Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Jacqueline Scott Corley
Nominee to be United States District Judge for the Northern District of California

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

   Response: Qualified immunity in California, as in the rest of the United States, is governed by United States Supreme Court precedent, most recently in two cases decided on October 18, 2021: *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021). Under that binding precedent, a law enforcement officer is not entitled to qualified immunity if the officer's conduct violates clearly established statutory or constitutional rights of which every reasonable officer would have known.

2. **What is the legal basis for a nationwide injunction?**

   Response: My general understanding is that under Ninth Circuit precedent, a nationwide injunction is only appropriate if (1) such broad relief is necessary to give the prevailing party the relief to which it is entitled, and (2) a nationwide injunction is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *City and County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020).

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

   Response: My general understanding is that 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); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that *Meyer v. Nebraska* recognized the fundamental right and liberty interest "to direct the education and upbringing of one's children").

4. **In a False Claims Act case, what is the standard used by the Ninth Circuit for determining whether a false claim is material?**

   Response: My general understanding of the Ninth Circuit standard, is that, applying the United States Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel Escobar*, 579 U.S. 176 (2016), and the plain language of the False Claims Act, "'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). "[M]ateriality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc*., 953 F.3d 1108, 1121 (9th Cir. 2020) (internal quotation marks and citation

omitted), *cert. denied sub nom*. *RollinsNelson LTC Corp. v. United States ex rel. Winters*, 141 S. Ct. 1380 (2021).

5. **What legal standard and circuit precedents would you apply in evaluating whether a regulation or statute infringes on Second Amendment rights?**

   Response: I do not recall specifically addressing a Second Amendment issue in my ten years as a Magistrate Judge. In general, I am aware that any analysis would involve application of the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Applying *Heller*, Ninth Circuit has adopted a two-step framework for 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), *petition for cert. filed* (May 11, 2021); *accord Duncan v. Bonta*, 2021 WL 5577267 *7 (9th Cir. Nov. 30, 2021).

   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." *Young*, 992 F.3d at 783. Courts also look at whether the law falls within the presumptively lawful regulatory measures the United States Supreme Court identified in *Heller*, such as prohibitions on the possession of firearms by persons convicted of a felony. If the law does not burden rights within the historical scope of the Second Amendment, or the law falls within the presumptively lawful regulatory measures, it does not violate the Second Amendment. On the other hand, if the challenged law burdens conduct protected by the Second Amendment, the examining court moves to the second step.

   Under the second step, the court must determine what level of scrutiny applies. *Id*. at 784. The Ninth Circuit 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)).

6. **What is the legal standard for "threats" in the Ninth Circuit?**

   Response: My general understanding is that 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). In the Ninth Circuit, *Black's* "true threat"

requirement "must be read into all threat statutes that criminalize pure speech." *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011).This requirement means that the "the speaker must subjectively intend to threaten" to be convicted." *United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021) (internal quotation marks and citation omitted).

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

    a. **Was *Brown v. Board of Education* correctly decided?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

    Response: As a sitting MagistrateJjudge it is not appropriate for me to opine on whether a Supreme Court case was correctly decided; instead, my obligation is to faithfully follow all Supreme Court precedent. However, given that it is unlikely that intentional racial segregation in schools or miscegenation laws will be re-enacted in the United States, I can state, as have prior nominees, that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided. The passage of time and subsequent caselaw have established that these two cases are beyond debate or reconsideration.

8. **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.

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

    Response: Please see my response to Question 8, above.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

12. **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.

b. **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.

c. **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.

13. **The Opens 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.

14. **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.

15. **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: In January 2021, I submitted an application for a vacant Northern District of California District Court position to the chair of Senator Dianne Feinstein's judicial nomination process. He forwarded my application to Senator Feinstein's judicial nomination committee for the Northern District of California. My understanding is that the committee recommended me to the chair, and I interviewed with him on March 24, 2021.

My understanding is that Senator Feinstein then recommended me to the White House. On July 29, 2021, I interviewed with attorneys from the White House Counsel's Office. Since August 5, 2021, I have communicated with officials from the Office of Legal Policy at the Department of Justice. On November 3, 2021, President Biden announced his intent to nominate me.

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

Response: No.

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

    Response: No.

18. **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.

19. **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.

20. **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.

21. **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 July 29, 2021. I do not have the exact dates of subsequent communications with White House staff or the Justice Department regarding my nomination. I was in regular contact with both offices during the vetting process and in preparation for my Senate Judiciary Committee hearing.

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

    Response: On December 8, 2021, I received these questions from the Office of Legal Policy (OLP). After reviewing the questions and relevant case law, I drafted my answers. OLP provided feedback on my draft, which I considered, before I submitted my final responses to the Committee.

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

Questions for the Record for Jacqueline Scott Corley, Nominee for the Northern District of California

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. **If you are to join the federal bench, 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 have been a Magistrate Judge on the Northern District of California since 2011. I am not aware of the Court providing any trainings that included any of the above statements. Nor am I aware of any desire or intent to do so. All of the trainings in which I have been involved focus on ensuring that judges decide cases based solely on the facts in the record and the controlling law and treat everyone equally and fairly.

2. **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: Please see my response to Question 1, above.

3. **Is the criminal justice system systemically racist?**

Response: I am aware that there is debate about whether aspects of certain criminal justice systems lead to disparate racial outcomes. I am also aware that the United States Sentencing Commission concluded "that the crack/powder sentencing differential 'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race.'" *Kimbrough v. United States*, 552 U.S. 85, 98 (2007). As a Magistrate Judge I always strive to conduct criminal proceedings fairly and impartially and without regard to the race of any of the participants and will continue to do so if confirmed as a District Court Judge.

