Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Rebecca Pennell
Nominee to be United States District Judge for the Eastern District of Washington

1. **Since 2018, you've served as a member of the Washington Office of Civil Legal Aid Oversight Committee. In 2020 you signed a statement which said that: "*Racism and white supremacy currently plague every social, educational, economic, governmental, and legal system in our state and nation*."**
    a. **Do you believe that racism and white supremacy plagues every part of the legal system?**

    Response: The 2020 statement was issued by a committee consisting of representatives from all branches of Washington government, including Republican and Democratic members of the state legislature, a representative of the governor's office, a Supreme Court justice, and a representative of the Washington State Bar Association. The statement was issued during the summer of 2020, shortly after the Washington Supreme Court issued a letter with a similar statement, calling on members of the judiciary and legal community to "bear responsibility" for the "on-going injustice" of "institutions [that] remain affected by the vestiges of slavery." Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Community at 1 (June 4, 2020) (https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf).

    I played a limited role in the committee statement. I am committed to treating all parties that come before me fairly and impartially regardless of race. My understanding of the committee statement was that it expressed the same sentiment as the Supreme Court's letter, recognizing the ongoing impacts of past discrimination, such as Jim Crow laws.

        i. **If yes, as a judge, do you believe you are a part of the problem?**

        Response: As a judicial officer, I take a careful and unbiased approach to all of my cases. I therefore do not see myself as part of any problem regarding racial bias.

        ii. **How does racism and white supremacy infiltrate the criminal justice system today?**

        Response: It would be generally inappropriate under federal and state ethics codes for me to opine on any ongoing injustices that might come before me as a judicial officer. However, in adopting Washington's General Rule (GR) 37, the Washington Supreme Court identified "unfair

exclusion of potential jurors based on race or ethnicity" as an area of concern. *See* GR 37(a).

b. **Soon after the statement's release, an undisclosed judge wrote to OCLA Director Jim Bamberger expressing concerns with the Oversight Committee's assertion that "every" part of the legal system was racist. In response Mr. Bamberger, along with two members of the OCLA Oversight Committee, called himself, "by definition, a racist" because he "quietly experience[s] and accept[s] the full spectrum of advantages . . . that accompany [his] skin color and gender."**

   i. **Do you agree with Mr. Bamberger's definition of a racist?**

   Response: No.

   ii. **Do you agree that Mr. Bamberger is, by definition, a racist**?

   Response: No.

2. **During a 2023 Oversight Committee meeting, while you were a judge, you led an "Occupied Land Acknowledgment."**

   a. **Do you believe that it is appropriate for a judge to speak in terms of occupier and occupied people?**

   Response: It is common in Washington State for meetings to open with a land acknowledgment, including meetings led by judicial officers. In fact, it is the practice of the Chief Justice of the Washington Supreme Court to provide a land acknowledgement on the first day of each court term. The land acknowledgement I presented in June 2023 drew from Justice Gorsuch's concurring opinion in *Haaland v. Brackeen*, 599 U.S. 255, 297 (2023) (Gorsuch, J., concurring).

   b. **Do "occupied land acknowledgments" or similar statements unify or divide our country?**

   Response: In my experience, land acknowledgment statements serve as reminders of history. I have not observed land acknowledgments to be divisive.

3. **The OCLA Oversight Committee is a founding member of the Race Equity and Justice Initiative ("REJI"). In 2018 the Oversight Committee adopted the REJI's Acknowledgements and Commitments.**

   a. **The REJI "acknowledges" that true justice cannot be achieved "until the legal and justice systems and all who work in these systems are conscious of and are able to counter the impact of racialized systems, racialized structures and bias."**

i. **Do you agree with this statement?**
ii. **What is the role of a federal district judge to counter the impact of "racialized" systems, structures, and bias?**

Response: The OCLA oversight committee adopted the Race Equity and Justice Initiative's (REJI) Acknowledgement and Commitments prior to my appointment to the committee. It is my understanding that a number of Washington organizations have signed off on the REJI Commitments, including nonprofit organizations, law schools, the King County Prosecuting Attorney's Office, and the Washington State Bar Association. I do not necessarily agree with everything produced by REJI. But under caselaw promulgated by the Washington Supreme Court, judges are expected to be "aware of the history of race and ethnic discrimination in the United States and that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." *State v. Bagby*, 200 Wash. 2d 777, 793 n.7 (2023). The Court has also extended the applicability of an implicit bias analysis to determining whether an individual has been seized by law enforcement. *State v. Sum*, 199 Wash. 2d 627, 643 (2022). As a state judge, I am bound by the decisions of the Washington Supreme Court. It has therefore been important for me to understand issues of potential bias that form the basis of Washington Supreme Court jurisprudence. As a federal district judge, I will be bound by U.S. Supreme Court and Ninth Circuit precedent.

b. **At a 2018 OCLA Oversight Committee meeting, all members received hard copies of the "Race Equity and Justice Organizational Toolkit produced by JustLead Washington under contract with the Office of Civil Legal Aid." A version of the "toolkit" from 2020 teaches that: "*The premise of the law and justice system rests upon two frameworks designed to maintain the status quo: 1) Common Law doctrine is known as 'stare decisis,' which means that courts should use precedent (what has happened in the past) in decision making; and 2) the structure of the law as an adversarial 'them versus us' system. In other words, those who benefit most by things staying as they are can count on the law and justice system help perpetuate a status quo that has been historically racialized.*"**
    i. **Do you agree that stare decisis helps *"perpetuate a status quo that has been historically racialized*"?**
    ii. **Do you believe that the foundational (adversarial) nature of the American legal system helps *"perpetuate a status quo that has been historically racialized*"?**

    Response: I believe in the importance and integrity of both stare decisis and the American adversarial legal system. The United States Supreme Court has recognized that precedent must, at times, be overturned because of its failure to live up to the core commitments of the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954). Further, the

Supreme Court considers a host of factors in deciding whether to overturn its own precedent. *See Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 585 U.S. 878, 916-929 (2018) (stare decisis factors include quality of reasoning, workability, compatibility with related decisions, change in developments, and reliance). But as a state appellate judge, I am bound by precedent from the Washington Supreme Court and the U.S. Supreme Court. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wash. 2d 566, 578 (2006). Should I be confirmed, I will be bound by Supreme Court and Ninth Circuit precedent. *See Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122, 136 (2023).

4. **In 2022 the OCLA Oversight Committee established a subcommittee to create a new mission statement for the OCLA which reflected the "racial justice awakening in the nation." You volunteered to join.**
    a. **What did the subcommittee propose?**
    b. **Was the statement adopted?**

    Response: I have not engaged in any activities regarding the mission statement. A draft mission statement has not yet been prepared or adopted.

5. **In September 2023, the OCLA Oversight Committee appears to have invited far-left activist Corey Best to serve as a "keynote speaker." The meeting minutes reflect that you were one of four committee members present. Mr. Best has referred to the U.S. as a "*racially capitalistic, exploitative, carceral, and colonized society*."**
    a. **Do you agree with that statement?**
    b. **Were you present for Mr. Best's speech?**
    c. **According to the meeting minutes, "*There was also a session where attendees read excerpts coauthored by Mr. Best that challenged white audiences to examine how they contribute to harm, uphold the white supremacist system, and contribute to the breakup of BIPOC families through the child welfare system*."**
        i. **Did you participate in this exercise?**
        ii. **Regardless of whether you participated in this exercise, it is appropriate to single out individuals on the basis of an immutable characteristic (such as race) for public criticism?**
    d. **Please describe the process by which the OCLA invited Mr. Best to speak.**
    e. **Did you have any role in inviting, approving, suggesting, or communicating about Corey Best as a speaker?**
    f. **Were you aware of Mr. Best's radical views before he spoke before your committee?**
    g. **Did you voice any objection to hosting Corey Best as a speaker?**
    h. **Do you believe Mr. Best was an appropriate speaker for the OCLA?**
    i. **Do you believe Mr. Best reflects the values of the OCLA Oversight Committee?**

Response: Corey Best did not speak at an oversight committee meeting. The oversight committee operates separately from the Office of Civil Legal Aid. The oversight committee meeting minutes indicate Mr. Best spoke at a state-wide training that was hosted by the Office of Civil Legal Aid and the Office of Public Defense. I did not attend the training and I was not involved in planning the training. I am not familiar with Mr. Best and do not know why he was selected as a speaker, whether he was an appropriate speaker, or whether he reflects the values of the oversight committee. I do not adhere to the view that the United States is a "racially capitalistic, exploitative, carceral, and colonized society." I do not agree with singling out individuals on the basis of immutable characteristics such as race.

6. **Mr. Best appears to advocate for the abolishment of the child welfare system. He has argued that the Child Abuse Prevention and Treatment Act ("CAPTA") is "discriminatory" and accuses "[m]andatory reporting laws" of "deputiz[ing] therapists, doctors, teachers, and social workers to surveil and control families."**
    a. **Do you agree that the child welfare system should be abolished?**
    b. **Is the child welfare system discriminatory?**
    c. **Is CAPTA discriminatory?**
    d. **Are mandatory reporting laws discriminatory? Are they an intrusion on personal privacy?**

    Response: I am unfamiliar with Mr. Best's views and I have never adhered to the view that the child welfare system or child welfare laws are discriminatory or should be abolished. I regularly adjudicate cases involving Washington's child welfare system and I have never invalidated any of the rules or laws pertaining to child welfare.

7. **The OCLA Oversight Committee removed "gender based honorifics such as Mr. and Ms." from meeting minutes because "these reflect binary gender assignments that are unnecessary and presumptive."**
    a. **Do you agree with this statement?**
    b. **Are gender based honorifics "unnecessary and presumptive?"**
    c. **Are gender based honorifics necessary in the court?**
    d. **Would it be appropriate for a judge to remove gender based honorifics in court filings?**

    Response: I use gender based honorifics in all of my court opinions. I consider them polite and humanizing.

