Senator Chuck Grassley, Ranking Member
Questions for the Record
Professor Anne Rachel Traum
Judicial Nominee to the United States District Court for the District of Nevada

1. **During your hearing, we discussed a 2013 article that you published in the Hastings Law Journal, which you called *Mass Incarceration at Sentencing*. I asked whether you would implement this article's ideas as a federal district judge. You seemed to distinguish the article's arguments from what federal judges do, as you emphasized that judges apply the sentencing statute. At the same time, your article said that "[c]ourts are authorized and well suited to consider mass incarceration impacts at sentencing under § 3553(a), which provides a framework for individualizing sentencing in light of systemic concerns." Your article also suggested that federal judges could hear special evidence on mass incarceration—and how it impacted a defendant, his family, and his community—during the sentencing process. As a federal judge, would you implement any portion of your article's ideas in your judicial sentencing work? If you would, please discuss how you would implement the article's ideas. If you would not, please explain why not.**

   Response: I well understand the difference between the role of an advocate, the role of a law professor, and the role of a judge – these are very different roles. My academic writings would have no bearing on my decisions as a judge, which would be based on controlling law and precedent. If confirmed, when imposing sentence, I would faithfully follow the sentencing statute, 18 U.S.C. § 3553(a), and relevant precedent from the United States Supreme Court and the Ninth Circuit. Section 3553(a) requires the court to impose a sentence based on the factors and in order to comply with the purposes that are specified in the statute. If confirmed I would impose an individualized sentence based on the facts of the case and looking only at the factors authorized by Congress under the statute.

2. **You published a 2015 essay titled *Fairly Pricing Guilty Pleas* in the Howard Law Journal. In this essay, you discussed the late Professor Andrew Taslitz's work on fair-price theory, which you recommended as "useful for conceptualizing fairness in the guilty plea context." Fair-price theory drew on behavioral economics and marketplace behavior. You applied this theory to how courts could "analyze guilty pleas differently, by focusing on price without relying on the agency of prosecutors." You wrote that fair-price theory "could reorient courts to focus on the process that generated the guilty plea." As you acknowledged, "This is a significant change in direction for courts, which do not regulate charging or plea-bargaining." As a federal district judge, would you implement any aspect of this article's ideas in your judicial work? If you would, please discuss how you would implement the article's ideas. If you would not, please explain why not.**

Response: I well understand that the role of a judge is critically different from the role of an advocate or law professor and my prior advocacy and writings would have no bearing on my decisions as a judge, which would be based on controlling law and precedent. If confirmed, I would adjudicate guilty pleas in the manner prescribed by Federal Rule of Criminal Procedure 11 in light of any relevant precedent from the United States Supreme Court and the Ninth Circuit. Rule 11 prohibits the court from participating in plea discussions and details the process for accepting a guilty plea, which is the process I would follow if confirmed.

3. **In your work at Boyd Law School, you have assigned readings on money bail to students in your Criminal Adjudication course. In your fall 2018 Criminal Adjudication syllabus, one of the assigned readings was a 2016 report from the Prison Policy Initiative. It is called *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*. This report says that "[o]ne reason that the unconvicted population in the U.S. is so large is because our country largely has a system of money bail, in which the constitutional principle of innocent until proven guilty only really applies to the well off." In the District of Nevada, magistrate judges may handle more pretrial-release issues than district judges, but district judges are ultimately responsible for the decisions made and the magistrate judges selected in this district court. Do you believe that, in a money-bail situation, "the constitutional principle of innocent until proven guilty" applies solely or disproportionately "to the well off"?**

   Response: As a professor, I draw on many sources to expose students to different aspects of the criminal justice system. In the federal system, decisions regarding pretrial release or detention are governed by the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1990). That inquiry focuses on the conditions, if any, that will "reasonably assure the appearance of the person" and "the safety of any other person and the community." *See* 18 U.S.C. § 3142(b) and (c). While financial conditions of release are permitted, the statute prohibits a court from "impos[ing] a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

4. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: To my knowledge, neither the Supreme Court nor the Ninth Circuit has used or defined the term "super precedent" and this is not a term that I have used in my work as a scholar or litigator. If confirmed, I will faithfully adhere to all Supreme Court and Ninth Circuit precedent.

5. **You can answer the following questions yes or no:**
   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 *Sturgeon v. Frost* correctly decided?**
k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

Response: If confirmed, I would follow all United States Supreme Court precedents. As a nominee, it is improper for me to comment on the correctness of United States Supreme Court precedents, especially concerning issues that could come before me. Considering that it is unlikely that *de jure* racial segregation in schools or miscegenation laws would be reimposed in the United States, I can state that I believe *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

6. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

Response: I am not familiar with Judge Jackson's statement. The Constitution is an enduring document that sets forth the principles that govern our nation.

7. **Should judicial decisions take into consideration principles of social "equity"?**

Response: Judicial decisions should take into consideration the record before the court and decide the limited issues before the court by applying precedent.

8. **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 have no familiarity with that statement and did not make it. Courts should interpret constitutional provisions by using interpretative methodologies as instructed by the United States Supreme Court and by faithfully following United States Supreme Court and Ninth Circuit precedent.

9. **As the Ninth Circuit has explained, "*In personam* jurisdiction, simply stated, is the power of a court to enter judgment against a person. *In rem* jurisdiction is the court's power over property." Under Ninth Circuit precedent, does a court need to identify a statute that grants it personal jurisdiction over a defendant?**

Response: Where subject matter jurisdiction is based on diversity of citizenship, a federal district court has no inherent authority to exercise personal jurisdiction. Instead, the district court has personal jurisdiction only if a federal statute authorizes personal jurisdiction or if a "court of general jurisdiction in the state where the district court is located" would have personal jurisdiction. See Fed. R. Civ. P. 4(k)(1). In the latter scenario, the court must refer to the state's long-arm statute.

10. Do parents have a constitutional right to direct the education of their children?

Response: The United States Supreme Court has held that parents have the right to direct their children's education. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[Plaintiff's] right thus to teach, and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty" of the Fourteenth Amendment.); *accord Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

11. Is whether a specific substance causes cancer in humans a scientific question?

Response: The Ninth Circuit has held that scientific evidence is relevant to determining whether a specific substance caused a human's cancer. *See Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014) (holding that it was an abuse of discretion for the district court to exclude a doctor's testimony that a particular substance was a substantial factor in the development of woman's cancer).

12. Is when a "fetus is viable" a scientific question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the United States Supreme Court noted that "advances in neonatal care have advanced viability to a point somewhat earlier" than in 1973. The Court further noted that viability occurred at approximately 28 weeks at the time of *Roe*, occurred at approximately 23 to 24 weeks at the time of *Casey*, and in the future may occur "at some moment even slightly earlier in pregnancy." *Id*.

13. Is when a human life begins a scientific question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the United States Supreme Court noted that "advances in neonatal care have advanced viability to a point somewhat earlier" than in 1973. The Court further noted that viability occurred at approximately 28 weeks at the time of *Roe*, occurred at approximately 23 to 24 weeks at the time of *Casey*, and in the future may occur "at some moment even slightly earlier in pregnancy." *Id*.

14. Does the president have the power to remove senior officials at his pleasure?

Response: Although the President's authority to remove officials who wield executive power is generally unrestricted, the United States Supreme Court has recognized two

exceptions to this rule: (1) Congress can include good cause removal protection when creating "expert agencies led by a *group* of principal officers"; or (2) Congress can create tenure protection for "*inferior* officers with narrowly defined duties." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020). If confirmed and presented with an issue on the President's power to remove a senior official, I would consider any statutory provisions governing removal of the position at issue and United States Supreme Court and Ninth Circuit precedent.