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

Response: As a sitting Magistrate Judge and District Court nominee it is not appropriate for me to comment on political appointments.

5. **In *Comcast v. National Association of African American-Owned Media*, the U.S. Supreme Court was asked to decide whether a racial discrimination claim under 42 U.S.C. § 1981 requires a plaintiff to show either "but-for" causation, or only that race is a motivating factor. Explain your understanding of the Court's holding and reasoning in its unanimous reversal of the Ninth Circuit.**

Response: As a Magistrate Judge I do not recall having had an occasion to consider *Comcast v. National Association of African American-Owned Media* in any of my cases. In general, I understand that the United States Supreme Court held that plaintiffs bringing a claim under 42 U.S.C. § 1981 "must initially plead and ultimately prove that, but for race, [they] would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

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

Response: Yes, the United States Constitution imposes identifiable limits on what the government may impose on private institutions.

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

Response: In general, the Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (internal quotation marks and alterations omitted). Laws that discriminate against institutions or persons because of their religious status are subject to strict scrutiny review. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2257 (2020). To satisfy that standard of review, "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* at 2260 (internal quotation marks and citation omitted).

I also understand that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). However, a law that appears facially neutral will not be considered neutral, and thus will be subject to strict scrutiny, if the law's object is to restrict practices because the practices are religiously motivated. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Similarly, if a government body adjudicates a free exercise defense to a law of general applicability in a manner that evinces hostility to religion, then the Free Exercise clause is violated notwithstanding the law's facial neutrality. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018). The Free Exercise Clause also bars enforcement of certain facially neutral employment discrimination laws if enforcing the law would interfere with the relationship between a religious institution and an employee charged with ministerial responsibilities. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012). Further, "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." *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

8. **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: As a Magistrate Judge I have not had occasion to consider *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). I understand generally that in that case religious organizations challenged a provision of an executive order issued by the Governor of New York that capped attendance at worship services in certain geographic areas classified as "red" or "orange" zones. The issue before the United States Supreme Court was whether the organizations were entitled to an injunction against application of the executive order pending resolution of the organizations' appeal to the Second Circuit. The Supreme Court first held that the organizations had established a likelihood of success on the merits because the organizations had "made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." *Roman Cath. Diocese*, 141 S. Ct. at 66. Second, the Supreme Court held that there could "be no question that the challenged restrictions, if enforced, will cause irreparable harm." *Id.* at 67. Finally, the Supreme Court concluded that granting an injunction was in the public interest. *Id.* at 68. The Court thus concluded "that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined." *Id.* at 69.

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

Response: As a Magistrate Judge I have not had occasion to consider *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). I understand generally that in that case the United States Supreme Court enjoined California from enforcing COVID-19 restrictions on private gatherings as applied to at-home religious services pending resolution of the plaintiffs' appeal to the Ninth Circuit and resolution of a certiorari petition, if any. The Supreme Court first concluded that the plaintiffs were likely to succeed. The law was not neutral because it contained exceptions and accommodations for non-religious activities comparable to religious activities and thus strict scrutiny applied. The law as applied to the plaintiffs did not survive strict scrutiny because there was no showing that the plaintiffs' proposed at-home religious exercise posed more of a risk of transmission than the secular activities that were allowed. Second, the plaintiffs would be irreparably harmed without an injunction. Finally, an injunction was in the public interest. Accordingly, the Supreme Court held that the plaintiffs were entitled to an injunction pending appeal.

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

Response: Yes.

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

Response: As a Magistrate Judge I have not had occasion to consider *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018). I understand generally that in that case the United States Supreme Court addressed whether applying Colorado's public accommodations law, which prohibited discrimination against gay people in purchasing products and services, required a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violated the Free Speech or Free Exercise Clauses of the First Amendment. The Supreme Court held that the application of the law to the cake baker in this particular situation violated the Free Exercise Clause because comments made by the Colorado Civil Rights Commission evidenced hostility to the cake baker's religious beliefs. That hostility was also evidenced by the different treatment the Commission gave cake bakers who had refused to make cakes with anti-gay messages. The Commission thus did not provide the cake baker with the neutral treatment mandated by the Free Exercise Clause.

12. **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?**

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

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

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

Response: Before I decide a legal issue in a case, I research and review the relevant United States and Supreme Court precedent, along with other caselaw, and consider the parties' written submissions and oral argument, if any. In general, my understanding of existing doctrine is that an individual's religious beliefs are protected by the First Amendment if they are sincerely held, even if they are not consistent with the faith tradition to which they belong. *See, e.g., Frazee v. Illinois Dep't of Emp. Sec.,* 489 U.S. 829, 834 (1989) ("we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held

religious belief. Under our cases, he was entitled to invoke First Amendment protection"). Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993) (internal quotation marks and citation omitted).

13. **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: I have not had occasion to consider *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) as a Magistrate Judge. My general understanding is that in that case the plaintiff, a teacher at a religious school, brought a claim under the Age Discrimination in Employment Act against the school. The Ninth Circuit held that the "ministerial" exception to the application of discrimination laws to religious institutions, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171 (2012) did not apply, and the United States Supreme Court reversed. The Supreme Court held that the inquiry relevant to whether the exception applies is what the employee does. As the plaintiffs in the two consolidated cases before the Supreme Court were tasked with educating students in their faith, which is at the core of a religious school's mission, the ministerial exception applied. 140 S. Ct. at 2064 ("educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school").