8. **You are a member of the Washington State Board for Judicial Administration ("BJA"). The BJA has identified a "lack of respect by legislators towards the bench" and discussed how "[i]t is difficult when our justice partners make comments to the media that makes the court look bad." The BJA would like to "remind our partners and elected officials of their ethical duties and possible results from their comments."**
    a. **Do you agree with these concerns?**
    b. **Is it important to ensure public trust in the integrity of the judicial system?**

c. **Do you believe it is damaging to the integrity of the judicial system when legislators accuse the U.S. Supreme Court of partisanship?**
d. **Is it appropriate for a U.S. Senator to threaten U.S. Supreme Court justices that they "won't know what hit if you go forward with these awful decisions"?**
e. **Is it appropriate for court decisions to be swayed by public opinion, partisanship, or attacks by the media?**

Response: All officials should be careful not to undermine public confidence in governmental institutions. As the Supreme Court wrote in *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023), "[i]t is important that the public not be misled" so as to mistake "plainly heartfelt disagreement for disparagement. … Any such misperception would be harmful to this institution and our country." Judicial decisions must not be impacted by public opinion, partisanship, or the media.

9. **In 2023 you participated in a panel on racial bias in the courtroom. During a discussion on Justice Alito and Justice Thomas' response to *Thompson v. Henderson*, you appear to criticize the U.S. Supreme Court. You say: "[Y]ou look at the colorblind what . . . . you know if it wasn't so sad it would be interesting, but you have a color – supposedly colorblind U.S. Supreme Court that's issued its affirmative action decisions this year, and you have our very color-conscious state Supreme Court."**
   a. **What did you mean by this?**
   b. **Were your comments appropriate for a sitting judge?**
   c. **As a sitting judge, is it appropriate to express skepticism towards the motives of the Supreme Court?**
   d. **As a sitting judge, is it appropriate to criticize decisions issued by the Supreme Court?**
   e. **Do your comments ensure public trust in the integrity of the judicial system?**
   f. **What did you mean that the U.S. Supreme Court is "supposedly colorblind"?**

   Response: My comment was meant to reference what might be viewed as a tension between jurisprudence from the U.S. Supreme Court and the Washington Supreme Court. There was no intent to criticize either court or to express an opinion as to the motives of any of the justices. In *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 205, 230 (2023), the Supreme Court referenced the general rule that the Constitution is "color-blind." But the Washington Supreme Court has adopted a different approach, which is binding on me as a state court judge. In *State v. Sum*, the Court held that "an allegedly seized person's race and ethnicity *are* relevant to the question of whether they were seized by law enforcement for purposes" of the state Constitution. 199 Wash. 2d 627, 643 (2022) (emphasis added). Additionally, in *Henderson v. Thompson*, the Washington Supreme Court held that "[w]hen a participant in the trial uses language that *could* evoke racist stereotypes, courts should not presume that such language has no effect—on them or on the jurors. … [T]rial courts should be deeply concerned about the possibility that racism has affected any trial, and courts should grant a new trial when an objective observer *could* conclude that racism was a factor in the verdict." 200 Wash. 2d 417, 439

(2022) (emphasis added). I believe judges foster public trust in the integrity of the judicial system when they talk to attorneys about the legal rules governing courtroom behavior and acknowledge that some legal expectations may seem difficult to synthesize.

10. **In the same panel you reflect on your experience as a federal public defender and describe how you were "representing folks in jurisdictions where there was a lot of racial bias."**
    a. **Which specific jurisdictions had "a lot" of racial bias?**
    b. **How did you identify racial bias in the jurisdiction?**
    c. **You later describe how, in preparation for trial, you would ask: "how are we going to deal with the racism that's gonna happen in this trial?" Should parties assume that there is racial bias at trial?**

    Response: My comments referred to jury trials that I had observed in the Eastern District of Washington where a number of for-cause challenges had been granted on the basis of bias. When I prepared for trial as an attorney, I believed it was a best practice to prepare for a number of unknown variables, including the possibility of racial bias.

11. **The Supreme Court of Washington acknowledged the persistence of "conscious and unconscious biases in every judge" and the "the responsibility of ongoing injustice which every member of the legal community bears."**
    a. **Are you biased? If so, how can you rule fairly and impartially?**

    Response: The quoted language appears to refer to a letter issued to the judiciary and legal community by the Washington Supreme Court. *See* Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Community at (June 4, 2020) (https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf). I do not understand the letter to suggest that state judicial officers are incapable of fairly and impartially adjudicating their cases. As a judicial officer, I take a careful and unbiased approach to all of my cases.

    b. **If not, do you disagree with the Supreme Court's statement?**

    Response: As a lower court judge, it would be inappropriate for me to express disagreement with the Washington Supreme Court, especially as the Court has incorporated the letter into its substantive jurisprudence. *See State v. Sum*, 199 Wash. 2d 627, 640 (2022).

    c. **Please identify where there is "ongoing injustice" in the judicial system.**

    Response: It would be generally inappropriate under federal and state ethics codes for me to opine on any ongoing injustices that might come before me as a judicial officer. However, in adopting Washington's General Rule (GR) 37, the

Washington Supreme Court identified "unfair exclusion of potential jurors based on race or ethnicity" as an area of concern. *See* GR 37(a).

d. **As a judge, if you believe a law is unjust, do you have a responsibility to disregard it?**

Response: As a lower court judge, I am bound by precedent set by the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

e. **As a judge, if you believe a U.S. Supreme Court or a Ninth Circuit ruling is unjust, do you have a responsibility to ignore it?**

Response: Please see my response to question 12(d).

f. **As a judge, if you uphold a U.S. Supreme Court or a Ninth Circuit ruling that you believe to be unjust, do you bear "the responsibility of ongoing injustice?"**

Response: If confirmed, I will apply binding precedent from the Supreme Court and Ninth Circuit without regard to any personal opinions about its correctness. *Mallory v. Norfolk S. Ry Co.*, 600 U.S. 122, 136 (2023).

12. **What is "equitable access to justice?" Do judges have a responsibility to ensure equitable access?**

Response: My understanding of equitable access to justice refers to elimination of unnecessary barriers to accessing the court system and ensuring equal treatment for all parties. Judges may sometimes play a role in eliminating barriers to the court system. For example, an individual with limited English proficiency may need an interpreter. Someone with a disability may require an auxiliary aid. Individuals outside the justice system might also play a role in eliminating barriers. In my introduction of Sarah Augustine at a May 23, 2023 Rotary meeting, I used the phrase "equitable access to justice." I was referring to my familiarity with Ms. Augustine's work at the Dispute Resolution Center of Yakima and Kittitas Counties. One of Ms. Augustine's projects was to help crime victims develop victim impact statements. This is a way that someone outside the court system can help eliminate a perceived barrier to accessing the court system.

13. **In *USA v. Nielson* you defended Michael Nielson, a man charged with receipt of child pornography after law enforcement uncovered 79,897 child pornography images and videos in his home. Arguing for a lower sentence, you wrote that "research shows that on-line offenders such as Mr. Nielson do not pose a risk of recidivism."**
    a. **Is this an accurate statement?**

b. **What evidence supports your statement that online offenders do not pose a risk of recidivism?**

Response: Child pornography is vile and causes ongoing trauma to children who have been victims of abuse and torture. I was appointed by the court to represent Mr. Nielson. The case was resolved by a plea with a joint recommendation of 60 months' imprisonment. The only contested issue at sentencing was the term of supervised release. My sentencing presentation in Mr. Neilson's case was made pursuant to my duties of zealous representation under the Sixth Amendment. Any evidence in support of this statement would have been set forth in my sentencing memorandum.

14. **Sitting as a Justice pro tempore for the Supreme Court of Washington, you wrote the majority opinion in a split decision reversing a felony murder conviction for a defendant who participated in a heinous home-invasion robbery that resulted in the murder of a father in close proximity to his wife and children (*In the Matter of the Personal Restraint of Knight*, Wash. App. No. 101068-1 (2023)). The concurrence described the ruling as "not just." The dissent accused the opinion of "ignor[ing]" and "rewrite[ing]" a prior decision, "decontextualize[ing]" the case, and "unjustifiably overturning Knight's conviction."**

a. **Please explain that facts of this case.**

Response: The facts in *Pers. Restraint of Knight*, 2 Wash. 3d 345 (2023) were horrifying. As set forth in the opinion, the facts were as follows:

> In April 2010, Ms. Knight and three male accomplices engaged in a home invasion robbery. Ms. Knight and one of her accomplices gained entrance to the home of James and Charlene Sanders under the pretext of buying a ring listed for sale on Craigslist. While discussing the ring, Ms. Knight's accomplice pulled out a handgun and brandished it at the Sanderses. Ms. Knight and her accomplice then restrained the Sanderses with zip ties, removed both their rings, and ordered them to lie face down on the floor. The remaining two accomplices then entered the residence after Ms. Knight issued a signal via a Bluetooth device. …
>
> Once all accomplices were inside, the Sanderses' two minor children were brought at gunpoint into the same room as their parents. The children were restrained with zip ties and one was pistol-whipped in the head. Not long after, Ms. Knight went upstairs to look for other items of value. …
>
> While Ms. Knight was upstairs, one of the male invaders held a gun to Charlene Sanders's head. He pulled back the hammer, began counting down, and asked about a safe. Ms. Sanders initially denied having a safe. The man kicked Ms. Sanders in the head, called her a profanity, and threatened to kill her and her children. Eventually, Ms. Sanders admitted there was a safe in the garage. …

> James Sanders agreed to provide a combination to the safe and his zip ties were loosened. Mr. Sanders then broke free of the restraints and attacked one of the men. … Mr. Sanders was shot in the ear, rendering him unconscious. The men then dragged Mr. Sanders into another room, where he was fatally shot. …
>
> Ms. Knight and her accomplices fled the residence, taking the rings and other items. ... The safe was neither breached nor removed from the residence.

Id. at 347-348 (internal citations committed).

b. **Do you believe the reversal was just?**

Response: In adjudicating the *Knight* case, my task was to set aside any personal feelings and decide the case according to the arguments raised by the parties and the established precedent of the Washington Supreme Court. I believe it would be inappropriate for me to comment on whether a prior opinion was or was not just.

c. **What did the dissent mean by accusing your opinion of rewriting and decontextualizing the case?**

Response: It would be inappropriate for me to comment on what was meant by the dissent.