15. Do you believe that we should defund police departments? Please explain.

Response: Questions regarding funding for police departments and law enforcement are for the executive and legislative branches of government and not the judicial branch.

16. Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.

Response: Questions regarding funding for police departments and social services are for the executive and legislative branches of government and not the judicial branch.

17. What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?

Response: To determine whether a defendant is entitled to compassionate release, courts determine whether a defendant has met the three requirements listed in 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018: (1) the defendant has exhausted his administrative remedies; (2) the 18 U.S.C. § 3553(a) factors are consistent with granting a motion for compassionate release; and (3) extraordinary and compelling reasons as defined by the United States Sentencing Commission warrant compassionate release. If confirmed, I would carefully consider each of these requirements and whether a particular defendant had met them. The factors in 18 U.S.C. § 3553(a) that courts must weigh include, among others, "the need for the sentence imposed … to protect the public from further crimes of the defendant."

18. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: In *District of Columbia v. Heller*, the United States Supreme Court declined to adopt a single standard of review. 554 U.S. 570, 634-35 (2008). In *Heller*, the United States Supreme Court held that a ban on firearms in the home violates the Second Amendment and failed any standard of scrutiny applied to enumerated constitutional rights. *Id.* at 628-29. The United States Supreme Court in *Heller* emphasized, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid regulations of firearms: (1) prohibitions on possession by "felons or the mentally ill"; (2) "laws forbidding the carrying of firearms in

sensitive places such as schools or government buildings"; and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. The United States Supreme Court noted that these were examples and the "list does not purport to be exhaustive." *Id.* at 627 n.26.

Applying *Heller*, the Ninth Circuit has adopted a two-step framework when evaluating whether a challenged regulation or law infringes on the rights protected by the Second Amendment. *See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). First, the Ninth Circuit determines whether "the challenged law affects conduct that is protected by the Second Amendment" by looking to the "historical understanding of the scope of the right." *Id.* The Ninth Circuit considers "whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood. Laws restricting conduct that can betraced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." *Id.* Furthermore, if the challenged law falls within the "presumptively lawful regulatory measures" identified by Heller, the law may be upheld without further analysis. Id.

If the law is within the historical scope of the Second Amendment, or not presumptively lawful, the Ninth Circuit determines what level of scrutiny applies. *Id.* at 784. As the Ninth Circuit explained in *Young*, it has "understood Heller to require one of three levels of scrutiny: If a regulation 'amounts to a destruction of the Second Amendment right,' it is unconstitutional under any level of scrutiny; a law that 'implicates the core of the Second Amendment right and severely burdens that right' receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." *Id.* (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)).

19. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: Though I am not presently aware of any United States Supreme Court or Ninth Circuit precedent that squarely addresses this issue, if confirmed and a case came before me that presented this issue, I would resolve it by carefully researching the law and impartially applying the law to the facts in the record.

20. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion

even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores*, *Inc*., 573 U.S. 682, 682 (2014) (quoting 42 U.S.C. §§ 2000bb–1(a), (b)); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006). When evaluating a person's RFRA claim, courts defer to parties'assertions about their sincerely held religious beliefs. *See Burwell*, 573 U.S. at 724.

b. How is a burden deemed to be "substantial[]" under current caselaw? Do you agree with this?

Response: The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstratesthat application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). In *Burwell v. Hobby Lobby Stores, Inc.*, the Court distinguished between the question of whether a government action "imposes a substantial burden on the ability of the objecting parties" to act "in accord with their religious beliefs," and the question of "whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. 682, 724 (2014). The Court explained that "the federal courts have no business addressing" the latter question. Regarding the former question, the Court has determined whether the government action imposed a substantial burden. *See id.* at 710, 719-21 (and cases cited therein). As a lower court judge, I would follow the Court's precedents regarding how to make that determination.

21. Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?

Response: All federal judges must faithfully and impartially apply the law to the cases that come before them and that is what I would do if confirmed.

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

Response: The First Amendment has always "'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992)). Fighting words are one of the categories of speech "the prevention and punishment of which has never been thought to

raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). The United States Supreme Court has stated that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971); *accord Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

Response: The United States Supreme Court has held that the First Amendment "permits a State to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (internal quotation marks omitted). "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* (internal quotation marks omitted).

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

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

Response: No.

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

Response: No.

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

Response: I spoke to Christopher Kang a few times in 2021 about the nominations process.

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

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

Response: No.

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

Response: No.

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

Response: I spoke to Daniel Goldberg once in 2021 about the nominations process.

26. 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? 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, or any other such Arabella dark-money fund.**

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I learned on January 21, 2016, of a judicial vacancy in the United States District Court for the District of Nevada. The following day I contacted Senator Reid's

office to express my interest in being considered for the position. On February 11, 2016, I met with Senator Reid in Washington, DC. On February 13, 2016, Senator Reid informed me that he was forwarding my name to the White House for further consideration. On February 18, 2016, I was contacted by officials from the Office of Legal Policy at the Department of Justice. On April 12, 2016, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, DC. On April 28, 2016, the President submitted my nomination to the Senate. I did not receive a hearing, and that nomination expired.

Nevada Senators Catherine Cortez Masto and Jacky Rosen announced on February 8, 2021, that they were accepting applications to fill the two judicial vacancies in the District of Nevada. I submitted my application on February 26, 2021, and was interviewed by the Nevada Judicial Commission on April 30, 2021. On May 2, 2021, I interviewed with Senators' staff members. On May 17, 2021, I learned that Senators Cortez Masto and Rosen were forwarding my name to White House Counsel's Office for further consideration. I interviewed with attorneys from the White House Counsel's Office on August 4, 2021, and was informed on August 9, 2021, that I would be vetted for the position. Since August 9, 2021, I have been in contact with officials at the Office of Legal Policy at the Department of Justice. On November 3, 2021, my nomination was submitted to the Senate.

30. 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: Yes, I spoke to Christopher Kang a few times in 2021 about the nominations process.

31. 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: Yes, I spoke to Russ Feingold and Zack Gima on one or two occasions in 2021 about the nominations process.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I interviewed with attorneys from the White House Counsel's Office on August 4, 2021, and was informed on August 9, 2021, that I would be vetted for the position. Since August 9, 2021, I have been in contact with officials at the Office of Legal Policy (OLP) at the Department of Justice regarding my nomination, which was submitted to the Senate on November 3, 2021. I communicated with OLP and attorneys in the White House Counsel's Office in advance of my hearing on December 15, 2021, and continue to work with OLP regarding follow-up work on my nomination.

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

Response: On December 22, 2021, I received these questions from the Office of Legal Policy (OLP). After reviewing the questions and relevant materials, I drafted my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee

Senator Marsha Blackburn
Questions for the Record to Anne Rachel Traum
Nominee for the District of Nevada

1. **In 2013, you published an article entitled Mass Incarceration at Sentencing. Your article defined mass incarceration as "high incarceration rates concentrated within disadvantaged communities" and argued that existing laws allow judges to consider the harms of mass incarceration at the sentencing stage. Do you believe justice is served when a defendant receives a lower penalty simply because he or she comes from what you refer to as a "disadvantaged community?"**

   Response: In federal court, the penalty to be imposed after conviction is governed by the sentencing statute, 18 U.S.C. § 3553(a), which requires the court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes and based on the factors specified in the statute. If confirmed, when imposing sentence, I would faithfully follow the sentencing statute, 18 U.S.C. § 3553(a), and relevant precedent from the United States Supreme Court and the Ninth Circuit. I am aware that the role of a judge is critically different from the role of an advocate or law professor and my prior advocacy and writings would have no bearing on the legal standard I would I apply if confirmed as a judge.