14. **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: As a Magistrate Judge I have not had occasion to consider *Fulton v. City of Philadelphia, Penn.*, 141 S. Ct. 1868 (2021). I understand generally that the United States Supreme Court held that the refusal of the City of Philadelphia to contract with Catholic Social Services (CSS) for the provision of foster care unless CSS certified that it would certify same-sex couples as foster parents violated the Free Exercise Clause. The Supreme Court first held the requirement burdened CSS's religious exercise by forcing it to choose between certifying same-sex couples or not following its Catholic beliefs. It further held that the certification requirement was not a neutral, generally applicable law because it allowed for exceptions to the anti-discrimination requirement at the sole discretion of the Commissioner. Therefore, the requirement as applied to CSS was subject to strict scrutiny. The Supreme Court concluded that the requirement did not survive strict scrutiny as the City of Philadelphia did not have a compelling interest in denying CSS an exception to the non-discrimination requirement.

15. **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: My understanding is that *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021) arose from government officials' insistence "that the Amish . . . adopt certain modern technologies or risk jail, fines, and even losing their farms." The United States Supreme Court granted the Amish's petition for review, vacated the lower court's decisions, and remanded the case for further proceedings in light of the Supreme Court's recent decision in *Fulton v. Philadelphia*, 593 141 S. Ct. 1868 (2021). Justice Gorsuch's concurrence articulates his belief that the lower courts erred by treating the government's general interest in sanitation regulations as "compelling" under the strict scrutiny standard of review without reference to the specific application of those rules to the Amish community. He further found that the lower courts erred by failing to consider the exemptions given to other groups. *Id.* at 2432-33 ("it is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal quotation marks and citation omitted). Finally, Justice Gorsuch concluded that the lower courts erred by failing to give sufficient weight to how other jurisdictions handle the sanitation issue. In particular, he stated that under strict scrutiny it was the government's burden to show why these alternatives would not work, not the Amish's burden to show that they would.

16. **In *Americans for Prosperity Foundation v. Bonta,* the Court's majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?**

Response: As a Magistrate Judge I have not had occasion to analyze *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). My general understanding of that decision is that Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, stated that "exacting scrutiny" applies to First Amendment challenges to compelled disclosure, and that for "exacting scrutiny" to be satisfied "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

Justice Thomas, concurring in the judgment, stated that strict scrutiny is the proper standard of review for the compelled disclosure requirement at issue. *Id.* at 2389-90 (Thomas, J., concurring in part and concurring in the judgment).

Justice Alito, joined by Justice Gorsuch, concluded that because "the choice between exacting and strict scrutiny has no effect on the decision in these cases," there was "no

need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment." *Id.* at 2392 (Alito, J., concurring in part and concurring in the judgment).

As the Ninth Circuit has explained, "[o]rdinarily, [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (quoting *Marks v. United States*, 430 U.S. 188, 193, (1977)). I would be required to apply this rule if the application of *Americans for Prosperity Foundation v. Bonta* came before me.

17. **Describe how you would 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: In my ten-plus years serving as a Magistrate Judge I have developed a judicial philosophy that emanates from Federal Rules of Civil Procedure 1: to preside in a manner that secures the just, speedy, and inexpensive determination of every action and proceeding. I do not have an opinion as to whether my philosophy, which is very much grounded in my role as a trial judge, is analogous to that of a United States Supreme Court justice.

18. **Please briefly describe the interpretative method known as originalism.**

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

19. **Please briefly describe the interpretive method often referred to as living constitutionalism.**

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." Black's Law Dictionary (11th ed. 2019).

20. **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: If I were presented with a constitutional issue of first impression, before I opined on the law I would carefully consider the parties' written submissions and oral argument, if any, as well as the relevant caselaw, including United States Supreme Court precedent. Even on a question of first impression, Supreme Court precedent is likely to establish the framework for analysis of the question.

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

Response: The United States Supreme Court has held that it normally interprets a statute consistent with its public meaning at the time the statute was enacted. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

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

Response: If presented with a question of the interpretation of a constitutional provision, I will fully and faithfully apply binding United States Supreme Court and Ninth Circuit precedent. In general, the meaning of the Constitution does not change; however, the United States Supreme Court has applied the Constitution to circumstances that did not exist at the time the Constitution was enacted. *See, e.g., Carpenter v. United States*, 140 S. Ct. 326 (2019).

23. **Name a Supreme Court case that (1) came to the right result for the right reason, (2) came to the right result but for the wrong reason, (3) came to the wrong result for the right reason, and (4) came to the wrong result for the wrong reason.**

Response: As a Magistrate Judge and as a District Court nominee, my obligation is to faithfully apply United States Supreme Court precedent regardless of my belief, if any, in the correctness of the decision.

24. **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: As a sitting Magistrate Judge and District Judge nominee, it is not appropriate for me to comment on this issue.

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

Response: In *District of Columbia v. Heller,* the United States Supreme Court held that an individual's right to own a firearm is protected by the Second Amendment. Because "the

Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States" "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791, 894 (2010).

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

Response: I have not had this issue arise before me as a Magistrate Judge. I understand that an individual's right to own a firearm is a fundamental right protected by the Second Amendment to the United States Constitution. I will faithfully apply all relevant United States Supreme Court precedent when evaluating a Second Amendment claim.

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

Response: Please see my response to Question 26, above.

