's "meaning is fixed according to the understandings of those who ratified it," though "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and apply the method of interpretation required by precedent in reviewing a specific constitutional provision.

7. **If called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, to what sources of law would you look for guidance?**

   Response: If I were called on to resolve a constitutional question of first impression with no applicable Supreme Court or Ninth Circuit precedents, I would focus on the plain meaning of the text of the relevant constitutional provision. If the text is ambiguous, I would consider persuasive authority from other courts and follow the method of interpretation dictated by Supreme Court and Ninth Circuit precedent for matters arising under that constitutional provision. For example, the Supreme Court has directed that lower courts must interpret the Establishment Clause by "reference to historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *see also Sabra v. Maricopa County Community College Dist.*, 44 F.4th 867, 888 (9th Cir. 2022).

8. Is textualism a legitimate method of statutory interpretation?

Response: Yes. In interpreting a statute, a court must start with the plain meaning of the statute. When the text of a statute is unambiguous, a court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Mfrs. v. Department of Defense*, 583 U.S. 109, 127 (2018). In determining the plain meaning of the statute's text, a court should consider any applicable statutory definitions and the broader context of the statute as a whole. *See McNeill v. United States*, 563 U.S. 816, 819–22 (2011). In the absence of relevant statutory definitions, dictionary definitions from the time of the statute's enactment may assist in determining the plain meaning of the statute.

9. When is it appropriate for a judge to look beyond textual sources when determining the meaning of a statute or provision?

Response: If there is Supreme Court or applicable circuit precedent interpreting the statute, the court must faithfully follow such precedent. Additionally, in the absence of relevant statutory definitions, a court may consider dictionary definitions from the time of the statute's enactment to assist in determining the plain meaning of the statute. If the statute's text is ambiguous, a court may apply applicable canons of statutory construction, consider other persuasive authority, and potentially consider legislative history such as committee reports.

10. Does the meaning (rather than the applications) of the U.S. Constitution change over time? If yes, please explain the circumstances under which the U.S. Constitution's meaning changes over time and the relevant constitutional provisions.

Response: The Supreme Court has held that a constitutional provision's "meaning is fixed according to the understandings of those who ratified it," though "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

11. What is the role of legislative history in determining a statute's meaning?

Response: The text of the statute controls and the Supreme Court has instructed that "reference to legislative history is inappropriate when the text of a statute is unambiguous." *HUD v. Rucker*, 535 U.S. 125, 132 (2002). Additionally, post-enactment legislative history "is not a legitimate tool of statutory interpretation" because it "by definition could have no effect on the congressional vote." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). To the extent a statute's text is ambiguous, committee reports may shed some light on legislators' understanding at the time of the statute's enactment. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill").

12. When is it appropriate for a district judge to issue a nationwide injunction? Please also explain the legal basis for issuing nationwide injunctions and the relevant factors a district judge should consider before issuing one.

Response: I am aware that concerns have been expressed about the scope of district courts' equitable powers under Article III to issue a nationwide or universal injunction. *See, e.g.*, *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring in grant of stay). Under Article III, the judicial power extends to cases in equity arising under the Constitution and the laws of the United States. Rule 65 of the Federal Rules of Civil Procedure provides authority for a district court to issue preliminary and permanent injunctions. The Ninth Circuit has held that there is no bar against nationwide injunctive relief in federal district court, but that "such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020) (overturning nationwide injunction but upholding statewide injunction). An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Id.* at 765. In considering a request for a nationwide injunction, a district court must consider factors including the need to tailor the scope of the injunctive remedy to fit the nature and extent of the violation, and whether the plaintiffs will continue to suffer their alleged injuries without a nationwide injunction. *Id.* at 765–66.

13. Is there ever an appropriate circumstance in which a district judge may ignore or seek to circumvent a precedent set by the circuit court under which it sits or the U.S. Supreme Court?

Response: No, a district court judge has the duty to faithfully follow binding Supreme Court and circuit court precedent. The Supreme Court may overturn its own precedent or may overrule a circuit decision, and the Ninth Circuit en banc may overturn its own precedent. But a lower court judge is duty bound to follow binding Supreme Court and circuit precedent, and I would faithfully do so if confirmed.

14. Would you faithfully apply all precedents of the U.S. Supreme Court?

Response: Yes, I would fully and faithfully apply all binding precedents of the U.S. Supreme Court.

15. Please describe the analysis you would use to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

Response: The Supreme Court has instructed courts to look first to whether the Second Amendment's plain text covers the individual's conduct; if so, that conduct is presumptively protected from infringement. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126, 2129–30 (2022). The government then "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm

regulation." *Id.* In determining whether the government has met its burden, I would follow the Court's instruction to compare the law or regulation at issue to historical regulations on the use of arms and to use analogical reasoning to determine whether the modern regulation imposes a comparable burden on the right to bear arms and whether that burden is comparably justified. *See id.* at 2132–33.