2. **The term "disadvantaged communities" is sometimes used to refer to certain groups that may be predominantly composed of a racial minority. Is that how you were defining "disadvantaged community" when you wrote that article, and if so, do you believe race should be a factor at sentencing?**

   Response: In my academic writing, I have used the term "disadvantaged communities" to refer to social science research describing areas of concentrated urban disadvantage where individuals or households experience poverty, unemployment, family disruption, and racial isolation. My academic writings would have no bearing on my decisions as a judge, which would be based on controlling law and precedent. If confirmed, I would faithfully apply the sentencing statute, 18 U.S.C. § 3553(a), which specifies the factors a federal judge shall consider when imposing a sentence. No sentencing judge should discriminate in sentencing based on race, gender, nationality, sexual orientation, or gender identity.

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

Questions for the Record for Anne Rachel Traum, Nominee for the District Court for the District of Nevada

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. **Ms. Traum, in 2013, you drafted an article called "Mass Incarceration at Sentencing" in the Hastings Law Journal. You explained that mass incarceration is a systemic problem, while sentencing occurs on an individual basis. In this article, you argued that existing laws allow judges to consider the harms of mass incarceration at the sentencing stage, as part of a method to address what you viewed as this systemic problem. You wrote that "[s]entencing provides the opportunity to consider mass incarceration impacts because it permits broad development of information relevant to the defendant including the long-term, third party, and systemic impact of his punishment." You concluded that while mass incarceration's systematic problems**

must be fixed with systemic reform, courts "can and should address mass incarceration at sentencing under existing legal frameworks with minimal changes to legal doctrine."

a. Do you still believe that judges should use sentencing as an opportunity to consider mass incarceration impacts?

Response: I well understand that the role of an advocate, the role of a law professor, and the role of a judge are very different. My academic writings would have no bearing on my decisions as a judge, which would be based on controlling law and precedent. If confirmed, when imposing sentence, I would faithfully follow the sentencing statute, 18 U.S.C. § 3553(a), and relevant precedent from the United States Supreme Court and the Ninth Circuit. Section 3553(a) requires the court to impose a sentence based on the factors and in order to comply with the purposes that are specified in the statute. Mass incarceration is not among the statutory factors that courts consider in imposing sentence. If confirmed I would impose an individualized sentence based on the facts of the case and looking only at the factors authorized by Congress under the statute.

b. What is the appropriate role for any individual judge to address policy concerns with "mass incarceration at sentencing"?

Response: The role of the judge as sentencing is to faithfully apply the sentencing statute, 18 U.S.C. § 3553(a), and relevant precedent from the Supreme Court and the Ninth Circuit. Congress has legislated sentencing policy through the enactment of the sentencing statute, which courts are tasked with applying in individual cases.

c. If confirmed, do you intend to consider factors outside of the law and facts when considering how to sentence an individual criminal defendant?

Response: If confirmed, I would faithfully apply the sentencing statute, 18 U.S.C. § 3553(a), any other relevant statutes, and controlling precedent from the United States Supreme Court and the Ninth Circuit in light of the record facts in the case before me and the arguments presented by the litigants.

2. On November 21, 2021, a convicted felon out on "inappropriately low" cash bail terrorized a Christmas parade in Waukesha, Wisconsin. This felon, Darrell Brooks, plowed through a crowded Christmas parade full of young children and families, killing six of them and injuring dozens more. The individual responsible for this massacre was a multiple-time felon, and a convicted sex offender. He posted bail twice in Wisconsin this year despite having an active warrant for jumping bail on a sex crime charge in Nevada. Earlier this month, Milwaukee prosecutors requested just $1,000 bail after this same man was charged for running over a woman with his car. The local prosecutor now admits that his bail was "inappropriately low."

a. You have actively advocated to reform cash bail. Do you support eliminating cash bail requirements as a general policy?

Response: As a law professor, I have never taken a position on holding violent offenders pretrial without bail. As an academic, I have addressed how bail can impact offenders charged with misdemeanors and also have participated in discussions regarding the use of evidence-based risk assessment tools for informing decisions on pretrial release and detention. However, regardless of my prior commentary, I well understand the difference between the role of an academic, the role of an advocate, and the role of a judge. As a district judge, if confirmed, I would evaluate and review pretrial release decisions under the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156, which requires a court to detain an individual if there are no release conditions that would reasonably assure the defendant's appearance or the safety of any other person or the community.

b. Do you believe that this man, Darrell Brooks, should not have had any cash bail requirement after his prior convictions?

Response: I am unfamiliar with the record and legal standards relevant to that case and, as a nominee, it would be inappropriate for me to comment on it.

3. You spoke in 2019 as part of the Nevada Attorney General's Continuing Education Series, during which you noted that "the problem of pretrial detention" can be addressed in many ways: "policy change can be a response to activism, mandated by legislation, spearheaded by internal policy change, or a result of litigation, either court-imposed or negotiated by the parties." Do you believe that judges should impose bail-related policy change from the bench?

Response: I well understand that the role of a judge is critically different from the role of an advocate or law professor and my prior advocacy and academic commentary would have no bearing on the legal standard I would I apply if confirmed as a judge. As a judge, in evaluating any claim seeking injunctive relief pertaining to a policy, I would faithfully and impartially apply United States Supreme Court and Ninth Circuit precedent as well as Federal Rule of Criminal Procedure 65 and carefully analyze the facts and legal arguments presented in the case before me.

a. In confirmed to the bench, do you intend to adopt a blanket policy against requiring cash bail?

Response: If confirmed as a district court judge, I would faithfully and impartially apply United States Supreme Court and Ninth Circuit precedent to the cases and controversies before me based on the facts and legal arguments presented in each case.

4. You made both of these recommendations for how judges should approach systemic criminal justice reform in the last ten years. These were not made in court filings on

behalf of a client, but rather are your personal writings and addresses on what you believed judges can and should do to address policy issues. This gives me serious pause that you fundamentally misunderstand the role of a judge, and view it as a super-legislature to make and correct policies that you prefer. Why should this Committee believe that you will fairly and impartially follow the law as written as applied to only the specific facts presented in the case before you?

Response: I understand that the role of an academic is different than the role of a judge. As an academic, my job is to study and write about the law and our legal system. As a judge, if confirmed, I would be bound to follow United States Supreme Court and Ninth Circuit precedent and to faithfully and impartially apply the law to the cases and controversies before me. I would work diligently to fulfill that obligation in every case.

5. **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: If confirmed as a district judge, my approach to deciding cases would be to come to each case with an open mind and faithfully and impartially apply United States Supreme Court and Ninth Circuit precedent to the specific case before me based on the facts and the parties' arguments. If confirmed, I would work diligently to respect the limited role of the judiciary, treat every person involved in the judicial process with respect, and strive to issue timely orders that clearly and comprehensively state my reasoning. Because I have neither been a judge nor studied the judicial philosophies of Supreme Court Justices, I cannot say which Supreme Court Justice's philosophy is most analogous to my own.