28. **Are students accused of sexual misconduct entitled to due process?**

Response: As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent. I generally understand that the Due Process Clause of the Fourteenth Amendment would not apply to students accused of sexual misconduct at private schools. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("The Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities"). If presented with a due process claim of a student at a public institution, I would faithfully apply the relevant United States Supreme Court and Ninth Circuit authority to the facts in the record.

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

Response: As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent. I will follow the same procedure if confirmed as a District Court Judge. If this question is presented to me, I will fully and faithfully apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: I have not had this issue arise before me and I do not have an understanding of either term, at least out of context. As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent. I will follow the same procedure if confirmed as a District Court Judge. If this issue arises before me, I will fully and faithfully apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent. I will follow the same procedure if confirmed as a District Court Judge. If this question is presented to me, I will fully and faithfully apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: My general understanding is that in *Alabama Association of Realtors v. Dep't. of Health and Human Servs*., 141 S. Ct. 2485 (2021), the question presented was whether the United States Supreme Court should vacate the stay, pending appeal, of a judgment that would end the Centers for Disease Control and Prevention's nationwide moratorium on evictions during the COVID-19 pandemic. The Supreme Court vacated the stay, concluding that the Centers for Disease Control did not have the statutory authority to impose the moratorium. In so concluding, the Court applied a four factor test: "(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 Supreme Court concluded that the plaintiffs were likely to succeed, the plaintiffs would be at risk of irreparable harm without a stay because the moratorium deprives them of rent payments, the government's interests had decreased, and that although "the public has a strong interest in combating the spread of the COVID-19 Delta variant," the CDC could not combat that spread unlawfully. *Id*. at 2488-90.

33. **In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the Fourth Amendment Third-Party Doctrine and those that are not?**

Response: My general understanding is that in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the United States Supreme Court held that the government's warrantless acquisition of Carpenter's cell-site records violated his Fourth Amendment right against unreasonable searches and seizures. In so holding, the Supreme Court declined to extend

the Third-Party Doctrine to the cell-cite records. The Court explained that two criteria governed its analysis. The first criterion is the "nature of the particular documents sought," and the legitimate expectation of privacy in those records. The second criterion is the level of intrusiveness of the records sought and, in particular, whether the user acts affirmatively to place the records in the third-party's possession.

34. **Please explain your understanding of Justice Gorsuch's dissent in *Carpenter*.**

Response: My general understanding of Justice Gorsuch's dissent is he believes that the Third-Party Doctrine is untethered to the Fourth Amendment's language and is unworkable. He proposes what he calls a traditional approach to Fourth Amendment analysis, which in general terms would ask whether what is being seized belongs to an individual, with a focus on state property rights.

a. **What is the judicial value of tying positive law and common law property interests to the test of what constitutes a "search"?**

Response: As a Magistrate Judge and, if confirmed, a District Court Judge, my role is to faithfully apply United States Supreme Court precedent in all areas of federal law, including Fourth Amendment jurisprudence.

b. **Would Gorsuch's suggested supplementation of *Katz* offer more 4th Amendment protections or less? Why?**

Response: Please see my response to Question 34a, above.

35. **Do Americans have a privacy interest in their financial affairs?**

Response: As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent in light of the facts in the record. I will follow the same procedure if confirmed as a District Court Judge. If this question is presented to me, I will fully and faithfully apply relevant United States Supreme Court and Ninth Circuit precedent.

36. **Are there any limitations on the Third Party Doctrine as applied to an individual's banking records? What are they?**

Response: As a Magistrate Judge, before I resolve an issue or answer a legal question, I carefully consider the parties' written submissions, oral argument, if any, and conduct my own research into the relevant precedent in light of the facts in the record. I will follow the same procedure if confirmed as a District Court Judge. If this question is presented to me,

I will fully and faithfully apply relevant United States Supreme Court and Ninth Circuit precedent.

37. **Please explain your understanding of the Supreme Court's holding and rationale in *Apple v. Pepper*. How does it reconcile with *Illinois Brick*?**

Response: My general understanding is that in *Apple v. Pepper*, 139 S. Ct. 1514 (2019), consumers who purchased iPhones brought an antitrust putative class action against Apple, alleging that Apple monopolized and attempted to monopolize the market for iPhone apps. The United States Supreme Court held that iPhone owners who purchased apps directly from Apple's "App Store" were direct purchasers under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and therefore could bring an antitrust claim alleging that Apple had "monopolized the retail market for the sale of apps." 139 S. Ct. at 1518.

38. **Please explain the Supreme Court's holding and rationale in *Associated Press v. United States*.**

Response: My general understanding is that in *Associated Press v. United States*, 326 U.S. 1 (1945), the United States Supreme Court held that the Sherman Act applied to the Associated Press (AP), a collective of over 1000 newspapers, and that the AP's by-laws, which prevented its members from selling the news to non-members, violated the Sherman Act. In so holding, the Supreme Court rejected the AP's contention that applying the Sherman Act to it would violate the First Amendment. The Court concluded that "far from providing an argument against application of the Sherman Act, [the First Amendment] provided powerful reasons to the contrary"; in particular, applying the Sherman Act to the AP ensures the "widest possible dissemination of information." *Id.* at 20; *see also id.* ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity"). The Supreme Court thus affirmed the grant of summary judgment in the government's favor.

39. **Should courts place significant weight on underlying First Amendment considerations when making antitrust determinations relating to the dissemination of information to the public, as the *Associated Press* majority suggests?**

Response: If this issue came before me as a Magistrate Judge or a District Court Judge, if confirmed, I would fully and fairly apply *Associated Press* and all relevant United States Supreme Court and Ninth Circuit precedent to the facts in the record after carefully considering the parties' written submissions and oral argument, if any.