15. **In *State v. Orozco* you concurred in reversing a murderer's conviction because you determined that a prosecutor improperly struck a black juror. The prosecutor struck the juror because he had personally previously prosecuted the stricken juror. You found the reason "compelling," but still concluded that, under *Batson* and Washington General Rule 37, an objective observer "could" conclude race was "'a' factor."**
    a. **If a prosecutor cannot strike a black juror that he has personally prosecuted, can he ever strike a black juror?**
        i. **If yes, please provide a hypothetical example.**

Response: In *State v. Orozco*, 19 Wash. App. 2d 367, 378 (2021) (Pennell, J., concurring) I issued an opinion concurring in the majority's decision to reverse a conviction under *Batson v. Kentucky*, 476 U.S. 79 (1986) and Washington State's GR 37. My opinion expressed concern that Mr. Orozco's conviction for "horrific acts of violence" was being reversed for reasons "not related to guilt." *Orozco*, 19 Wash. App. 2d at 378. I wrote a concurring opinion to emphasize that this type of outcome needed to be avoided in the future.

Under GR 37, the validity of a peremptory strike must be viewed from the perspective of an "objective observer" who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in

the unfair exclusion of potential jurors in Washington State." GR 37(f). If, based on this perspective, "an objective observer *could* view race or ethnicity as *a* factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e) (emphasis added). As explained in my concurring opinion, GR 37 is "a broad rule that requires attorneys and judges to fundamentally change their perspectives on peremptory challenges." *Orozco*, 19 Wash. App. 2d at 379. "If a for-cause challenge cannot be sustained, counsel would be well advised to exercise restraint and accept the juror onto the panel." *Id.* at 380.

Outside my opinion in *Orozco*, it would be inappropriate under federal and state ethics codes for me to opine on hypotheticals that might come before me in future cases.

b. **In your opinion, you stated that "[n]o citation to authority is necessary to support the claim that people of color are disproportionately targeted," and that race "could have been a factor in causing venire juror 25 to have run-ins with police that were documented in police reports" viewed by the prosecutor. As a judge, is it appropriate to suggest, without evidence, that police are racist?**

Response: My opinion did not state police are racist or suggest why people of color are disproportionately represented in the criminal justice system. The reference to disproportionality was supported by a citation to Washington Supreme Court commission and task force findings. In addition, the Washington Supreme Court has taken judicial notice of "implicit and overt racial bias against black defendants in this state." *State v. Gregory*, 192 Wash. 2d 1, 22 (2018) (plurality opinion). Under GR 37, the test is whether an "objective observer" who is aware of "implicit, institutional and unconscious biases," *could* view race as *a* factor in causing the juror to have run-ins with police. This standard speaks in terms of possibilities, not whether there was ever any actual bias.

c. **Can someone be implicitly biased against the police? If so, is a baseless assumption that police will be biased against an individual an example of implicit bias?**

Response: From my understanding, the possibility of implicit bias is not specific to race and could extend to a variety of situations.

d. **Is it appropriate for a judge to assume that law enforcement practices are racist or biased, regardless of whether it is a question raised before the court or whether evidence is presented?**

Response: Under the GR 37 test discussed in *Orozco*, the question is whether an "objective observer" as defined by GR 37(f) "*could* view race or ethnicity as *a* factor in the use of the peremptory challenge." GR 37(e) (emphasis added). The

rule speaks in terms of possibilities, not actual bias. *See State v. Sum*, 199 Wash. 2d 627, 652 (2022).

16. **In 2001 you expressed opposition to capital punishment. As a federal district judge, would you impose the death penalty if the law so required?**

Response: Yes. Federal law authorizes the death penalty for offenses described in 18 U.S.C. § 3591. Procedures for imposition of the federal death penalty are set forth in 18 U.S.C. §§ 3592 and 3593. The Supreme Court has upheld the constitutionality of the death penalty under the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153 (1976).

17. **According to Planned Parenthood of Greater Washington and Northern Idaho, you and Tom Zeilman donated between $1,000 and $2,499 in at least 2017, 2018, and 2019. Beginning in 2018, Planned Parenthood labeled you and Mr. Zeilman as donors for at least 10 consecutive years. However at your hearing, you told Senator Kennedy that you "don't recall" whether you donated to Planned Parenthood. Have you ever donated to Planned Parenthood?**
    a. **If not, why is your name listed as a donor?**

Response: I was surprised by the question posed during the April 17, 2024 hearing and did not, at the time, recall the specific donations referenced by Senator Kennedy. My husband, Tom Zeilman, was primarily responsible for making donations to Planned Parenthood of Greater Washington and Northern Idaho. The organization listed us both as donors. To the best of my knowledge, Planned Parenthood's donation report is accurate.

18. **Are you a citizen of the United States?**

Response: Yes.

19. **Are you currently, or have you ever been, a citizen of another country?**

Response: No.

    a. **If yes, state countries and dates of citizenship.**
    b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
        i. **If not, please explain why.**

20. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

Response: No.

21. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

    Response: No.

22. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

    Response: Foreign law is generally irrelevant to constitutional interpretation. Nevertheless, the Supreme Court has referenced foreign law when analyzing the constitution's original public meaning. *See, e.g., New York State Rifle and Pistol Ass'n v. Bruen*, 597 U.S. 1, 40 (2022); *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

23. **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.

24. **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: No, all judicial opinions should be made in adherence to precedent.

25. **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.

26. **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.

27. **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: Relief may be obtained through direct appeal (28 USC § 1291), collateral attack (28 U.S.C. § 2255), writ of habeas corpus (28 U.S.C. § 2241), compassionate release (18 U.S.C. § 3582(c)), and government motion based on substantial assistance (Fed. R. Crim. P. 35(b)).

28. **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: Harvard College and the University of North Carolina had admissions processes that took into account applicants' race. Students for Fair Admissions (SFFA) sued, arguing the institutions' race-based admission processes violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution. The Supreme Court sustained SFFA's challenge, holding that the race-based college admissions processes cannot withstand strict scrutiny review. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

29. **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: I have participated in hiring decisions at every job I have held since graduating from law school, with the exception of my time as a fellowship attorney with TeamChild. I have also participated in various aspects of hiring decisions for volunteer organizations such as the U.S. Magistrate Judge Selection Committee, Yakima Area Arboretum, the Yakima YWCA, and the Office of Civil Legal Aid's Oversight Committee.

30. **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.

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

    Response: No.

32. **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: Not to my knowledge. While working for previous employers, my participation in the hiring process was limited to reviewing applications and participating in interviews.

    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.

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

    Response: Yes.

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

    Response: In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Supreme Court held that the First Amendment's Free Speech Clause prohibits a state from utilizing anti-discrimination laws to compel a wedding website designer to create expressive content for same-sex couples.

35. **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: The Supreme Court quoted from this portion of *Barnette* in *303 Creative v. Elenis*, 600 U.S. 570, 584-85 (2023). *Barnette* remains good law and is binding precedent.

36. **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: Supreme Court precedent provides guidance on determining whether a law that regulates speech is content based or content neutral. A law may be content based in two ways: (1) it targets speech based on communicative content or (2) it is motivated by a discriminatory purpose. *City of Austin, Tx. v. Regan National Advertising of Austin, LLC*, 596 U.S. 61, 69, 76 (2022). If a law is content based, it must satisfy strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015). Content neutral laws are subject to intermediate scrutiny. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

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

Response: True threats are not protected by the First Amendment's Free Speech Clause. A true threat is one that conveys a serious expression of intent to commit a violent act. *Counterman v. Colorado*, 600 U.S. 66, 74 (2023). To constitute a true threat, the speaker need not actually intend to carry out the violent act. *Elonis v. United* States, 575 U.S. 723, 734 (2015). Nor must the speaker purposefully or knowingly intend to convey a threat of violence. *Counterman*, 600 U.S. at 74. But to fall outside of First Amendment protections, the speaker must at least act in reckless disregard of whether his or her statement would be understood as a threat of violence. *Id*. at 79.

38. **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: A fact addresses the question of "who did what, when or where, how or why." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC. v. Village at Lakeridge, LLC*, 583 U.S. 387, 394 (2018). A trial court's factual findings are given broad deference and are reviewed by appellate courts for clear error. *Id.* Questions of law refer "to the application of a legal standard to settled facts." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227 (2020). Traditionally, questions of law are reviewed de novo. *Highmark, Inc. v. Allcare Health Management System Inc.*, 572 U.S. 559, 563 (2014). The distinction between what constitutes a question of law versus a question of fact can sometimes be "vexing." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). According to the Supreme Court, in some circumstances "the fact/law distinction" turns "on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

39. **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), the court is required to consider all four purposes of sentencing. The statute does not prioritize any of the factors. If confirmed, I will consider all § 3553(a) factors in reaching individual sentencing decisions.

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

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, I believe it would be inappropriate for me to comment about the quality of Supreme Court decisions. I faithfully apply all binding precedent and will continue to do so if confirmed.

41. **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 judge and judicial nominee who is governed by federal and state ethics codes, I believe it would be inappropriate for me to comment about the quality of Ninth Circuit decisions. If confirmed, I will faithfully apply all Ninth Circuit precedent.

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

Response: 18 U.S.C. § 1507 states:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to opine on matters that might come before me. That said, I am unaware of any authority declaring 18 U.S.C. § 1507 unconstitutional. In *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), the Supreme Court opined that a similarly worded state statute did not "infringe upon the constitutionally protected rights of free speech and free assembly."

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

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

    As to subparts (a) and (b): Consistent with the responses of past nominees, I recognize the issues of *de jure* racial segregation in public schools and government prohibitions on interracial marriage are unlikely to come before me as a United States District Judge. Thus, I can state that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

    As to subparts (c) and (f)-(m): As judge and judicial nominee, it would be inappropriate for me to opine on whether a Supreme Court decision was correctly decided.