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

Response: In general, I understand "originalism" to be the view that the Constitution should be interpreted in the way the relevant text would have been understand at the time it was adopted. On any issue of constitutional interpretation I would follow the binding precedent of the United States Supreme Court and Ninth Circuit.

7. **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 defines "living constitutionalism" as the "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." On any issue of constitutional interpretation, I would follow the binding precedent of the Supreme Court and the Ninth Circuit.

8. 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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification.

9. 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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification. Similarly, in *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020), the United States Supreme Court stated: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."

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

Response: The Supreme Court's understanding of certain constitutional provisions has changed over time. *Compare, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (interpreting the Equal Protection Clause as permitting "separate but equal"), *with Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (stating that the Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written" and concluding "that in the field of public education the doctrine of 'separate but equal' has no place"). If confirmed, I would follow all applicable Supreme Court and Ninth Circuit precedent concerning the meaning of the Constitution in applying its provisions.

11. Do you believe that any of the current justices on the Supreme Court sit in "stolen seats" or are otherwise disqualified from their role?

Response: Under the Appointments Clause of the Constitution, the President has the power, with the advice and consent of the Senate, to make appointments to high-level political positions in the federal government. U.S. Constitution, Art. II, §2, cl. 2. I respect the Senate's constitutional role to provide advice and consent on the President's nominees to serve as Article III judges.

12. 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: The Supreme Court has issued a number of opinions discussing the limits on government's ability to regulate private institutions, including religious organizations and small businesses operated by observant owners, including *Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018), *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), among others. If confirmed, I would faithfully follow all Supreme Court and Ninth Circuit precedent.

13. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: The Supreme Court has stated that laws that discriminate on basis of religion are subject to strict scrutiny. *See, e.g.*, *Church of the Lukumi Babalu Aye,Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). To survive that standard, the challenged law "must advance interests of the highest order and must be narrowlytailored in pursuit of those interests." *Id.* (internal quotation marks and citation omitted).

14. 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*, 141 S. Ct. 63, 67 (2020), the United States Supreme Court held the religious organizations were entitled to a preliminary injunction pending disposition of their challenge to New York COVID-19 restrictions affecting religious worship. The Court recognized that because the challenged restrictions were not "neutral" and of "general applicability," they must satisfy "strict scrutiny" and be "narrowly tailored" to serve a "compelling" state interest. While the Court acknowledged that "stemming the spread of COVID–19 is unquestionably a compelling interest," the restrictions did not appear to be "narrowly tailored" to serving that interest and the other relevant factors, including irreparable harm and public interest, favored enjoining the regulation. *Id.* at 67-69.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the United States Supreme Court clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. "It is no answer that a State treats some comparable secular businesses or other activitiesas poorly as or even less favorably than the religious exercise at issue." *Id*.

In *Tandon*, the United States Supreme Court also clarified that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. "Comparability is concerned with the risks various activities pose, not the reasons why people gather." *Id*.

In *Tandon*, the United States Supreme Court further clarified that, where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny's narrow tailoring requirement only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297. "The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" *Id*. (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)).

In *Tandon*, the United States Supreme Court also determined that even if the government withdraws or modifies a COVID restriction during the course of litigation, that does not necessarily moot the case. *Id*. "And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions.'" *Id*. (quoting *Roman Catholic Diocese of Brooklynv. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam)).

16. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the United States Supreme Court held that the Colorado Civil Rights Commission discriminated against a baker who refused based on his religious beliefs to create a wedding cake for a gay couple. The Court held that the Colorado Commission's decision was not neutral because the Commission expressed hostility toward the baker's religion, passed judgment on his beliefs, and treated him differently than other bakers who prevailed before the Commission. Thus, the Commission's treatment of the baker violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

18. 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: The operative question is whether the professed belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989).

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

Response: The United States Supreme Court looks at whether a person's religious belief is sincerely held, not whether or how that religious belief aligns with church doctrine. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (observing that federal courts "have no business addressing" whether the religious belief asserted by a person is reasonable). Sincere religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" and can include beliefs held only by a singleperson. *Welsh v. United States*, 398 U.S. 333, 340 (1970). Indeed, even atheism can count as a sincerely held belief. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

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

Response: The United States Supreme Court has made it clear that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without a judicial evaluation of the validity of their interpretations. *Frazee*, 489 U.S. at 833-834.

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

Response: I have not studied the official position of the Catholic Church on abortion or any other issue. If confirmed and confronted with a case presenting an issue regarding religion or religious freedom, I would study and faithfully apply the binding precedent of the United States Supreme Court and the Ninth Circuit to the case before me.

19. 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 teachers at religious schools could not bring employment discrimination claims against their employers based on the "ministerial exception," which

requires courts to stay out of employment disputes involving persons holding certain important positions with churches and other religious institutions. *Id.* at 2055 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 186 (2012)). Though the teachers did not hold the title "minister," the Court found that they were engaged in same vital religious duties and thus covered by the ministerial exception. The Court explained that judicial review of employment disputes at religious schools would undermine the independence of religious institutions in a way that the First Amendment does not tolerate. *Id.* at 2055.

20. 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*, 141 S. Ct. 1868, 1878-81 (2021), the United States Supreme Court held that a provision of Philadelphia's standard foster care contract was "not generally applicable as required by *Smith*" and thus, strict scrutiny applied. The United States Supreme Court reached this conclusion because the provision at issue "incorporates a system of individual exemptions" and "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable." *Id.* At 1878-79. Applying strict scrutiny, the United States Supreme Court concluded that "the interest of the City in the equal treatment of prospective foster parents and foster children . . . cannot justify denying [plaintiff] an exception for its religious exercise." *Id.* at 1882. Accordingly, the provision "cannot survive strict scrutiny, and violates the First Amendment." *Id.*

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

Response: The Supreme Court in *Mast v. Fillmore County* vacated and remanded a Minnesota Court of Appeals decision in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *Mast* concerned a local ordinance requiring an Amish community to install modern septic systems despite their objection that doing so would violate their religious faith. Justice Gorsuch explained in his concurrence that under *Fulton* and the Religious Land Use and Institutionalized Persons Act (RLUIPA), the local ordinance was subject to "strict scrutiny," which required the government to prove both that its regulations serve a "compelling" governmental interest—and that its regulations are "narrowly tailored." *Fulton*, 141 S. Ct. at 1881; 42 U.S.C. § 2000cc(a)(1). Further, if "the government can achieve its interests in a manner that does not burden religion, *it must do so*." *See Fulton*, 141 S. Ct. at 1881 (emphasis added).

22. If you are to join the district court, and supervise along with your colleagues the court's human resources programs, will 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;

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

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

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

Response: I am not aware of any such trainings in the District of Nevada or in the Ninth Circuit, or what role, if any, I would have in determining the content of trainings by either court, if confirmed. All trainings provided by federal courts should be consistent with the Constitution and laws of the United States and should be consistent with sound pedagogy.

23. 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: I am not aware of any such trainings at my court, the content of trainings provided by the Ninth Circuit, or what role, if any, I would have in determining the content of any trainings, if confirmed. All trainings provided by federal courts should be consistent with the Constitution and laws of the United States and should be consistent with sound pedagogy.

24. Is the criminal justice system systemically racist?

Response: I have not had occasion to conduct quantitative or qualitative research about whether the criminal justice system is systemically racist. If confirmed as a judge, it would be my job to make sure that no one involved in any matters before me is treated unfairly because of their race.