Senator Josh Hawley
Questions for the Record

Judge Jacqueline Corley
Nominee, U.S. District Court for the Northern District of California

1. **Justice Thurgood 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?**

    Response: I am not familiar with the statement or its context; however, I do not believe that a judge should do what the judge believes is right without regard to the governing law. As a sitting Magistrate Judge, I always apply controlling United States Supreme Court and Ninth Circuit precedent to the facts in the cases before me regardless of any personal beliefs.

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

    Response: I am not familiar with the statement or its context and thus cannot answer the question. The judicial oath requires judges to affirm that they "will administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me as under the Constitution and laws of the United States." 28 U.S.C. § 453. I follow that oath as a Magistrate Judge and will continue to do so if confirmed as a District Court Judge.

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

    Response: I understand the standards in the Ninth Circuit for the various abstention doctrines to be generally as set forth below.

    Under the *Younger* abstention doctrine, federal courts generally must abstain from enjoining "(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.3d 732, 735 (9th Cir. 2020), cert. denied, 141 S. Ct. 2796 (2021) (internal quotation marks and citations omitted).

    Under 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."

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–17 (1996) (citing *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941)). "*Pullman* requires that the federal court abstain from deciding the federal question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd*., 988 F.3d 1194, 1209 (9th Cir. 2021).

Under the *Burford* abstention doctrine, a federal court is required to dismiss an action where: "(1) . . . 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) . . . federal review might disrupt state efforts to establish a coherent policy. *Poulos v. Caesars World, Inc*., 379 F.3d 654, 671 (9th Cir. 2004) (quoting *Tucker v. First Md. Sav. & Loan, Inc*., 942 F.2d 1401,1405 (9th Cir. 1991)).

Under the *Rooker-Feldman* doctrine, a federal district court is prohibited from exercising subject matter jurisdiction over a lawsuit that is a de facto appeal from a state court judgment. *See Rooker v. Fidelity Trust Co*., 263 U.S. 413 1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In particular, a federal court lacks subject matter jurisdiction if a plaintiff in a federal court case alleges as a legal wrong a state court decision and seeks relief from the state court judgment arising from that decision. A federal court does not lack jurisdiction if the federal court plaintiff asserts as a legal wrong an act by an adverse party. *Kougasian v. TMSL, Inc*., 359 F.3d 1136, 1139 (9th Cir. 2004).

The Ninth Circuit has held that *Colorado River* is technically not an abstention doctrine, but because it is similar to an abstention doctrine I will describe it here. *See United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021) (observing that *Colorado River* is not an abstention doctrine but "shares the qualities of one."). Under *Colorado River*, in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," a district court can dismiss or stay "a federal suit due to the presence of a concurrent state proceeding." *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). The *Colorado River* doctrine applies only in exceptional circumstances, with the clearest of justifications. *State Water Res. Control Bd.*, 988 F.3d at 1203. The Ninth Circuit has identified eight factors for a court to consider in weighing whether a *Colorado River* stay is warranted:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. (internal quotation marks and citations omitted).

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

   Response: I have never worked on a legal case or representation in which I opposed a party's religious liberty claim.

   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.**

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

   Response: In general, I understand that the United States Supreme Court has held that it normally interprets a statute consistent with its public meaning at the time the statute was enacted. *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020).

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

   Response: When a lower court is interpreting a statute, it must first review the text and any relevant binding precedent. If the text is unambiguous, or there is binding precedent interpreting the statute, the court must apply the statute's plain meaning or the binding precedent. Only if the statute's meaning is ambiguous, and there is no applicable binding precedent, should the court review the 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: I do not recall the issue of whether some legislative history is more probative of legislative intent than others arising during my tenure as a Magistrate Judge. If confronted with this issue, either as a Magistrate Judge or if confirmed, as a District Court Judge, I will faithfully apply United States Supreme Court and Ninth Circuit precedent to the legal issue before me.

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

      Response: In general, I do not believe it is appropriate for a trial judge, who is bound to apply Ninth Circuit and United States Supreme Court precedent, to consider foreign laws in interpreting the United States Constitution.

6. **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: In general, I understand that where the question is "whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip v. Gross*, 135 S .Ct. 2726, 2732–2738 (2015); *Baze v. Rees*, 553 U.S. 35, 52 (2008).) The Supreme Court has declared that this standard governs "all Eighth Amendment method-of-execution claims." *Bucklew*, 139 S. Ct. at 1125 (internal quotation marks and citation omitted).

7. **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: Please see my response to Question 6, above.

8. **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: I understand that 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 a habeas petitioner does not have a due process right to access DNA evidence.

9. **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: As a Magistrate Judge, I have always applied the governing law regardless of any personal feelings as I swore to do when I took the oath of office. If confirmed as a District Court Judge, I have no doubt that I will continue to do so.

10. **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: In general, I understand that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). However, a law that appears

facially neutral will not be considered neutral, and thus will be subject to strict scrutiny, if the law's object is to restrict practices because the practices are religiously motivated. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Similarly, if a government body adjudicates a free exercise defense to a law of general applicability in a manner that evinces hostility to religion, then the Free Exercise clause is violated notwithstanding the law's facial neutrality. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018). The Free Exercise Clause also bars enforcement of certain facially neutral employment discrimination laws if enforcing the law would interfere with the relationship between a religious institution and an employee charged with ministerial responsibilities. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012). Further, "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." *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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 state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 10, above.