    As to subparts (d) and (e): *Roe v. Wade* and *Planned Parenthood v. Casey* have been overturned by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). If confirmed, I will follow and apply binding precedent from the Supreme Court and Ninth Circuit.

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

    Response: The standard for analyzing a Second Amendment challenge is set forth in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. at 17. To justify a firearm regulation, the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id*. at 17. Should I be confirmed, I will apply *Bruen* and all other binding Second Amendment precedent.

46. **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, including Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond, requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond? If so, who?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond? If so, who?**

       Response: In early 2021, I attended a webinar presentation regarding the judicial nomination process sponsored by Demand Justice. Christopher Kang presented during the webinar. This is the only contact I have ever had with Demand Justice.

47. **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, including, but not limited to, Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris, requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

       Response: No.

c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

Response: No, not to my knowledge.

48. **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?**
        i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund.**

    Response: No.

    b. **Are you currently in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
        i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
        i. **Please include in this answer anyone associated with Arabella's subsidiaries, such as the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No, not to my knowledge.

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

    Response: No.

b. **Are you currently in contact with anyone associated with the Open Society Foundations, including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No, not to my knowledge.

d. **Have you ever received any funding, or participated in any fellowship or similar program affiliated with the Open Society network?**

Response: No.

50. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

    Response: No, not to my knowledge.

51. **The Raben Group is a lobbying group that "champions diversity, equity, and justice as core values that ignite our mission for impactful change in corporate, nonprofit, government and foundation work." The group prioritizes judicial nominations and its list of clients have included the Open Society Foundations, the American Civil Liberties Union, the New Venture Fund, the Sixteen Thirty Fund, and the Hopewell Fund. It staffs the Committee for a Fair Judiciary.**

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

Response: No.

b. **Are you currently in contact with anyone associated with The Raben Group, including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff and/or Katherine Huffman? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with The Raben Group including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff, and/or Katherine Huffman? If so, who?**

Response: No, not to my knowledge.

d. **Has anyone associated with the Raben Group offered to assist you with your nomination, including but not limited to organizing letters of support?**

Response: No.

52. **The Committee for a Fair Judiciary "fights to confirm diverse and progressive federal judges to counter illegitimate right-wing dominated courts" and is staffed by founder Robert Raben.**

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

Response: No.

b. **Are you currently in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

Response: No, not to my knowledge.

53. **The American Constitution Society is "the nation's foremost progressive legal organization" that seeks to "support and advocate for laws and legal systems that redress the founding failures of our Constitution, strengthen our democratic legitimacy, uphold the role of law, and realize the promise of equality for all, including people of color, women, LGBTQ+ people, people with disabilities, and other historically excluded communities."**

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

    Response: No.

    b. **Are you currently in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

    Response: I am acquainted with a Seattle attorney named Frank Shoichet who is associated with the American Constitution Society. I have, in the past, talked to him about the federal judicial nomination process. To the best of my recollection, the last time I talked to Mr. Shoichet was in the fall of 2023. I have not communicated with Mr. Shoichet since speaking with a representative from Senator Murray's Office on December 8, 2023.

    In addition, in early 2021, I participated in a webinar regarding the federal judicial nomination process. I believe the American Constitution Society was involved in planning the webinar.

54. **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 February 1, 2021, the United States Senators for Washington State announced a vacancy for a United States District Judge position. I submitted an application to the Merit Selection Committee established by Senators Patty Murray and Maria Cantwell later that month. On March 25, 2021, I interviewed with the Merit Selection Committee. I was advised that my name was forwarded bv the Committee to the Senators' offices. On April 21, 2021, I interviewed with staff from Senator Murray's Office. On April 23, 2021, I interviewed with staff from Senator Cantwell's Office. On May 13, 2021, I interviewed with Senator Murray. On May 26, 2021, I interviewed with

attorneys from the White House Counsel's Office. In February 2022, I was contacted by staff from Senator Murray's Office with a request for additional information. I provided the requested information over the course of the next month. On December 8, 2023, I was contacted by a representative of Senator Murray's Office regarding my continued interest in a position with the Eastern District of Washington. On January 4, 2024, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 20, 2024, the President announced his intent to nominate me.

55. **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.

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

    Response: No.

57. **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, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

58. **During or leading up to 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.

59. **During or leading up to 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.

60. **During or leading up to your selection process, did you talk with any officials from or anyone directly associated with The Raben Group or the Committee for a Fair Judiciary, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

61. **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: Please see my response to Question 53(c).

62. **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?**
    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?**

Response: While preparing the Senate Judiciary Questionnaire, I was provided feedback by officials from the Department of Justice's Office of Legal Policy (OLP). Some of the feedback suggested I emphasize my civil cases, since my background as an attorney was primarily in criminal law. I chose all cases listed on my Senate Judiciary Committee questionnaire.

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

Response: Please see my response to question 54.

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

Response: On April 24, 2024, I received questions from the Committee through OLP. Once I completed my draft responses, I forwarded them to OLP. I then made edits, finished my responses, and forwarded my answers to the questions to OLP for submission to the Committee.

Senator Mazie K. Hirono
Senate Judiciary Committee

Nominations Hearing | April 17, 2024
Questions for the Record for Rebecca L. Pennell

Sexual Harassment
As part of my responsibility as a member of this committee to ensure the fitness of nominees, I ask each nominee to answer two questions:

QUESTIONS:

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

   Response: No.

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

   Response: No.

Senator Mike Lee
Questions for the Record
Rebecca L. Pennell, Nominee for District Court Judge for the Eastern District of Washington

1. How would you describe your judicial philosophy?

Response: As a judge on the Washington State Court of Appeals, my philosophy is to approach each case with an open mind, thorough research, and adherence to binding precedent. In issuing decisions, I strive to set forth my opinions in a way that is clear, practical, and easy to follow. If confirmed as a district judge, I will continue to follow this philosophy.

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

Response: I would look to the text of the statute, context, and applicable precedent. In addition, consistent with Supreme Court jurisprudence, I would consult period specific dictionaries for the "ordinary public meaning" of a statute's terms at the time of enactment. *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 654 (2020). I would also consult Supreme Court and Ninth Circuit precedent on methods of interpretation. If a statute's meaning is plain on the face of the text, "that is the end of the matter." *Royal Foods Co. Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001).

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

Response: I would look to the text of the provision and applicable precedent from the Supreme Court and Ninth Circuit. In the unlikely event of no binding precedent, I would consult persuasive authority from other circuit courts.

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

Response: The text and original public meaning have been critical to the Supreme Court's constitutional jurisprudence. *See, e.g., Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022) (First Amendment's Establishment Clause); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront witnesses). If confirmed, I would faithfully apply this precedent.

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

Response: Please see my response to Question 2.

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 or constitutional provision refers to the ordinary meaning at the time of enactment. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 20 (2022) (constitutional interpretation); *New Prime, Inc. v. Oliveria*, 586 U.S. 105, 113 (2019) (statutory interpretation).

7. What are the constitutional requirements for standing?

Response: To establish Article III standing, a plaintiff must demonstrate it has "(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." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016).

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

Response: Under the Necessary and Proper Clause, Congress is empowered to "make all Laws which shall be necessary and proper for carrying into Execution" the powers "vested by" the U.S. Constitution. U.S. Const. art. I, sec. 8, cl. 18. *See also McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

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 explained that constitutionality of a statute does not turn on how it is labeled. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012). If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent.

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

Response: Yes. The Supreme Court has recognized that due process protects unenumerated substantive rights. *See Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). These include the right to same sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015) the right to engage in private, consensual sexual activity, *Lawrence v. Texas*, 539 U.S. 558 (2003); the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); the right to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to have children, *Skinner v. Oklahoma ex*

rel. Williamson, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

11. What rights are protected under substantive due process?

Response: Please 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: My responses to the above questions are not based on my personal beliefs, but on binding Supreme Court precedent. Cases setting forth a right to contraceptives remain good law. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). In contrast, *Lochner v. New York*, 198 U.S. 45 (1905) is longer good law. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: The Supreme Court has interpreted the Commerce Clause to allow for three areas of congressional regulation: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Purely local, noneconomic activities fall outside of this purview. *Id.* In addition Congress cannot regulate a person's inactivity simply because the inactivity has an impact on interstate commerce. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: A suspect classification has been recognized to consist of a "discrete group" with "obvious, immutable, or distinguishing characteristics," that has been "subjected to discrimination" or is "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Supreme Court has identified suspect classifications to include race, religion, national origin, and alienage. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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 system of separation of powers provides "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

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: I would apply applicable precedent from the Supreme Court and Ninth Circuit. For example, if presented with a challenge to the exercise of presidential power, I would look to Justice Jackson's tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-38 (1952) (concurring opinion).

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

Response: Empathy should play no role in a judge's substantive analysis or disposition. However, judges should conduct court proceedings in a way that is respectful of counsel, parties, witnesses, and the public.

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

Response: Both are equally bad and should be avoided.

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 have not studied this trend in Supreme Court jurisprudence. The structure of the Constitution requires respect for coordinate branches of government. At the same time, it is the duty of the judiciary to enforce the limits on federal power by striking down legislation that exceeds congressional authority. *See Marbury v. Madison*, 1 Cranch 137 (1803). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: Judicial review refers to the judiciary's authority to review a particular action or decision. *See Kloeckner v. Solis*, 568 U.S. 41, 53 (2012). Judicial supremacy refers to the idea that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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 uphold the Constitution. U.S. Const. art. VI, cl. 3. The oath encompasses abiding by court judgments. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a judge and nominee to the federal bench, it would be improper for me to opine on how elected officials should comply with their oaths of office.

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: The integrity of the rule of law demands that judges interpret the law and Constitution as written. Policy decisions lie with the other branches of government. If confirmed, I will decide each case according to individual facts and issues presented, in accordance with precedence established by the Supreme Court and Ninth Circuit.