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

Response: Article II of the Constitution gives the President the power, with the advice and consent of the Senate, to make appointments to high-level political positions in the federal government. As a judge, it is not for me to comment on what is or is not appropriate for the President and Senate to consider regarding political appointments.

26. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: I have not formed an opinion. If confirmed to serve as a district court judge, I would be bound to follow Supreme Court precedent regardless of the number of justices.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the United States Supreme Court concluded that "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."

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

Response: No.

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

Response: No.

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

Response: In *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), the United States Supreme Court held that private citizens generally "lack standing to contest the policies of the prosecuting authority" when that citizen is neither prosecuted nor threatened with prosecution. Particularly in the realm of criminal law, 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).

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

Response: To the extent that this question is inquiring about matters of current legal debate, as a judicial nominee it would not be appropriate for me to opine. If the question were to come before me whether an act constituted prosecutorial discretion or a substantive rule change, I would carefully consider the record and the arguments presented by the parties and would impartially and faithfully research and apply Supreme Court and Ninth Circuit precedent to the record before me.

32. Does the President have the authority to abolish the death penalty?

Response: Article I of the Constitution vests Congress with "[A]ll legislative Powers herein granted." Pursuant to that authority, Congress has enacted 18 United States Code § 3591, which states that a defendant who has been found guilty of certain offenses "shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." It would thus require appropriate legislation duly passed by Congress and signed into law by the President to amend the current criminal code regarding the availability of capital punishment for certain offenses. However, Article II of the Constitution grants the President the "Power to grant Reprieves and Pardons for Offenses against the United States" in individual cases.

33. Does a federal judge have authority to not apply the death penalty if it appropriately requested by a prosecutor?

Response: Though I have not personally been involved in a death penalty case, I understand that the decision to seek (or decline to seek) the death penalty in a death-eligible case must be approved by the Attorney General following a process within the Department of Justice. If the Attorney General decides to seek the death penalty, a jury would determine whether to impose a sentence of death and the judge would be bound by that decision. *See* 18 U.S.C. §§ 3593-3594

34. 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. Dep't. of Health and Human Servs.*, 141 S. Ct. 2485, 2487-88 (2021), the United States Supreme Court vacated the district court's stay of the district court's order concluding the Centers for Disease Control lacked statutory authority to impose an eviction moratorium. The United States Supreme Court applied the governing four factor test announced in *Nken v. Holder*, 556 U.S. 418 (2009): "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2487. The United States Supreme Court concluded that: "it is difficult to imagine [the plaintiffs] losing," the moratorium has put the plaintiffs "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery," "the Government's interests have decreased," and that although "the public has a strong interest in combating the spread of the COVID-19 Delta variant," agencies may not do so unlawfully. *Id.* at 2488-90.

Senator Josh Hawley
Questions for the Record

Anne Traum
Nominee, U.S. District Court for the District of Nevada

1. **You have repeatedly criticized the practice of jails holding pretrial offenders unless they can post a sizable bail. But just a few weeks ago, a person released before trial, Darrell Brooks, plowed his SUV through a parade in Waukesha, Wisconsin, killing six people and injuring dozens of others. He was released on a meager $1,000 bail after being charged with punching a woman and running her over with his car. Has this episode caused you to rethink the wisdom of your preferred policy of releasing pretrial detainees?**

   Response: As an advocate and a law professor, I have never taken a position on holding violent offenders without bail. My academic writing has addressed how bail can impact offenders charged with misdemeanors and I have participated in discussions regarding the use of evidence-based risk assessment tools for informing decisions on pretrial release and detention. However, regardless of my prior commentary, I well understand the difference between the role of an academic, the role of an advocate, and the role of a judge. As a district judge, if confirmed, I would evaluate and review pretrial release decisions under the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156, which requires a court to detain an individual if there are no release conditions that would reasonably assure the defendant's appearance or the safety of any other person or the community.

2. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

   a. **Do you agree with that philosophy?**

   b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

   Response: I am not familiar with that statement or its context. If confirmed, I would be required—and would—faithfully and impartiallyapply United States Supreme Court and Ninth Circuit precedent to the cases before me without regard to my personal views, if any.

3. **What is the standard for each kind of abstention in the court to which you have been nominated?**

   Response: The *Pullman* abstention doctrine addresses the scenario in which a plaintiff brings a suit in federal court alleging both a federal constitutional claim and a state law claim. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). If resolving the state law claim could resolve the entire case and the state law issue is unclear, the federal court should abstain from deciding the case. *Id.* at 501. The Ninth Circuit has held

that, "[p]ursuant to the *Pullman* abstention doctrine, federal courts have the power to refrain from hearing cases . . . in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1209 (9th Cir. 2021) (internal citation omitted).

The *Burford* abstention doctrine provides that a federal court should abstain from exercising diversity jurisdiction over a state law claim that could affect a state's administration of an important policy. *Burford v. Sun Oil Co*., 379 U.S. 315 (1943). In the Ninth Circuit, the *Burford* abstention doctrine applies if the party seeking to invoke the doctrine shows "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

The *Younger* abstention doctrine prohibits a federal court from enjoining certain pending state proceedings. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). In the Ninth Circuit, the *Younger* abstention doctrine prohibits a federal court from enjoining "three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d732, 735 (9th Cir. 2020).

The *Colorado River* abstention doctrine addresses the scenario in which there are concurrent state and federal suits addressing the same subject matter. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal courts should not stay a case in that scenario unless the "clearest of justifications" shows that a stay would be in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 818-19. In the Ninth Circuit, there are "eight factors to be considered in determining whether a Colorado River stay is appropriate: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1203 (9th Cir.2021) (internal citation omitted).

The *Rooker-Feldman* doctrine prohibits federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The Ninth Circuit has "developed a two-part test to determine whether the *Rooker-Feldman* doctrine bars jurisdiction over a complaint filed in federal court":

(1) "the federal complaint must assert that the plaintiff was injured by legal error or errors by the state court" and (2) "the federal complaint must seek relief from the state court judgment as the remedy." *Lundstrom v. Young*, 857 F. App'x 952, 955 (9th Cir. 2021) (internal citation omitted).

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

   Response: No.

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

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

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification.

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

   Response: If confirmed as a district court judge, when applying statutes, I would be bound by *stare decisis*, namely the binding decisions of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. To the extent existing case law does not resolve the statutory issue, I would begin with the text of the statute, examining the words of the provision at issue in light of the statutory context, structure, and related provisions. In appropriate cases, I also would consider persuasive authority from other courts as well as legislative history.

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

      Response: The Supreme Court has stated that certain forms of legislative history are more persuasive than others. For example, the Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted).

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

      Response: The Constitution is a domestic document. If confirmed, I would look to the text, structure, and background of the Constitution itself in carrying out the task of constitutional interpretation.

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

   Response: To prevail on such a claim, a claimant must show that the challenged method creates a substantial risk of severe pain when compared to known and available alternatives that present a significantly reduced risk of severe pain. *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015); *see also Baze v. Rees*, 553 U.S. 35, 51-52 (2008); *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (citing *Baze*, 553 U.S. at 50).

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

   Response: Yes. *See Glossip v. Gross*, 135 S. Ct. 824, 867 (2015).

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

   Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), the United States Supreme Court held that there was no due process right (procedural or substantive) to access DNA evidence for a habeas petitioner.

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

    Response: No.

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

    Response: Under current free exercise doctrine, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877. "A law is not generally applicable if," among other things, "it invites the government to

consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (internal quotation marks, brackets, and citation omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*; *see also Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (addressing COVID gathering restrictions).