12. 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: In general, I understand that under Ninth Circuit precedent, a nationwide injunction is only appropriate if (1) such broad relief is necessary to give the prevailing party the relief to which it is entitled, and (2) a nationwide injunction is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *City and County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020).

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: In general, I understand that the United States Supreme Court recently held that "religious beliefs need not be acceptable, logical, consistent or comprehensible to others" to fall within the protection of the First Amendment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (declaring 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)). I am not aware that the Ninth Circuit follows a different standard than that set forth by the United States Supreme Court.

14. 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 a sitting Magistrate Judge and District Court nominee, it is not appropriate for me to opine on whether I agree with a statement in a Supreme Court decision or whether the case was correctly decided; instead, my obligation is to faithfully follow all United States Supreme Court precedent. My understanding, however, is that *Lochner* has been largely overruled. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("The doctrine that prevailed in *Lochner* . . . has long since been discarded").

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

Response: Please see my response to Question 14a, above.

15. 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: Although I am not familiar with this statement or its context, to the extent it means that a judge should issue decisions based on binding precedent and the facts in the record without regard to the judge's personal views, I agree with the statement.

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

Response: I have not had the opportunity to consider the application of *Trump v. Hawaii* to any of my cases. However, after reviewing the opinion, including the passage quoted above, my understanding is that although the United States Supreme Court had never expressly overruled *Korematsu*, the passage of time and subsequent caselaw have demonstrated that the case was wrongly decided and thus is not valid precedent.

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

Response: As a Magistrate Judge I have not been presented with the question of whether a United States Supreme Court case that has not been formally overruled is still good law. Other than *Korematsu*, discussed in my response to Question 16, above, I am not aware of any cases.

a. If so, what are they?

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

Response: As I have done in my ten years as a Magistrate Judge, if confirmed as a District Court Judge I will faithfully apply all United States Supreme Court precedent.

18. 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: My personal views, if any, on Judge Learned Hand are irrelevant to my decision making as a Magistrate Judge and, if confirmed, as a District Court Judge. Instead, I am required to apply the current United States Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 18a, above.

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

Response: In general, I understand that the United States Supreme Court has 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 monopoly finding. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 481 (1992). In so holding, the Supreme Court cited an earlier United States Supreme Court case stating that "over two-thirds of the market is a monopoly." *Id.* (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

I also understand that in applying these United States Supreme Court precedents, the Ninth Circuit has held that a prima facie case of sufficient market power is established with evidence that the defendant had 65% market share. *See Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997). On

the other hand, the Ninth Circuit has also held that less than 50% of market share is "presumptively insufficient to establish market power." *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1434 (9th Cir. 1995).

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

Response: I understand that the United States Supreme Court recently explained that there is "no general federal common law"; instead, "only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020). These areas include "admiralty disputes and certain controversies between States." *Id.* As for other areas, "common lawmaking must be necessary to protect uniquely federal interests." *Id.* (internal quotation marks and citation omitted).

20. 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?

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

Response: In general, the interpretation of a state constitutional provision is a question of state law. Thus, I would turn to state precedent to determine the scope of the state constitutional provision, along with Ninth Circuit precedent, if any, applying the relevant state law. However, a federal court interpreting a federal constitutional provision would not be bound by a state court's interpretation of an identical state court provision.

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

Response: My understanding is that it is a question of state law as to whether a state's constitution provides greater protection than the federal constitution. A state constitution, however, cannot abrogate the protections provided by the United States Constitution and thus the United States Constitution provides a floor.

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

Response: As a sitting Magistrate Judge it is not appropriate for me to opine on whether a United States Supreme Court case was correctly decided; instead, my obligation is to faithfully follow all Supreme Court precedent. However, given that it is unlikely that intentional racial segregation in schools or miscegenation laws will be re-enacted in the United States, I can state, as have prior nominees, that *Brown v. Board of Education* was correctly decided. The passage of time and subsequent caselaw have established that this case is beyond debate or reconsideration.

22. 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: In general, Federal Rule of Civil Procedure 65 gives a court the authority to issue an injunction. As I understand Ninth Circuit precedent, a nationwide injunction is appropriate only if (1) such broad relief is necessary to give the prevailing party the relief to which it is entitled, and (2) a nationwide injunction is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *City and County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020).

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

Response: In general, federalism means that all powers not given to the federal government through the United States Constitution are retained by the individual states. As the United States Supreme Court has explained, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: In 2010 and 2011 I represented Gold Star families in a putative class action against Prudential Life Insurance. The lawsuit challenged Prudential's conduct of retaining the life insurance proceeds to which these military families were entitled when their immediate family member died while serving in a time of conflict. It was a great honor to have earned the trust of these families who had given so much in service to our country.

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

Response: Please see my response to Question 2, above.

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

Response: As a sitting Magistrate Judge and District Court nominee, it is not appropriate for me to opine on the advantages or disadvantages of particular remedies. My responsibility is to faithfully apply the governing law to the facts in the record when deciding what relief, if any, to award.

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: As a sitting Magistrate Judge, and District Court nominee, it is not appropriate for me to generally opine on my view of the law outside of any specific context. When a particular First Amendment issue is raised before me, I will faithfully apply United States Supreme Court and Ninth Circuit precedent to the specific facts in the record.

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

Response: Please see my response to Question 27a, above.

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 27a, above.

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

Response: Please see my response to Question 27a, above.