23. As a federal judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a federal 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 federal judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Lower court judges are bound to follow binding precedent. If Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions" a lower court must follow binding precedent, "leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If confirmed, I will apply binding precedent from the Supreme Court and Ninth Circuit without regard to any personal opinions about its correctness. *Mallory v. Norfolk S. Ry Co.*, 600 U.S. 122, 136 (2023).

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 judge's sentencing analysis?

Response: None. A defendant's race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10 (Policy Statement). In imposing sentence, a judge is obliged to consider the factors set forth in 18 U.S.C. § 3553(a).

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 Biden Administration's definition of equity. During my work on the Washington Courts Board for Judicial Administration's Court Education Committee, we have defined equity for purposes of judicial education as "the identification and removal of barriers to make the process fairer for all so that they can fully participate."

26. Without citing a dictionary definition, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: Equality generally refers to the state of being equal. To the extent equity involves removal of barriers, the goal of equity is to achieve equality.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that guarantees equity as defined by this question. The Fourteenth Amendment's Equal Protection Clause guarantees "the equal protection of the laws." The Fourteenth Amendment does not refer to equity.

28. According to your current understanding, and without citing a dictionary definition, how do you define "systemic racism?"

Response: I do not know if there is a generally accepted definition of systemic racism. My understanding of the term is that it generally refers to the impact of past acts of racial discrimination. To the extent a claim of systemic racism comes before me, I will adjudicate the claim based on the facts of the case and applicable precedent from the Supreme Court and Ninth Circuit.

29. According to your current understanding, and without citing a dictionary definition, how do you define "Critical Race Theory?"

Response: I do not have a sufficient understanding of Critical Race Theory to explain it without referring to a dictionary definition. I believe Critical Race Theory is an academic theory that addresses the impact of racism on law and society. To the extent a claim involving critical race theory comes before me, I will adjudicate it based on

the facts of the case and applicable precedent from the Supreme Court and Ninth Circuit.

30. Do you distinguish "Critical Race Theory" from "systemic racism," and if so, how?

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

31. In *State v. Martin*, you represented a defendant who had collected and distributed—in the words of the prosecutor—"an astronomical 129,965 images of child pornography." The quantity of images "far exceeds any number previously seen in the Eastern District of Washington." Despite the defendant's proficiency at obtaining child pornography, and despite admitting in his journal that he had raped a minor female, you argued against the suggested Guidelines range. You argued that he should receive a downward variant that would cause him to serve a meager 60 months rather than the Guidelines range of between 235 and 240 months. Most alarmingly, you wrote, "[i]f anything, a lower sentence [than 60 months] might seem appropriate. However, a lower sentence is not possible, given the statutory minimum." If the lowest possible sentence is still too severe in your opinion, how much prison time would have been appropriate if there were no statutory constraints?

Response: Child pornography is vile and causes ongoing trauma to children who have been victims of abuse and torture. I was appointed by the court to represent Mr. Martin. My sentencing presentation in Mr. Martin's case was made pursuant to my duties of zealous representation under the Sixth Amendment. The role of a judge is different from that of an advocate. As a judge and judicial nominee who is governed by both federal and state ethics codes, it would be improper for me to opine on what type of sentence would be appropriate in the proposed hypothetical given the differences in my role as an advocate versus a judge. If confirmed, I will abide by statutory terms of incarceration set by Congress as well as 18 U.S.C. § 3553.

32. Similarly, in *United States v. Nielson*, you argued for the lowest possible sentence of five years for a child pornographer despite the guidelines recommending a sentence of up to life imprisonment. You wrote, ". . . the ultimate Guidelines ranges indicated for child pornography cases are 'overly severe.'" The court disagreed, and pointed out that the defendant admitted that he is "only attracted to children, particularly girls between the ages of 9 and 12," and that he used child pornography every day. The court also highlighted that the defendant is also a hands-on offender, having inappropriately touched a five-year-old girl. Setting aside the Sentencing Guidelines, what sentence do you believe would have been appropriate for this defendant?

Response: As previously stated, child pornography is vile and causes ongoing trauma to children who have been victims of abuse and torture. I was appointed by the court to represent Mr. Nielson. The case was resolved by a plea with a joint recommendation of 60 months' imprisonment. The only contested issue at sentencing

was the term of supervised release. My sentencing presentation in Mr. Nielson's case was made pursuant to my duties of zealous representation under the Sixth Amendment. The role of a judge is different from that of an advocate. As a judge and judicial nominee who is governed by federal and state ethics codes, it would be improper for me to opine on what type of sentence would be appropriate in the proposed hypothetical given the differences in my role as an advocate versus a judge. If confirmed, I will abide by statutory terms of incarceration set by Congress as well as 18 U.S.C. § 3553.

33. What is the standard for a witness to be a credible informant such that their testimony provides a police officer with sufficient reasonable suspicion to initiate a *Terry* stop? In *State v. Morrell*, you found a witness' tip to be unreliable, stating that "[w]hile [the witness] was a named informant and she made a statement implicating her penal interests, her credibility remained suspect because she was a criminal informant." Does this holding accurately reflect the state of the law under Ninth Circuit and Supreme Court precedent? Can a criminal ever be a reliable informant?

Response: Under Ninth Circuit and Supreme Court precedent, an informant's tip can provide reasonable suspicion for a *Terry* stop if it is reliable under the totality of the circumstances. *See, e.g., Navarette v. California*, 572 U.S. 393, 397-401 (2014); *United States v. Rowland*, 464 F.3d 899, 907-908 (9th Cir. 2006). Citizen informants are considered more reliable than criminal informants. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1397 (9th Cir. 1986). Nevertheless, a criminal informant can be reliable. *Id*.

34. In *State v. Orozco*, you wrote "[n]o citation to authority is necessary to support the claim that people of color are disproportionately targeted by the criminal justice system." What is your justification for this statement, and have you treated people of color differently than their peers in your courtroom as a result of your belief?

Response: In *State v. Orozco*, 19 Wash. App. 2d 367, 378 (2021) (Pennell, J., concurring), I issued an opinion concurring in the majority's decision to reverse a conviction under *Batson v. Kentucky*, 476 U.S. 79 (1986) and Washington State's General Rule (GR) 37. The passage quoted above was supported by a citation to Washington Supreme Court commission and task force findings. In addition, the Washington Supreme Court has taken judicial notice of "implicit and overt racial bias against black defendants in this state." *State v. Gregory*, 192 Wash. 2d 1, 22 (2018) (plurality opinion). Throughout my life and legal career, I have always endeavored to treat all people equally, regardless of race.

35. In *Orozco*, you also stated that "[t]here may be limited circumstances where a peremptory strike against a person of color will be upheld. But they are likely rare . . . If a for-cause challenge cannot be sustained, counsel would be well advised to exercise restraint and accept the juror on to the panel." Do you believe that prospective jurors should be given a presumptive position on a jury

panel based exclusively on that individual's race? Does that presumption depend solely on race?

Response: My analysis in *Orozco* was based on the specific requirements of Washington's General Rule (GR) 37. Under GR 37, the validity of a peremptory strike must be viewed from the perspective of an "objective observer" who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f). If, based on this perspective, "an objective observer *could* view race or ethnicity as *a* factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e) (emphasis added).

As explained in my concurring opinion, GR 37 is "a broad rule that requires attorneys and judges to fundamentally change their perspectives on peremptory challenges." *Orozco*, 19 Wash. App. 2d at 379. "If a for-cause challenge cannot be sustained, counsel would be well advised to exercise restraint and accept the juror onto the panel." *Id.* at 380.

GR 37 is about peremptory strikes, which involve removing jurors from the venire. The rule does not require presumptively placing any particular individual on the petit jury. GR 37 does not apply in federal court. If confirmed, I will abide by Supreme Court and Ninth Circuit precedent regarding peremptory strikes.

36. In *State v. Lahman*, you held that a challenge to the prosecutor's peremptory strike against a juror with an Asian surname should have been upheld due to "possible influence of implicit stereotyping." As you know, my last name is Lee. If I were a juror on that panel and I were dismissed, would that dismissal be presumptively improper solely because my surname is also a common surname in Asia?

Response: *State v. Lahman*, 17 Wash. App. 2d 925 (2021) involved a challenge to a peremptory strike under Washington's GR 37. During trial, the State used a peremptory strike against Juror 2, who had an Asian surname. The trial record indicated the parties believed Juror 2 to be a person of color, as the trial court ruled the prosecutor had provided a "race-neutral" reason for striking the juror from the venire. *Lahman*, 17 Wash. App. at 931. Appellate review of a GR 37 strike is de novo. *Id*. at 935. In *Lahman*, my court noted that de novo review strike might sometimes be difficult, given appellate judges cannot observe a juror's appearance. *Id*. But given the trial court record and the juror's Asian surname, we concluded we were able to engage in de novo review. Because GR 37 is written in terms of whether an objective observe "could" view race or ethnicity as a factor in the peremptory strike, it was immaterial whether Juror 2 actually identified "with a racial or ethnic minority group." *Id*. at 935 n.6.

As a judge and a judicial nominee governed by federal and state ethics codes, it would be inappropriate for me to address a hypothetical application of GR 37. However, a GR 37 objection must be preserved in the trial court in order to allow for

appellate review. *See State v. Pierce*, 195 Wash. 2d 230, 240 (2020). If confirmed, I will abide by Supreme Court and Ninth Circuit precedent regarding peremptory strikes. GR 37 does not apply in federal court.

37. What is the Ninth Circuit and Supreme Court understanding of inventory searches—specifically in regard to items catalogued from a stolen vehicle? Do you stand by your holding in *State v. Peck*?

Response: A warrantless inventory search does not violate the Fourth Amendment so long as it is administered in good faith, pursuant to reasonable police regulations. *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976); *United States v. Sapalsan*, 97 F.4th 657, 661 (9th Cir. 2024). Federal law recognizes that a defendant lacks a reasonable expectation of privacy in stolen property and therefore cannot object to a warrantless search. *United States v. Caymen*, 404 F.3d 1196, 1200 (9th Cir. 2005).