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

Response: Please see my answer to Question 11.

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

Response: A religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). If a belief is sincere, a court may not inquire into the "truth or verity" of the belief. *United States v. Ballard*, 322 U.S. 78 (1944); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (emphasizing that "it is not for [the court] to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, [the court's] 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction'" (citation omitted)). Sincere religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" and can include beliefs held only by a single person. *Welsh v. United States*, 398 U.S. 333, 340 (1970). Indeed, even atheism can count as a sincerely held belief. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

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

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

Response: In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. *See* 554 U.S. at 576-628.

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

Response: No.

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

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

Response: As Justice Holmes explained in that same opinion, I believe he meant that the "Constitution is not intended to embody a particular economic theory." *Lochner*, 197 U.S. at 75 (Holmes, J., dissenting).

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

Response: If confirmed, I would be bound to follow binding United States Supreme Court and Ninth Circuit precedent. My understanding is that much of *Lochner* was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) ("There is no absolute freedom to do as one wills or to contract as one chooses.").

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

a. If so, what are they?

Response: I do not believe that *Prigg v. Pennsylvania*, 41 U.S. 539 (1843), or *Dred Scott v. Sandford*, 60 U.S. 393 (1857), have been "formally overruled by the Supreme Court" but both have been superseded by the Reconstruction Amendments. The same may be true of similar examples of which I am unaware.

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

Response: I commit to faithfully applying all binding United States Supreme Court precedents. Any personal views would not be relevant to my judicial decision-making.

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

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with the quoted statement by Judge Learned Hand. If

confirmed, I would be required to—and would—faithfully apply governing Supreme Court and Ninth Circuit precedent about what constitutes a monopoly. In *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 481 (1992), the United States Supreme Court held that evidence that a defendant holds more than 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. *Kodak* also cited United States Supreme Court precedent for the proposition that "over two-thirds of the market is a monopoly." *Id*. (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). Applying these precedents, the Ninth Circuit has concluded that a "65% market share" typically "establishes a prima facie case of market power." *See Image Tech.Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997). The Ninth Circuit also has observed that a market share of less than 50 percent is "presumptively insufficient to establish market power." *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1434 (9th Cir. 1995). If confirmed and confronted with a case concerning monopoly power, I would apply precedent to the specific facts of the case before me.

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

Response: Please see my answer to Question 17(a).

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

Response: Please see my answer to Question 17(a).

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

Response: Broadly speaking, I understand federal common law to refer to rules of decision that are formulated by federal courts as part of their Article III authority to decide cases and controversies that come before them. The Supreme Court has long emphasized, however, that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: The meaning of a state constitutional provision is ultimately a matter of state law upon which federal courts must defer to the decisions of the highest court ofthe relevant State. *See generally Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: Please see my response to Question 17.

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

Response: Generally speaking, federal, state, and local government entities possess authority to protect individual rights above and beyond the rights secured by the U. S. Constitution, which is sometimes referred to as the "constitutional floor." Because the Federal Constitution is the "supreme Law of the Land," U.S. Const., art. VI, ¶ 2, its protections are binding on the States, regardless of what a State's own constitution provides. The meaning of a state constitutional provision is ultimately a matter of state law upon which federal courts must defer to the decisions of the highest court of the state. *See generally Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: If confirmed, I would follow all United States Supreme Court precedents. As a nominee, it is improper for me to comment on the correctness of United States Supreme Court precedents, especially concerning issues that could come before me. Considering that it is unlikely that *de jure* racial segregation in schools or miscegenation laws would be reimposed in the United States, I can state that I believe *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

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

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

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

Response: While the United States Supreme Court has noted that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), it has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant relief to the parties. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding portion of preliminary injunction with respect to parties and nonparties similarly situated). Nationwide injunctions reflect the principle that injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

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

Response: Please see my response to Question 21.

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

Response: The Supreme Court has stated that "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrityof the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011).

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

Response: The Supreme Court has held that federal courts should generally refrain from intervening in ongoing state criminal proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971). The Court has also held that abstention may sometimes be appropriate in other situations, including "pending determination in state court of state-law issues central to [a] constitutional dispute," *Moore v. Sims*, 442 U.S. 415, 427-28 (1979) (citing *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941)), or "where the exercise of jurisdiction by the federal court would disrupt a state administrative process," *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 189 (1959) (*citing Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

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

Response: The Supreme Court has described an injunction as "extraordinary remedy" whose issuance requires "irreparable injury and the inadequacy of legal remedies," including damages. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). In *Glucksberg*, the Court collected cases previously recognizing such rights, including the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v.Society of Sisters*, 268 U.S. 510 (1925), use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. at 720; *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing aright of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing aright to travel). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted

lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

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

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

Response: Please see my response to Question 11.

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

Response: No. For example, the Supreme Court has stated that "[t]he Free Exercise Clause protects against laws that impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012, 2021 (2007) (internal quotation marks, brackets, and citations omitted).

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

Response: Please see my response to Question 11.

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

Response: Please see my response to Question 11.

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

Response: The Supreme Court has stated that, where it applies, "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). If confirmed, I would follow all relevant precedent of the Supreme Court and the Ninth Circuit construing RFRA and other federal statutes.

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with the specific statement quoted above. I understand it to mean that a judge who is faithfully interpreting and applying the law will sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome.

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

Response: To the best of my recollection, I have in three cases challenged without success the constitutionality of a state or federal statute.

a. If yes, please provide appropriate citations.

Response: *Dent v. Sessions*, 900 F.3d 1075, 1080-82 (9th Cir. 2018) (challenging a naturalization statute, 8 U.S.C. § 1433 (1982)); *Porto v. City of Laguna Beach et al.*, 720 F. App'x 853 (9th Cir. Apr. 26, 2018) (challenging a local ordinance, Laguna Beach Municipal Code § 8.30.030(b)); and *State v. Maffit*, Case No. A-21-837620-W (Nev. 8th Jud. District Nov. 18, 2021) (challenging a Nevada criminal statute, NRS 624.750).

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

Response: No.

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

Response: This is an important question for policymakers to consider. If confirmed as a judge, I would evaluate any claim involving racial disparities based on the record before me and applicable law. In general, I would strive to make sure that no one involved in any matters before me is treated unfairly because of their race.

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

Response: In my role as an advocate, I have fulfilled my duty to advocate zealously on behalf of my client's position and made good-faith, legally supported arguments to that end without regard to my personal views, in any.

33. How did you handle the situation?

Response: Please see my response to Question 32.

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

Response: Yes.

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

Response: Federalist No. 78 sets forth the establishment, role, and independence of the judiciary in safeguarding the Constitution relative to legislative power.

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

Response: As a nominee, it is not appropriate for me to respond to this question because it may create the impression that I have prejudged a future case that may come before me and raise this question.

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

Response: To the best of my recollection, I have not otherwise testified under oath.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No.

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

Response: To the best of my recollection, I have not authored or edited a brief that was filed in court without my name on the brief.

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

41. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

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

Response: All nominees take the oath before they testify at their confirmation hearing to provide truthful information, so that the United States Senate can fulfill its advice and consent role under the Constitution.