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

Response: Please see my response to Question 27a, above.

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: To the best of my memory, only one of my nearly 2000 written orders involved the adjudication of a claim under any of those acts or constitutional provisions.

France v. Allman, No. 15-CV-04078-JSC, 2016 WL 7439577 (N.D. Cal. Dec. 27, 2016).

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

Response: The Ninth Circuit Manuel of Model Criminal Jury Instructions advise judges to instruct jurors on the definition of "beyond a reasonable doubt" as is set forth below.

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.
>
> A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.
>
> If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Manuel of Model Criminal Jury Instructions 3.5 (Reasonable Doubt—Defined). I gave this instruction to the jury in a misdemeanor A criminal jury trial over which I presided as a Magistrate Judge. If confirmed as a District Court Judge I intend to give the same instruction in felony criminal trials.

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

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

Response: As a Magistrate Judge, I handle habeas cases with the consent of the parties and if confirmed as a District Court Judge I will handle even more habeas cases. I believe it is inappropriate to discuss this legal issue as it is likely to be a question that will come before me. In deciding the issue, I would faithfully apply

United States Supreme Court precedent and controlling Ninth Circuit authority interpreting § 2254(d), *Harrington*, and its progeny.

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

Response: Please see my response to Question 29a, above.

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

Response: Please see my response to Question 29a, above.

30. In your legal career:

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

Response: None.

b. How many have you tried as second chair?

Response: Two.

c. How many depositions have you taken?

Response: As I have been a Magistrate Judge for over ten years, I do not recall the exact number of depositions I took when I was a practicing attorney. I estimate I took between 15 and 20 depositions.

d. How many depositions have you defended?

Response: As I have been a Magistrate Judge for over ten years, I do not recall the exact number of depositions I defended when was a practicing attorney. I estimate I defended between 10 and 15 depositions.

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

Response: I have not had oral argument before a federal appellate court.

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

Response: I have not had oral argument before a state appellate court.

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

Response: None.

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

Response: As I have been a Magistrate Judge for over ten years, I do not recall the exact number of dispositive motions I argued orally before a trial court when I was a practicing attorney. I estimate I appeared at oral argument approximately 10 to 15 times.

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

Response: I do not recall arguing any evidentiary motions before trial courts.

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

Response: Not to the best of my memory.

a. If yes, please provide appropriate citations.

32. 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.

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

Response: I am generally aware that in several cases the United States Supreme Court has recognized substantive due process rights emanating from the Fifth and Fourteenth Amendments to the United States Constitution. *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (the right of same sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (the right to interstate travel); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (the right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the right to use contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to marital privacy); *Kent v. Dulles*, 357 U.S. 116 (1958) (the right to travel); *Skinner v. Oklahoma,* 316 U.S. 535 (1942) (the right to have children); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (the right to direct the upbringing of one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to direct the education of one's child); *see also Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) (holding that the Due Process Clause protects "those fundamental rights and liberties which are,

objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty") (internal quotation marks and citations omitted).

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

Response: A "systemically racist country" means different things to different people and may also differ depending on the context. As a Magistrate Judge for over ten years, I have consistently strived to apply the law impartially and fairly and without regard to the race of those appearing before me and if confirmed as a District Court Judge I will continue to do so.

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

Response: Not to the best of my memory.

a. How did you handle the situation?

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

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

Response: There is no particular Federalist Paper that has shaped my view of the law.

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

Response: I am aware that people have different views on whether an unborn child is a human being and it is an issue that may be relevant to a case that comes before me; thus, it would be inappropriate to express my personal belief. If the question is presented to me as a Magistrate Judge or District Court Judge, I will faithfully apply United States Supreme Court precedent regardless of my personal belief as I took an oath to do so.

38. 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: My general understanding of *Heller* is that the United States Supreme Court held that the Second Amendment protects an individual's right to be armed, and does not apply just to militias.

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.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

44. 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: Nominees take an oath to speak truthfully and honestly consistent with the Code of Conduct for United States Judges. The Code requires a judge to refrain from activity which would cause a litigant to question the judge's impartiality. To honor that obligation, which is critical to the public's respect for the federal judiciary and thus the operation of our democracy, a nominee must refrain from answering questions that relate to matters that could come before the nominee in a way that would suggest that the nominee has made up her mind on an issue or could not be impartial.

Senator Mike Lee
Questions for the Record
Jacqueline Corley, Nominee to the District Court for the Northern District of California

1. How would you describe your judicial philosophy?

Response: In my ten-plus years serving as a Magistrate Judge, I have developed a judicial philosophy that emanates from Federal Rules of Civil Procedure 1: to preside in a manner that secures the just, speedy, and inexpensive determination of every action and proceeding.

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

Response: When deciding a case that turns on the interpretation of a federal statute, I start with the text of the statute and its plain meaning, along with any binding Ninth Circuit or Supreme Court precedent interpreting that statute. If the statute's interpretation cannot be determined from its plain language using the canons of statutory interpretation or binding precedent, I turn to legislative history as well as review non-binding caselaw.

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

Response: When deciding a case that turns on the interpretation of a constitutional provision, I would start with any United States Supreme Court authority considering the provision, along with any Ninth Circuit precedent. Even if there is no United States Supreme Court authority directly on point, the Supreme Court is likely to have adopted a framework or process that would apply to addressing the constitutional question, and I would follow that precedent along with any applicable Ninth Circuit precedent.

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

Response: Please see my response to Question 3, above.