16. When should a district judge deem a previously unrecognized unenumerated right to be "fundamental" and therefore entitled to protection under the Fourteenth Amendment?

Response: The Supreme Court has held that the fundamental rights protected by the Due Process Clause of the Fourteenth Amendment are those which are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237–38 (2022). The Court has instructed that courts must "exercise the utmost care whenever [they] are asked to break new ground" with respect to unenumerated fundamental rights. *Glucksberg*, 521 U.S. at 720; *see also Dobbs*, 597 U.S. at 240; *Khachatryan v. Blinken*, 4 F.4th 841, 856 (9th Cir. 2021). If confirmed, and if a claim regarding a previously unrecognized unenumerated right were to come before me, I would faithfully follow binding Supreme Court and Ninth Circuit precedent.

17. Should a district judge give deference to an agency's interpretation of a statute that imposes criminal penalties? Please explain.

Response: No. The Supreme Court has held that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). The Court has noted that it has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014). The Chevron doctrine has not been held to apply in the criminal law context. *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006).

18. Please describe how courts determine whether an agency's action violates the Major Questions Doctrine.

Response: The Major Questions Doctrine has been applied when an agency claims an extraordinary grant of regulatory authority, considering "the history and the breadth of the authority that the agency has asserted" and "the economic and political significance of that assertion." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022). In such cases, the agency must point to "clear congressional authorization" for the power it asserts, as courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2609.

19. Please identify one member of the federal judiciary, current or former, whose service on the bench most inspires you and explain why.

Response: I have had the opportunity to practice in federal court in the Eastern District of California for over 20 years before judges who faithfully applied the law and followed precedent, treated those before the court with dignity and respect, decided cases only after carefully considering the parties' arguments, and presided fairly and impartially over trials and other hearings. I would not single out one judge in these respects, but I would note that former Chief Judge Coyle was inspiring for the tremendous dedication and tireless effort, on top of his regular judicial duties, he put into overseeing the construction of the new federal courthouses in the Eastern District of California. Congress subsequently named the Fresno federal courthouse in his honor.

20. You have been nominated to serve as a federal district judge. To the best of your recollection, please list up to 10 cases in which you served as lead counsel in a case tried before a jury in federal district court.

Rodriguez v. Runyon, No. 1:96-cv-06009 (E.D. Cal.) (Title VII)

Ruiz-Johnson et al. v. Ingram et al., No. 1:01-cv-05882 (E.D. Cal.) (Bivens)

United States v. Sanchez et al., No. 1:10-cr-0249 (E.D. Cal.) (fraud; money laundering)

United States v. Salado, No. 1:10-cr-0343 (E.D. Cal.) (fraud; money laundering)

United States v. Farmer, No. 1:11-cr-0026 (E.D. Cal.) (fraud)

United States v. Wilkins, No. 1:12-cr-0039 (E.D. Cal.) (fraud)

United States v. Mota et al., No. 1:18-cr-0035 (E.D. Cal.) (attempt to kill federal officer; assault)

I also tried the following cases, among others, as co-counsel with substantial trial responsibilities:

United States v. Sortini, No. 1:06-cr-0100 (E.D. Cal.) (fraud)

United States v. Livingston, No. 1:09-cr-00273 (E.D. Cal.) (fraud; theft)

United States v. Vincent, No. 1:14-cr-0049 (E.D. Cal.) (tax evasion)

21. To the best of your recollection, please list up to 10 instances in which you presented oral argument before a U.S. Court of Appeals panel.

Mark Twain St. Joseph's Healthcare Corp. v. Leavitt, No. 04-15092 (9th Cir.) (Medicare) (argued Oct. 19, 2005)

Kehila v. Mukasey, No. 04-74069 (9th Cir.) (immigration) (argued Feb. 12, 2008)

United States v. Noriega-Valenzuela, No. 07-10571 (9th Cir.) (narcotics), and *United States v. Ruiz*, No. 07-10594 (9th Cir.) (narcotics) (argued Feb. 10, 2009)

United States v. Livingston, No. 11-10520, 725 F.3d 1141 (9th Cir. 2013) (fraud; theft) (argued April 15, 2013)

United States v. Salado, No. 12-10117 (9th Cir.) (fraud; money laundering) (argued Jan. 12, 2015)

United States v. Adams, No. 19-10264 (9th Cir.) (assault) (argued Nov. 15, 2021)

United States v. Mota, No. 19-10265 (9th Cir.) (attempt to kill federal officer) (argued Nov. 15, 2021)

22. Please describe the process by which you prepared for your hearing before the U.S. Senate Committee on the Judiciary, including materials or sources provided to you or consulted by you.

Response: I reviewed numerous Supreme Court decisions, questions that had been asked in prior proceedings, and a list of prior hearings of judicial nominees. I watched various prior hearings. I conducted additional research, reviewed constitutional and statutory issues as well as federal rules, and reviewed various cases and matters I handled over the course of my career. I also participated in preparation sessions with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice.