Questions for the Record for Anne Rachel Traum
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Anne Traum, Nominee to the District Court for the District of Nevada

1. How would you describe your judicial philosophy?

Response: If confirmed as a district judge, my approach to deciding cases would be to come to each case with an open mind and faithfully and impartially apply United States Supreme Court and Ninth Circuit precedent to the specific case before me based on the facts and the parties' arguments. If confirmed, I would work diligently to respect the limited role of the judiciary, treat every person involved in the judicial process with respect, and strive to issue timely orders that clearly and comprehensively state my reasoning.

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

Response: If confirmed as a district court judge, when applying statutes, I would be bound by *stare decisis*, namely the binding decisions of the United States Supreme Court and the Ninth Circuit. To the extent existing case law does not resolve the statutory issue, I would begin with the text of the statute, examining the words of the provision at issue in light of the statutory context, structure, and related provisions. In appropriate cases, I also would consider persuasive authority from other courts as well as legislative history.

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

Response: If confirmed, I would first determine whether the United States Supreme Court or Ninth Circuit had previously interpreted the specific constitutional provision at issue. If I were to confront a constitutional issue of true first impression, if such a situation were to arise, I would consider the text of the provision and the meaning of the terms at issue, as well as the method of interpretation that the Supreme Court or Ninth Circuit has used in the most analogous circumstance and any persuasive authority from other jurisdictions.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *Id.* at 605.

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: The Supreme Court has repeatedly stated that statutory interpretation begins with the text and that, when the text is clear, it ends there as well. *See, e.g., National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 631 (2018). If confirmed, I would faithfully follow that guidance.

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

Response: My understanding is that "plain meaning" generally refers to a term's ordinary meaning at the time of its enactment.

6. What are the constitutional requirements for standing?

Response: The doctrine of standing enforces Article III's requirement that federal courts adjudicate only "genuine, live dispute[s] between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). To satisfy "the 'irreducible constitutional minimum' of standing," a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

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

Response: The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. In *M'Culloch v. Maryland*, 17 U.S. 316, 436-37 (1819), the United States Supreme Court held that Congress has implied powers derived from the Necessary and Proper Clause.

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

Response: I would apply the relevant Supreme Court and Ninth Circuit precedent to evaluate the constitutionality of the law. For example, I would look to *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), in evaluating whether Congress had the authority to enact a law under the Commerce Clause.

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). In *Glucksberg*, the Court collected cases previously recognizing such rights, including the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and abortion, *Planned Parenthood of Southeastern Pennsylvania v.Casey*, 505 U.S. 833(1992). *Id*. at 720; *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: My responses to Questions 9 and 10 are based on my understanding of United States Supreme Court precedent and not on personal beliefs. If confirmed, I would faithfully follow all United States Supreme Court precedent regardless of any personal beliefs I may have.

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

Response: The United States Supreme Court has held that Commerce Clause of Article I grants Congress the authority to regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'"*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (citing *United States v. Morrison*, 529 U.S. 598, 618-19 (2000)). Congress may not use the Commerce Clause to regulate inaction, for example, by "compel[ing] individuals to become active in commerce by

purchasing a product." *Id*. at 552.

13. You recently wrote an article entitled *Distributed Federalism: The Transformation of* Younger, in which you argued that *Younger*'s "core premise that a defendant could get adequate relief in his state criminal case probably was never accurate and is even less true today insofar as criminal and civil proceedings are distinct and provide different kinds of relief." Can you expound on this statement?

Response: I well understand the difference between the role of an advocate, the role of a law professor, and the role of a judge – these are very different roles. My academic writings would have no bearing on my decisions as a judge, which would be based on controlling law and precedent. If confirmed as a district court judge, I would faithfully apply *Younger v. Harris*, 401 U.S. 37 (1971), as it has been interpreted and applied by the United States Supreme Court and the Ninth Circuit. *Younger* and its progeny recognize that, absent extraordinary circumstances, federal courts will abstain based on interests of comity and federalism from exercising jurisdiction in certain circumstances when asked to enjoin ongoing state enforcement proceedings. *See Page v. King*, 932 F.3d 898, 901–02 (9th Cir. 2019) (internal citations and quotation marks omitted).

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

Response: The United States Supreme Court has explained that a group is a "suspect class" under the "the traditional indicia of suspectedness," if it has an "immutable characteristic determined solely by the accident of birth" or if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). For example, a group of people classified by race, religion, national origin, or alienage is a suspect class. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-32 (1971).

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

Response: The United States Supreme Court has emphasized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *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: In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court emphasized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. If another branch of government purports to assume an authority not granted to it by the Constitution, it is the duty of the judicial department to disregard the improper exercise of power.

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

Response: A judge is duty bound to apply the law to the case in question regardless of personal feelings. If confirmed, I would faithfully discharge that duty.

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

Response: Both are undesirable outcomes that judges should strive to avoid.

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: My law practice has not required me to study the arc of the Supreme Court's review of congressional action.

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

Response: I understand judicial review to refer to the ability of the judicial branch to assess the legality of actions taken by the legislative or executive branch. Although others may have a different view, I understand judicial supremacy to refer to the view that courts have the sole ability or obligation to interpret the Constitution.

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: Elected officials in the United States swear an oath to uphold the Constitution. U.S. Const., Art. VI, Sec. 3. In our system of government, elected officials are also required to follow properly rendered judicial decisions.

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: A court's role is limited by the text and principles of Article III. Judges do not have the will of the legislators to enact laws or the force of the executive branch to execute laws. Judges merely determine "what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), in the cases and controversies properly before them.

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

Response: If confirmed as a district court judge, I will be bound to fully and faithfully apply binding precedent to the cases before me regardless whether I agree with it. In that role, it would not be within my purview to question the constitutional reasoning for binding precedent or limit its applicability beyond what Supreme Court or Ninth Circuit precedent requires.

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

Response: If confirmed I would impose an individualized sentence based on the facts of the case and looking only at the factors authorized by Congress under the sentencing statute, 18 U.S.C. § 3553(a), which specifies the factors a federal judge shall consider when imposing a sentence. No sentencing judge should discriminate when sentencing based on race, gender, nationality, sexual orientation, or gender identity.

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 was not previously aware of this definition from the Biden Administration. If a case involving the definition of "equity" came before me, I would look to United States Supreme Court and Ninth Circuit precedent to define it. If confirmed, my personal views about the Executive Branch's definition of equity would not factor into any case.

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

Response: Black's Law Dictionary defines "[e]quity" as "[f]airness; impartiality; evenhanded dealing," and "[t]he body of principles constituting what is fair and right; natural law." *Black's Law Dictionary* 560 (7th ed. 1999). It defines "[e]quality" as "[t]he state of being equal; esp., likeness in power or political status." *Black's Law Dictionary* 556 (7th ed. 1999).

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

Response: The text of the 14th Amendment does not include the term "equity."

28. How do you define "systemic racism?"

Response: I am not aware of any consensus definition of "systemic racism," nor do I have a personal definition of that term. Although I am aware that there is much public discussion and debate about the issue, any personal views I have would not be relevant to any decisions I would make as a district court judge, if confirmed.

29. May judges take systemic racism into account in sentencing decisions? If yes, under what statute?

Response: If confirmed I would impose an individualized sentence based on the facts of the case and looking only at the factors authorized by Congress under the sentencing statute, 18 U.S.C. § 3553(a), which specifies the factors a federal judge shall consider when imposing a sentence. No sentencing judge should discriminate based on race or racism, and the sentencing statute does not provide otherwise.