Washington law differs from federal law in that a defendant "has automatic standing to challenge a search if (1) possession is an essential element of the charged offense and (2) the defendant was in possession of the contraband at the time of the contested search or seizure." *State v. Peck*, 194 Wash. 2d 148, 154 (2019). In *Peck*, the Supreme Court held that, despite the applicability of automatic standing, the permissible scope of an inventory search of a vehicle "known to be stolen is simply different from other inventory searches." *Id*. at 160. Thus, the court concluded that "a proper inventory search of a stolen vehicle extends to opening unlocked, innocuous closed containers in order to determine true ownership." *Id. Peck* is binding precedent in Washington which I am bound to follow as a state court judge.

38. In 2021, you either co-wrote or had voting authority on a "best practices guide" for the Remote Jury Trial Workgroup. You stated that "[i]nformation on race, equity, and implicit bias needs to be included in all aspects of remote jury trial trainings." Topics like "race, equity, and implicit bias" are steeped in political ideology and the validity of those theories is subject to vigorous public debate. Is it appropriate for judges to take firm ideological positions, and then impose those beliefs on all prospective jurors as if they were recognized truths?

Response: In June 2020, the Washington Supreme Court issued an open letter to members of the judiciary and legal community, calling on legal professionals to "develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole." Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Community at 1 (June 4, 2020) (https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf). The Supreme Court has since incorporated its open letter into its substantive jurisprudence. *See, e.g., State v. Sum*, 199 Wash. 2d 627, 640 (9th Cir. 2022). The Supreme Court has also adopted a jury selection rule that requires an assessment of peremptory challenges based on "implicit, institutional, and unconscious biases." GR 37(f).

The contents of the 2021 best practices guide are in keeping with the precedent set by the Washington Supreme Court.

39. The 2021 Remote Jury Trial Workgroup's best practices guide advocated for "jury instructions on implicit bias." Please provide a specific example of a jury instruction you would accept that adequately nullifies implicit bias.

Response: As a sitting judge and judicial nominee, it would be inappropriate under federal and state ethics codes for me to pre-judge a particular jury instruction. I am aware that the United States District Court for the Western District of Washington has developed a video and criminal jury instructions addressing unconscious bias. *See* https://www.wawd.uscourts.gov/jury/unconscious-bias.

40. In a 2020 speech introducing Washington State Chief Justice Debra Stephens at Seattle University School of Law, you stated that the court you served on had ". . . only four female judges, including myself. Only one judge has been a person of color. We can do better." Are judges of one race inherently better than another?

Response: My comments were intended to reflect the idea that we should do a better job of outreach so that the judiciary and legal profession better reflect the people we serve. Public confidence is increased when institutions such as the judiciary reflect the broad diversity of their communities. I very much oppose the idea that one race is inherently better than another.

41. You are a member of the Washington Office of Civil Legal Aid Oversight Committee ("OCLA"). In 2020, you and ten other members released a "Statement on Racism, White Supremacy, and Justice." It proclaims the "pernicious effect of racist law and justice systems" and calls for "fundamental change." How do you intend on fundamentally changing the justice system?

Response: The 2020 statement was issued by a committee consisting of representatives from all branches of Washington government, including Republican and Democratic members of the state legislature, a representative of the governor's office, a Supreme Court justice, and a representative of the Washington State Bar Association. The statement was issued during the summer of 2020, shortly after the Washington Supreme Court issued letter with a similar statement, calling on members of the judiciary and legal community to "bear responsibility" for the "on-going injustice" of "institutions [that] remain affected by the vestiges of slavery." Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Community at 1 (June 4, 2020) (https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf).

I played a limited role in the OCLA committee statement. My understanding of the committee statement was that it expressed the same sentiment as the Supreme Court's letter, recognizing the ongoing impacts of past discrimination, such as Jim Crow laws.

As a judge, my role is limited to fairly and impartially deciding each case that comes before me regardless of race, on the basis of the law and the facts presented.

42. The Director of the OCLA wrote an email responding to a judge who did not agree with the Director's assertion that the judge carried bias. The Director wrote in response, that he (the Director) "could easily write an entire book . . . titled 'How White Silence and Complicity With Racist Law and Justice Systems Is Itself Racist Behavior." The Director continued, "[n]evertheless, I am, by definition, a racist . . ." because ". . . every day I quietly experience and accept the full spectrum of advantages and privileges that accompany my skin color." Do you agree with the Director's statement? Are you also a racist because every day you experience your skin color?

Response: I played no role in the drafting or transmission of this e-mail. I respect the director's right to express his opinions, but I do not share his sentiments.

43. The OCLA adopted the "Acknowledgments and Commitments" of the Race Equity and Justice Initiative ("REJI") with its seven tenets. Your committee regularly goes through "race equity exercises" in your meetings, as prescribed by REJI, and you participate in discussions from the REJI toolkit to start each meeting. Do you agree with each of REJI's seven tenets?

Response: The OCLA oversight committee adopted the Race Equity and Justice Initiative's (REJI) Acknowledgement and Commitments prior to my appointment to the committee. It is my understanding that a number of Washington organizations have signed off on the REJI Commitments, including nonprofit organizations, law schools, the King County Prosecuting Attorney's Office, and the Washington State Bar Association. I do not necessarily agree with everything produced by REJI. But under caselaw promulgated by the Washington Supreme Court, judges are expected to be "aware of the history of race and ethnic discrimination in the United States and that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." *State v. Bagby*, 200 Wash. 2d 777, 793 n.7 (2023). The Court has also extended the applicability of an implicit bias analysis to determining whether an individual has been seized by law enforcement. *State v. Sum*, 199 Wash. 2d 627, 643 (2022). As a state judge, I am bound by the decisions of the Washington Supreme Court. It has therefore been important for me to understand issues of potential bias that form the basis of Washington Supreme Court jurisprudence. As a federal district judge, I will be bound by U.S. Supreme Court and Ninth Circuit precedent.

44. A 2020 REJI toolkit claims that the justice system is established upon two frameworks "designed to maintain the status quo," including the adversarial system of the courts, and the doctrine of stare decisis. It claims that those two elements "help perpetuate a status quo that has been historically racialized." Is stare decisis racist? Should it be abandoned by the justice system?

Response: I believe in the importance and integrity of both stare decisis and the American adversarial legal system. The United States Supreme Court has recognized that precedent must, at times, be overturned because of its failure to live up to the core commitments of the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954). Further, the Supreme Court considers a host of factors in deciding whether to overturn its own precedent. *See Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 585 U.S. 878, 916-929 (2018) (stare decisis factors include quality of reasoning, workability, compatibility with related decisions, change in developments, and reliance). But as a state appellate judge, I am bound by precedent from the Washington Supreme Court and the U.S. Supreme Court. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wash. 2d 566, 578 (2006). Should I be confirmed, I will be bound by Supreme Court and Ninth Circuit precedent. *See Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122, 136 (2023).

45. At the start of OCLA meetings, you present a "Land Acknowledgement and Recognition of Responsibility" to account for the groups who previously occupied the land where you now meet. If confirmed, do you plan on starting each day in federal court with a land acknowledgement? How do you determine which Native nation to acknowledge, assuming that land changed hands before the arrival of Westerners?

Response: During my eight years as a judge on the Washington State Court of Appeals, I have never begun a court hearing with a land acknowledgment. If confirmed, I do not plan to begin court proceedings with a land acknowledgement. I understand that preparation of a land acknowledgment requires a careful study of history and a best practice would be to consult local tribal authorities.

46. You wrote praise for your OCLA colleague, Sarah Augustine, saying that you are impressed by her efforts to "dismantle[] the doctrine of discovery." What did you mean by dismantling the doctrine of discovery? Is discovery racist?

Response: I am unfamiliar with the context of this question. On May 23, 2023, I introduced Ms. Augustine in advance of her presentation to the Rotary Club of Yakima. My introduction referenced the fact that Ms. Augustine is cofounder and executive director of the Dismantling the Doctrine of Discovery Coalition. Ms. Augustine's presentation had nothing to do with the exchange of evidence pursuant to court discovery rules such as Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16. I do not believe discovery is racist.

47. You were asked in the Nominations Hearing on April 17, 2024, about your longstanding donations to Planned Parenthood. You appeared surprised by the question and unaware of your yearly donations. Have you taken the opportunity to review your donations to Planned Parenthood? Is it accurate, as reported by Planned Parenthood, that as of 2019 you were a donor of at least ten consecutive years?

Response: I was surprised by the question posed during the April 17, 2024 hearing and did not, at the time, recall the specific donations referenced by Senator Kennedy. My husband was primarily responsible for making donations to Planned Parenthood of Greater Washington and Northern Idaho. The organization listed us both as donors. To the best of my knowledge, Planned Parenthood's donation report is accurate.

48. In a panel you appeared on that you failed to disclose to this Committee, you stated that "trial judges and trial practitioners have a heavy burden to anticipate racial bias issues and to take steps to avoid them before your jury trial is tainted . . . ." You told the panel that as a defense attorney, you would ask yourself "how are we going to deal with the racism that is going to happen?" Is racism inevitable?

Response: The panel discussion in question was disclosed on my Senate Judiciary questionnaire. At the time I filed the questionnaire I was unaware that the presentation was recorded. Once I became aware of the recording, I provided a link to the Committee in advance of my hearing.

I do not believe that racism is inevitable. When I prepared for trial as an attorney, I believed it was a best practice to prepare for a number of unknown variables, including the possibility of racial bias.

49. In that same panel, you encouraged attorneys accused of racial bias to say "thank you, and learn to do better." Do you stand by this statement?