23. Why should Senator Kennedy support your nomination?

Response: I appreciate that the role of a district court judge is to faithfully apply the law to the facts, and faithfully follow binding Supreme Court and circuit precedent, in cases that come before the court. I have had the privilege of representing the United States as an Assistant U.S. Attorney in the Eastern District of California for over 20 years and of working with dedicated colleagues who demonstrate every day their commitment to public service, to protecting the community, and to ensuring equal justice under the law.

While recognizing the importance of the transition from being an advocate to being a neutral arbiter, my experience would guide my service as a judge in several ways. First, I have gained extensive experience in federal court through handling a wide range of civil

and criminal cases at all stages, from the filing of a civil complaint or the initiation of criminal charges through trial and appeal. Second, as a prosecutor and supervisor, I understand the fundamental importance of evaluating cases fairly and objectively, carefully considering and following the evidence and the law, and respecting and protecting the rights of all in every case. Third, as the Fresno Office chief, I have had the opportunity over many years to manage and work collaboratively with attorneys and staff, to review their work on the broad range of criminal matters brought in the Fresno Division of the Eastern District of California, and to mentor newer attorneys as they further develop their skills and expertise. In addition, I gained experience in complex commercial litigation matters in my prior private practice. My range of experience would inform my work as a judge, if I were fortunate to be confirmed.

Questions from Senator Thom Tillis
For Kirk Edward Sheriff, nominee to be United States District Judge for the Eastern District of California

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

   Response: A judge's personal views are irrelevant in interpreting and applying the law. A judge's background such as educational and professional experience, however, may benefit the judge by providing prior familiarity with legal issues.

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

   Response: Impartiality is a fundamental expectation and duty for a judge. It is also required under Canon 3 of the Code of Conduct for United States Judges.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." I do not consider judicial activism appropriate. Judges must apply the law to the facts before them without regard to their personal views about public policy.

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

   Response: No. A judge's duty is to faithfully apply the law to the facts of the case before the court and to faithfully follow binding precedent. It is not the judge's role to second-guess policy decisions by Congress or state legislative bodies.

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

   Response: Yes. If confirmed as a judge, my obligation would be to faithfully apply the law to the facts without regard to any personal view as to the desirability of an outcome. I reconcile that by recognizing that ensuring the rule of law requires that judges evenhandedly apply the law to the facts of a case and render decisions accordingly.

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

Response: If confirmed, I will faithfully follow all binding Supreme Court and Ninth Circuit precedents regarding the Second Amendment, including the decisions in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). These precedents recognize a personal right under the Second Amendment to bear arms in the home and in public.

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

Response: If confirmed, I would faithfully follow binding Supreme Court and Ninth Circuit precedent concerning qualified immunity. Qualified immunity is typically raised pretrial, in 42 U.S.C. § 1983 and *Bivens* cases against law enforcement officers and other government officials, in a motion to dismiss or motion for summary judgment. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "[Q]ualified immunity is an immunity from suit rather than a mere defense to liability." *Id.* A court must consider (i) whether the plaintiff has alleged (at the motion to dismiss stage) or established (at the summary judgment stage) a violation of a constitutional right, and (ii) if so, whether the right was clearly established at the time at the time of the alleged conduct. *Id.* at 232. Officials are entitled to qualified immunity unless both requirements are met, and the court may consider these steps in whichever sequence is warranted in a case. *Id.* at 236–37.

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

Response: Qualified immunity questions frequently arise in 42 U.S.C. § 1983 and *Bivens* cases. As a judicial nominee, I am precluded from offering an opinion on issues pending or impending in any court or that may come before me if I were confirmed. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully follow binding Supreme Court and Ninth Circuit precedent regarding qualified immunity.

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

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

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

Response: The Founders recognized the importance of intellectual property rights by including among Congress's enumerated powers the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const., art. I, § 8. If confirmed, I will apply the laws Congress has passed regarding IP rights and faithfully follow binding Supreme Court and circuit precedent regarding such rights.

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

Response: In the Eastern District of California, each division has multiple judges and under the district's Local Rules cases are assigned at random. As such, I do not believe this is an issue in the district. The Supreme Court held in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. 258, 261–62 (2017) that, for purposes of the patent venue statute, which allows patent infringement cases to be brought where a defendant resides or where the defendant committed acts of infringement and has a regular and established place of business, a domestic corporation resides only in its State of incorporation. If confirmed, I will faithfully follow binding Supreme Court and circuit precedent regarding venue in patent cases.

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

Response: As a judicial nominee, I am precluded from offering an opinion on Supreme Court cases involving issues that may come before me if I were confirmed. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will apply the laws Congress has passed regarding intellectual property rights and faithfully follow binding Supreme Court and circuit precedent regarding such rights.