30. How to you define "mass incarceration?"

Response: Though I am not aware of any consensus definition of the term "mass incarceration," the Oxford Bibliographies defines "mass incarceration" as a "phenomenon" in the United States "which is defined by comparatively and historically extreme rates of imprisonment and by the concentration of imprisonment among young, African American men living in neighborhoods of concentrated disadvantage." *See https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0033.xml*

31. May judges take mass incarceration into account in sentencing decisions? If yes, under what statute?

Response: If confirmed I would impose an individualized sentence based on the facts of the case and looking only at the factors authorized by Congress under the sentencing statute, 18 U.S.C. § 3553(a), which specifies the factors a federal judge shall consider when imposing a sentence. Mass incarceration is not one of the factors included in that statute.

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

Response: I am not aware of any consensus definition of "critical race theory." Black's Law Dictionary defines the term as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Black's Law Dictionary* 382 (7th ed. 1999).

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

Response: Please see my responses to Questions 28 and 32.

Questions from Senator Thom Tillis for Anne Rachel Traum
Nominee to be United States District Judge for the District of Nevada

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

   Response: Yes.

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

   Response: Although definitions of judicial activism may vary, I understand it to include situations where judges decide a case based on their personal views rather than what the law requires or go beyond the case before them to reach issues that are not properly presented. Neither type of judicial activism is appropriate.

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

   Response: I believe that impartiality is an obligation for all judges.

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

   Response: No.

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

   Response: A judge who is faithfully interpreting the law will sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome. In all cases, the judge's duty is to set aside any personal views and faithfully interpret and apply the law.

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

   Response: No.

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

   Response: The Supreme Court has held that the Second Amendment confers "an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), and has incorporated that right on the States via the Fourteenth Amendment, *see McDonald v. City of Chicago,* 561 U.S. 742 (2010). If confirmed, I will faithfully follow those and other precedents interpreting the SecondAmendment.

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

Response: The Constitution is not suspended in times of crisis. If I were confirmed and such a case came before me, I would begin by reviewing the arguments of the parties and researching Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts and record of the case before me.

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

Response: There is significant Supreme Court and Ninth Circuit precedent on qualified immunity, and, if confirmed, I would analyze and apply that precedent in resolving cases that came before me that raised qualified immunity issues. Supreme Court precedent makes clear that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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

Response: The Supreme Court has held that law enforcement officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent about the scope of qualified immunity.

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

Response: The Supreme Court has held that law enforcement officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established atthe time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent about the scope of qualified immunity.

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

Response: Although I have experience with both civil and criminal litigation, I have not handled patent cases during my legal career. Intellectual property matters are very important and, if confirmed, I would strive to rapidly get up to speed on the relevant issues if a case came before me involving patent law. I would of course be bound by all Supreme Court, Ninth Circuit, and Federal Circuit precedent on these issues. As a judicial nominee, I do not believe it would be appropriate for me to offer a personal opinion about the Supreme Court's patent eligibility jurisprudence.

13. **How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

    a. ***ABC Pharmaceutical Company*** **develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

    Response: As a judicial nominee, I do not believe it would be appropriate for me to opine about the proper outcome in a hypothetical case. If confirmed and presented with a case involving patent eligibility, I would study the specific facts and arguments in each case and faithfully follow Supreme Court, Ninth Circuit, and Federal Circuit precedent.

    b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?**

    Response: Please see my answer to Question 13(a).

    c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

    Response: Please see my answer to Question 13(a).

    d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and**

conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: Please see my answer to Question 13(a).

e. ***Natural Laws and Substances, Inc.*** **specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

Response: Please see my answer to Question 13(a).

f. **A business methods company, *Financial Services Troll*, specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?**

Response: Please see my answer to Question 13(a).

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTechCo* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

Response: Please see my answer to Question 13(a).

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

Response: Please see my answer to Question 13(a).

i. ***Hantson Pharmaceuticals*** **develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

Response: Please see my answer to Question 13(a).

j. ***Stoll Laboratories*** **discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response: Please see my answer to Question 13(a).

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my answer to Question 12.

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

a What experience do you have with copyright law?

Response: None.

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

Response: None.

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

Response: None.

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

Response: None.

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

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

Response: A judge tasked with interpreting and applying a statute must first examine the plain meaning of that statute and review all relevant precedent. Only if the meaning of the statute cannot be determined using tools and canons of statutory interpretation should a judge consider legislative history.

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

Response: The Supreme Court and the Ninth Circuit have issued opinions governing the weight that a reviewing court should give to an agency determination. If confirmed to the District Court bench, I would follow and apply that law.

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

Response: As a judicial nominee, I do not believe it would be appropriate for me to opine about the proper outcome in a hypothetical case. If confirmed and presented with a case raising this question, I would study the specific facts and arguments in that specific case and faithfully apply the law.

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

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

Response: I do not have personal familiarity with these issues. In general, if a statute by its terms allows for an application that promotes the statute's underlying purposes to circumstances not anticipated at the time it was enacted, courts may give effect to the plain meaning of the statute. If it does not, Congress can amend the statute to account for changes.

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

Response: If confirmed, I would be bound to follow Supreme Court precedent unless or until the Supreme Court chose to overrule it or Congress passed a superseding statute.

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

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

Response: I am not familiar with these practices in the District of Nevada, which is a single district with unofficial northern and southern divisions. My understanding is that all cases in Nevada are randomly assigned and there is no unofficial division served by a single judge. So, while the practice of judge or forum shopping is a serious concern, I do not foresee those practices being an issue in the District of Nevada.

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

Response: Please see my response to Question 18(a).

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

Response: I am not familiar with the term or practice of "forum selling" and as a judicial nominee it would not be appropriate for me to opine on the practice. If confirmed, I would apply binding precedent neutrally and impartially to every case that comes before me without favor to any litigant, regardless of the subject matter. I would not regard it as appropriate to encourage or discourage the filing of any particular case in a manner that would incentivize a particular judge to hear the case.

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

Response: Please see my answer to Question 18(c).

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: Though I am not familiar with the situation described in the question, judges are bound to follow Supreme Court and circuit court precedent. The Ninth Circuit recognizes that appellate mandamus relief may be appropriate if a district court order reflects an oft repeated error or manifests a persistent disregard of the federal rules. *See Perry v. Schwarzenegger,* 591 F.3d 1147, 1156(9th Cir.2010), *citing Bauman v. United States District Court,* 557 F.2d 650, 655–56 (9th Cir.1977).

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: I am not aware of other corrective measures.

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

Response: As a judicial nominee it would be inappropriate for me to speculate on whether a particular court is perceived as fair and evenhanded in administering justice. All judges are sworn apply the law faithfully and impartially and to administer justice without regard to persons.

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

Response: As a judicial nominee it would be inappropriate for me to opine on the procedures and rules adopted in a particular federal court.

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

Response: As a judicial nominee it would be inappropriate for me to opine on whether a particular federal court should amend its local rules.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. **If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?**

Response: While I am not familiar with a situation in which a judge has ignored the law or flouted the orders of a higher court, I recognize that judges are bound to follow Supreme Court and circuit court precedent and mandamus relief may be appropriate if a district court disregards the law or orders on remand. *See Perry v. Schwarzenegger,* 591 F.3d 1147, 1156 (9th Cir.2010), *citing Bauman v. United States District Court,* 557 F.2d 650, 655–56 (9th Cir.1977). Given that any such situation would be highly fact-specific, it would be inappropriate for me to speculate as to whether a judge's behavior would be deemed lawless.

b. **Would five mandamus reversals be sufficient? Ten? Twenty?**

Response: Please see my response to Question 21(a).