Response: In my closing comments during the panel discussion, I made the following statements: "There needs to be a lot more kindness and helping each other out—that we are all wanting to be justice partners and to do the right thing." 1:31:04-1:31:11. "As we engage in this paradigm shift [regarding the Washington Supreme Court's approach to bias in the courtroom] … some of us are going to struggle more than others, but … what was taught to be me years ago was rather than responding … if somebody calls you out and says what you said was racially insensitive, instead of focusing on … 'but I'm not racist,' say thank you. Thank you for caring enough to tell me. Because if somebody tells you that what you've done is insensitive it may be a sign that they think you can do better. And so take it like that. … It's hard to react that way. … You can say thank you and then you think about it and then you resolve to do better." 1:31:34-1:32:19. I stand by this statement.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Rebecca Pennell, nominated to be United States District Judge for Eastern District of Washington

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Racial discrimination is wrong and is also unlawful pursuant to numerous federal and state statutes, along with the U.S. Constitution and state constitutions.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to opine on whether there are any unenumerated rights that have yet to be identified by the Supreme Court. Should I be presented with a case that seeks recognition of an unenumerated right, I would apply the test set forth by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), along with any applicable Ninth Circuit precedent.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: As a judge on the Washington State Court of Appeals, my philosophy is to approach each case with an open mind, thorough research, and adherence to binding precedent. In issuing decisions, I strive to set forth my opinions in a way that is clear, practical, and easy to follow. I have not studied the philosophies of justices from the Warren, Burger, Rehnquist, and Roberts courts sufficiently to opine on which justice's philosophy is most like mine. If confirmed, I will continue to follow my current approach to impartial decision making.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?**

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I do not subscribe to any particular interpretive philosophy, other than adherence to precedent. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent, including precedent identifying interpretive canons such as originalism.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I do not subscribe to any particular interpretive philosophy, other than adherence to precedent. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: Yes. If presented with a constitutional issue that is truly a matter of first impression, I would faithfully apply the interpretive method set forth by Supreme Court and Ninth Circuit precedence. *See, e.g., New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 20 (2022).

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: The Constitution and federal statutes are generally interpreted according to how they would have been understood at the time of ratification or enactment. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 20 (2022) (constitutional interpretation); *New Prime, Inc. v. Oliveria*, 586 U.S. 105, 113 (2019) (statutory interpretation). However, the Supreme Court has held that the Eighth Amendment's ban on cruel and unusual punishment should be interpreted according to evolving standards of decency. *See Roper v. Simmons*, 543 U.S. 551, 560-61 (2005). Contemporary standards are also relevant to discerning whether materials are obscene and therefore fall outside of First Amendment protections. *See Miller v. California*, 413 U.S. 15, 24 (1973).

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: No. The Constitution is an enduring document whose meaning does not change over time outside the amendment process outlined in Article V. Nevertheless, the Constitution is sufficiently broad to allow for application to modern circumstances. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022).

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: Yes. *Dobbs v. Jackson Women's Health Organization* is binding precedent.

a. **Was it correctly decided?**

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to provide an opinion on whether a Supreme Court decision was correctly decided. *Dobbs* is binding precedent and if confirmed I would faithfully apply the decision.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes. *New York Rifle & Pistol Association v. Bruen* is binding precedent.

a. **Was it correctly decided?**

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to provide an opinion on whether a Supreme Court decision was correctly decided. *Bruen* is binding precedent and if confirmed I would faithfully apply the decision.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: Yes, *Brown v. Board of Education* is binding precedent.

a. **Was it correctly decided?**

Response: Because the issue of *de jure* racial segregation in public schools is unlikely to come before me as a United States District Judge, consistent with the responses of past nominees, I can state *Brown v. Board of Education* was correctly decided.

12. **Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?**

Response: Yes. *Students for Fair Admissions v. Harvard* is binding precedent.

a. **Was it correctly decided?**

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to provide an opinion on whether a Supreme Court decision was correctly decided. *Students for Fair Admissions* is binding precedent and if confirmed I would faithfully apply the decision.

13. **Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?**

Response: Yes. *Gibbons v. Ogden* is binding precedent.

a. **Was it correctly decided?**

Response: As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to provide an opinion on whether a Supreme Court decision was correctly decided. *Gibbons v. Ogden* is binding precedent and if confirmed I would faithfully apply the decision.

14. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: The Bail Reform Act establishes a rebuttable presumption of pretrial detention in cases that meet criteria set forth at 18 U.S.C. § 3142(e)(3). These include cases where there is probable cause to believe the defendant has committed: certain drug offenses for which the maximum term of imprisonment is 10 years or more; certain offenses involving firearms, conspiracy, or international terrorism; certain other terrorism offenses for which the maximum penalty is 10 years or more; certain human trafficking offenses; and certain offenses involving minor victims. *Id*. The Bail Reform Act also sets forth a rebuttable presumption of pretrial detention in cases where the defendant has committed certain offenses while on pretrial release. 18 U.S.C. § 3142(e)(2).

a. **What are the policy rationales underlying such a presumption?**

Response: The presumption set forth at 18 U.S.C. § 3142(e)(2) and (3) reflects concerns for public safety and the risk that the defendant will not appear for court proceedings.

15. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes, there are various limits on what the government may impose on businesses or organizations in light of religious freedoms. The Religious Freedom Restoration Act (RFRA) protects religious entities and closely held corporations from substantial interference with the free exercise of religion by the federal government unless justified by strict scrutiny. *See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657 (2020); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). In addition, anti-discrimination laws cannot interfere with a religious institution's decisions over ministerial employees or compel expressive speech. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020); *303 Creative v. Elenis*, 600 U.S. 570 (2023). Finally, laws will not be treated as neutral towards religion if they exempt comparable non-religious activities or are enforced in a manner that demonstrates hostility towards religion. *See Tandon v. Newsom*, 593 U.S. 61 (2021); *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). A non-neutral law violates the First Amendment's Free Exercise Clause unless it satisfies strict scrutiny. *Tandon*, 593 U.S. at 62.

16. **Is it ever permissible for the government to discriminate against religious**

organizations or religious people?

Response: A law that is not neutral towards religion violates the First Amendment's Free Exercise Clause unless the government can satisfy the requirements of strict scrutiny. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). While strict scrutiny review is not always fatal, it "requires the State to further interest of the highest order by means narrowly tailored in pursuit of those interests." *Id*. at 64-65 (internal quotation omitted).

17. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), the Supreme Court enjoined an executive order imposing occupancy limits at houses of worship during the COVID-19 pandemic. Injunctive relief requires demonstrating a likelihood of success on the merits, irreparable injury, and the furtherance of public interest. The court held all three criteria were met. There was a likelihood of success on the merits because the occupancy restrictions were not neutral towards religion (they exempted comparable non-religious activities) and the state was unable to establish strict scrutiny's demand of narrow tailoring to achieve the compelling interest of quelling the spread of COVID-19. The court held the applicants had shown irreparable injury because, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. at 19. And finally, the court determined that injunctive relief would not be contrary to the public's interest.

18. **Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom*.**

Response: In *Tandon v. Newsom*, 593 U.S. 61 (2021), the Supreme Court enjoined California from enforcing COVID-19 restrictions on private gatherings against at-home religious gatherings. Relying on *Roman Catholic Dioceses of Brooklyn v. Cuomo*, the court held that the applicants were likely to succeed on the merits, had demonstrated irreparable harm, and there was no showing injunctive relief would be against the public interest. As was true in *Roman Catholic Dioceses of Brooklyn*, the California regulation triggered strict scrutiny because it treated some comparable non-religious activities more favorably than religious exercise. In addition, the government was unable to satisfy strict scrutiny because it could now show that measures less restrictive of First Amendment activity were inadequate to address the state's interests in reducing the spread of COVID-19.

19. **Do Americans have the right to their religious beliefs outside the walls of their**

houses of worship and homes?

Response: Yes. *See Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

20. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.***

Response: In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617 (2018), the Supreme Court set aside an order from the Colorado Civil Rights Commission, finding it was issued in violation of the First Amendment's Free Exercise Clause. The order in question had determined that a bakery owner violated Colorado's anti-discrimination law by refusing to bake a wedding case for a same-sex couple. The Supreme Court reviewed the Commission's administrative record and determined that the baker had been denied his right to a neutral adjudication and that the Commission had demonstrated hostility towards the baker's sincere religious beliefs during the hearing process.

21. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes. "[I]t is not for [courts] to say that" a religious belief is "mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Instead, our narrow function is to determine whether an asserted belief reflects an "honest conviction." *Id*. (internal quotation omitted).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: I am unaware of any limitations. Please see my response to Question 21.

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: I am unaware of any limitations set by law. Please see my response to Question 21.

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: That is not my understanding of the official position of the Catholic Church.

22. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the First Amendment foreclosed an employment discrimination claim brought by two Catholic school teachers. The First Amendment protects the right of religious institutions to decide matters of church governance, faith, and doctrine without government intrusion. Under what has been dubbed the "ministerial exception," the government cannot intervene in employment disputes between a religious institution and employees holding ministerial roles. The ministerial exception is not limited to church ministers and is not set by labels or a rigid formula. Whether the ministerial exception applies turns on what the employee does. An employee responsible for educating and guiding young people in religious faith qualifies as ministerial.

23. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: In *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Supreme Court held that the City of Philadelphia violated the First Amendment's Free Exercise Clause when it stopped making referrals to a Catholic foster care agency due to the agency's refusal to certify same-sex foster parents. The City's standard foster care contract generally prohibited agencies from rejecting prospective foster parents on the basis of sexual orientation. But the contract allowed for exceptions at the discretion of City officials. Given the availability of exceptions, the Supreme Court ruled the nondiscrimination requirement was not generally applicable. Because the requirement burdened the Catholic agency's religious exercise, enforcement required the City to satisfy strict scrutiny. The court determined Philadelphia did not meet this burden.

24. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 596 U.S. 767 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for otherwise generally applicable tuition assistance payments violated the First Amendment's Free Exercise Clause. The Supreme Court recognized that a state law discriminates against religion if it excludes otherwise eligible recipients from receiving funds solely because of their religious character. Maine's antiestablishment interests did not satisfy strict scrutiny because there is no compelling interest in separating church and state more fiercely than required by the Federal Constitution.

25. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the Supreme Court held that the First Amendment's Free Exercise and Free Speech Clauses protected a high school football coach's exercise of personal prayer after football games. The Court held that the school district's regulation of the coach's activities was both discriminatory as to religion and not neutral as to speech. The Court determined the coach's activities did not raise Establishment Clause concerns. In so doing, the Court abandoned the test for Establishment Clause violations set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and instead recognized that the Establishment Clause should be interpreted according to historical practices and understandings

26. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: *Mast* involved a request by members of an Amish community for an exemption from a wastewater treatment ordinance under the Religious Land Use and Institutionalized Persons Act (RLUIPA). After the Minnesota authorities denied the exemption, the Supreme Court granted certiorari, vacated the Minnesota court's decision, and remanded in light of *Fulton v. Philadelphia*, 593 U.S. 522 (2021). *See Mast v. Fillmore County, Minnesota*, 141 S.Ct. 2430 (2021). Justice Gorsuch issued a concurring opinion, explaining that state authorities failed to apply strict scrutiny as required by RLUIPA. Justice Gorsuch acknowledged the state's general interest in wastewater treatment regulations. But strict scrutiny requires a precise analysis, specific to whether the State has a compelling interest in denying an exemption to the Amish community. In assessing strict scrutiny, Justice Gorsuch noted that the State must account for exceptions provided to non-religious groups such as hunters, fishermen, and owners and renters of rustic cabins; alternatives to gray water disposal employed by other states; and the actual feasibility of the wastewater treatment alternative proposed by the Amish.

27. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: As judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate to opine on matters that might come before me. I am aware that in *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) the Supreme Court opined that a similarly worded state statute did not "infringe upon the constitutionally protected rights of free speech and free assembly."

28. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**

Response: No.

b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

Response: No.

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

Response: No.

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response: No.

29. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: Yes.

30. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

31. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: Under Article II of the Constitution, the President is empowered to appoint federal officers with the advice and consent of the Senate. As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to opine on how the President and Senate should exercise this authority.

32. **If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?**

Response: Impact alone is not determinative of discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Nevertheless, impact may be circumstantial evidence of discriminatory intent. *See id*.

33. **Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: Response: I do not have an opinion on this issue. This is a policy matter that lies within the province of Congress. *See* U.S. Const. art. III, sec. 1.

34. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

35. **What do you understand to be the original public meaning of the Second Amendment?**

Response: According to the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

36. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: According to the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022), the government must demonstrate that regulation "is consistent with this Nation's historical tradition of firearm regulation."

37. **Is the ability to own a firearm a personal civil right?**

Response: Yes. *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

38. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: No. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

39. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: No. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

40. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response. Article II of the Constitution states the President "shall take Care that the Laws be faithfully executed." According to the Supreme Court, the "Executive Branch

has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to opine on how the executive branch exercises its discretionary authority.

41. **Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.**

Response: Prosecutorial discretion refers to "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Black's Law Dictionary (11th ed. 2019). Decisions made pursuant to prosecutorial discretion are generally immune from judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). An administrative rule is "[a]n officially promulgated agency regulation that has the force of law." Black's Law Dictionary (11th ed. 2019). The federal administrative rule-making process is governed by the Administrative Procedures Act, 5 U.S.C. §§ 551-559. Courts may set aside an agency action taken in violation of the rule making process. 5 U.S.C. § 706.

42. **Does the President have the authority to abolish the death penalty?**

Response: No. The federal death penalty statute is enacted by Congress. 18 U.S.C. § 3591. The President is not empowered to unilaterally abolish an act of Congress. The President also lacks power to abolish death penalty statutes enacted by the States. *See* U.S. Const. amend. X.

43. **Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS*.**

Response: In *Alabama Association of Realtors v. HHS*, 141 S.Ct. 2485 (2021), a group of real estate agents and landlords challenged an eviction moratorium issued by the Centers for Disease Control (CDC) during the COVID-19 pandemic. The district court initially struck down the moratorium as unlawful, but judgment was stayed pending appeal. The Supreme Court vacated the stay, reasoning that the applicants had shown a substantial likelihood of success on the merits and that the equities weighed in their favor. The Court explained the CDC lacked statutory authority to impose the moratorium and that, even if the text of the statute were ambiguous, the sheer scope of the CDC's claimed authority weighed against the moratorium's validity.

44. **Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?**

Response: No.

45. **In 2015 you defended Michael Nielson, who was charged with receipt of child**

pornography, in violation of 18 U.S.C. § 2252A(a)(2), after sending three video files in a peer-to-peer sharing system of child pornography to an undercover Homeland Security Investigations special agent.

a. **Is it still your view today that the child pornography sentencing guidelines are too harsh on offenders?**

Response: Child pornography is vile and causes ongoing trauma to children who have been victims of abuse and torture. I was appointed by the court to represent Mr. Nielson. My sentencing presentation in Mr. Nielson's case was made pursuant to my duties of zealous representation under the Sixth Amendment. The role of a judge is different from that of an advocate. As a judge and judicial nominee who is governed by federal and state ethics codes, it would be inappropriate for me to opine on what type of sentence would be appropriate. If confirmed, I will abide by statutory terms of incarceration set by Congress as well as 18 U.S.C. § 3553.

b. **Is alleged depression an acceptable defense for child pornography?**

Response: I am unaware of the viability of any such defense.

c. **Do you think in a case where the defendant self-admitted that "he is only attracted to children, particularly girls between the ages of 9 and 12," and that he used child pornography every day is somehow deserving of leniency?**

Response: I was appointed by the court to represent Mr. Nielson. The case was resolved by a plea with a joint recommendation of 60 months' imprisonment. The only contested issue at sentencing was the term of supervised release. My sentencing presentation in Mr. Nielson's case was made solely pursuant to my duties of zealous representation under the Sixth Amendment. As a judge and judicial nominee who is governed by federal and state ethics codes, it would be improper for me to opine on what type of sentence would be appropriate in the proposed hypothetical given the differences in my role as an advocate versus that of a judge.

46. **Further, in another child pornography case, where the defendant collected and distributed "an astronomical 129,965 images of child pornography," you argued the defendant "did not collect child pornography for purposes of his own sexual gratification," but instead simply for the sake of "collecting" and "maintain[ing] control," adding that "[t]here were too many images for the defendant to look at." Do you regret your arguments in that case?**

Response: As previously stated, child pornography is vile and causes ongoing trauma to children who have been victims of abuse and torture. All of my criminal defense work was performed pursuant to court appointment. My sentencing presentations were made solely pursuant to my duties of zealous representation under the Sixth Amendment.

47. **Since 2018, you served as a member of the Oversight Committee for the Washington Office of Civil Legal Aid. The organization has made inflammatory statements.**

a. **Can you explain how racism and white supremacy "plague every social, educational, economic, governmental, and legal system in our state and nation?"**

Response: The quotation referenced in this question comes from a 2020 statement issued by a committee consisting of representatives from all branches of Washington government, including Republican and Democratic members of the state legislature, a representative of the governor's office, a Supreme Court justice, and a representative of the Washington State Bar Association. The statement was issued during the summer of 2020, shortly after the Washington Supreme Court issued a letter with a similar statement, calling on members of the judiciary and legal community to "bear responsibility" for the "on-going injustice" of "institutions [that] remain affected by the vestiges of slavery." Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Community at 1 (June 4, 2020) (https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf).

I played a limited role in the committee statement. I am committed to treating all parties that come before me fairly and impartially regardless of race. My understanding of the committee statement was that it expressed the same sentiment as the Supreme Court's letter, recognizing the ongoing impacts of past discrimination, such as Jim Crow laws.

It would be generally inappropriate under federal and state ethics codes for me to opine on any ongoing injustices that might come before me as a judicial officer. However, in adopting Washington's General Rule (GR) 37, the Washington Supreme Court identified "unfair exclusion of potential jurors based on race or ethnicity" as an area of concern. *See* GR 37(a).

b. **Please list every instance where you lodged a complaint, or otherwise pushed back, on your organization's inflammatory rhetoric. If there were no such instances, please state such.**

Response: I have not filed any complaints.

c. **Do you plan to change the "racist" and "white supremacist" system once you are on the bench? If so, in what way?**

Response: As a judge, my role is limited to fairly and impartially deciding each case that comes before me on the basis of the law and the facts presented.

d. **Does diversity or DEI have any role in judicial decision-making?**

Response: I am unclear of what definition of diversity or DEI is contemplated by this question. I am unaware of any of any jurisprudence discussing DEI. It is important for a judge to be sensitive to the context of their decisions and to treat the parties with respect. But I issue my judicial decisions according to precedent and the facts before me, not under diversity or DEI. If confirmed, I will do the same as a federal district judge.

e. **Would you require law clerks or interns to take implicit bias or DEI training?**

Response: As a judge, I have never required law clerks or interns to take implicit bias or DEI training. I am unaware of any such trainings in the United States District Court for the Eastern District of Washington.

48. **In 2022, you were a moderator for the Board for Judicial Education's Court Education Committee on the "U.S. Supreme Court's Year in Review." Before facilitating the viewers' Q&A, you asked a panelist "to what extent do we need to rethink legal education for judges and lawyers to focus more on history and reading ancient texts and statutes? And is there going to be a bleed-over to other areas of constitutional law where we focus more on history and tradition than we do on a balancing test that looks to government interests?"**

a. **What did you mean by "ancient texts and statutes?"**

Response: I believe I was referring to *Bruen*'s discussion of how to assess the "[n]ation's historical tradition of firearm regulation." *New York State Rifle & Pistol Association v. Bren*, 597 U.S. 1, 34 (2022). *Bruen* engaged in a "long journey through the Anglo-American history of public carry." *Id*. Part of the history discussed by the Court included English common law and texts dating back to, for example, 1328. *Id*. at 40.

b. **Is the Constitution an ancient text?**

Response: No. While the Constitution is not new, it is a vital document that carries importance for every day life in the United States.

c. **What is your view on originalism? Please be as detailed as possible.**

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."

Originalism is a method of judicial interpretation that has provided foundation for

many important Supreme Court decisions. *See, e.g., New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 24 (2022); *Kennedy v. Bremerton School District*, 597 U.S. 507, 536 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent, including precedent identifying interpretive methods such as originalism.