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: Any interpretation of a statute begins with an analysis of its text. If the statute is unambiguous, then its plain meaning controls the interpretation absent binding precedent requiring a different interpretation. Only if the statute is ambiguous, and there is no binding precedent interpreting the statute, do I use other interpretative tools, including legislative history.

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 general understanding is that the United States Supreme Court has held that it normally interprets a statute consistent with its public meaning at the time the statute was enacted. *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: The Article III requirements for standing are: (i) an injury in fact that is concrete, particularized, and actual or imminent; (ii) the injury was likely caused by the defendant; and (iii) the injury would likely be redressed by judicial relief. *See, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: My general understanding is that the United States Supreme Court ruled in *McCulloch v. Maryland*, 17 U.S. 316 (1819), that Article I, sec. 8, paragraph 18 of the Constitution (Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers"), gives Congress the power to pursue legitimate and appropriate means necessary to further objectives covered by enumerated powers.

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

Response: In general, if presented with this question, I would first determine whether any binding precedent addresses Congress's authority to enact the same or a similar law. If so, I would follow that precedent. If not, I would next consider any sources of constitutional authority proffered by the government in support of the law's constitutionality, and the United States Supreme Court or Ninth Circuit caselaw regarding each proffered source of authority. I would also consider whether concluding that Congress has the authority to pass the challenged law is inconsistent with any Constitutional restrictions on Congress's power.

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

Response: In several cases the United States Supreme Court has recognized constitutional rights not expressly enumerated in the United States Constitution. *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (the right of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (the right to interstate travel); *Planned Parenthood v. Casey,* 505 U.S. 833 (1992) (the right to abortion); *Eisenstadt v.*

Baird, 405 U.S. 438 (1972) (the right to use contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to marital privacy); *Kent v. Dulles*, 357 U.S. 116 (1958) (the right to travel); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to have children); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (the right to direct the upbringing of one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to direct the education of one's child); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that the Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted)).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9, above.

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

Response: As a Magistrate Judge, and if confirmed as a District Court Judge, my responsibility is to faithfully apply United States Supreme Court and Ninth Circuit precedent without regard to my personal beliefs, if any, on an issue.

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

Response: In general, I understand that the Commerce Clause, Art. I, § 8, cl. 3, grants Congress "the power 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) (citation omitted). "[T]he Federal Government can exercise only the powers granted to it." *Id.* at 534-35 (internal quotation marks and citation omitted).

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

Response: In general, I understand that the United States Supreme Court has held that a particular group is a "suspect class" such that strict scrutiny applies if the group has the "traditional indicia of suspectedness" such as an "immutable characteristic determined solely by the accident of birth," or the group is "subjected to . . . a history of purposeful unequal treatment," or "relegated to a position of political powerlessness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (citations omitted).

14. 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 described the system of checks and balances and separation of powers as "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)); *see also Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020) (observing that the Framers of the Constitution recognized that separation of powers is "critical to preserving liberty") (citation omitted).

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

Response: As a Magistrate Judge I have not had occasion to address the legality of a situation in which it appears that one branch of government assumed an authority the Constitution's text did not grant it. Before I rule on a legal issue, I review the parties' written submissions and conduct my own research into controlling precedent. In general, I understand that any analysis would begin with the Constitution's text and any relevant United States Supreme Court and Ninth Circuit authority. *See Zivotofsky ex. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (holding that to determine whether the President possessed a particular power, the Court must examine "the Constitution's text and structure, as well as history and precedent bearing on the question").

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

Response: Empathy should play no role in a judge's determination of the governing law and the facts and then applying those facts to the law. However, empathy, defined as understanding another's feelings, should play a role in how a judge treats litigants that appear before her, both in the judge's written and oral language and temperament.

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

Response: I do not have an opinion as to which is worse; neither is a good outcome. Trial judges must faithfully apply United States Supreme Court and Circuit precedent in an effort to reach the correct decision.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I am not aware of the data regarding the number of federal statutes ruled unconstitutional by the United States Supreme Court, or how that number has changed over time. As a Magistrate Judge, and as a District Court Judge if

confirmed, my role and constitutional obligation is to faithfully apply United States Supreme Court and Ninth Circuit precedent.

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

Response: Black's Law Dictionary defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). It defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: As a sitting Magistrate Judge and District Court nominee, it is not my role to opine on how elected officials should act. I note, however, that elected officials may enact greater protections for individuals than the Constitution requires, provided such enactments are consistent with the power the Constitution grants to those elected officials.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: As the judicial branch does not have any police power, the willingness of the public to comply with judicial rulings—and thus facilitate the rule of law—is dependent upon public respect for the judicial branch. The judicial branch can command that necessary respect only by fairly and impartially applying the governing law, issuing clearly reasoned decisions, and showing respect to lawyers, litigants, jurors and observers in their writings and temperament.

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

the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: As a Magistrate Judge, and if confirmed, as a District Court Judge, my obligation is to apply relevant binding precedent regardless of whether I agree with its reasoning. I may determine that the precedent may not apply, but only because the facts and circumstances are distinguishable, and not because I disagree with the precedent's reasoning.

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

Response: A criminal defendant's group identity should not play any role in a judge's sentencing analysis; instead, every litigant must be treated fairly and equally.

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

Response: I am not familiar with any Biden Administration definition of equity. However, as a Magistrate Judge, and if confirmed as a District Court Judge, I will strive to treat all who appear before me fairly, justly and impartially.

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

Response: I am aware that people have various understandings of what "equity" and "equality" mean, and that the meaning may depend on the particular context in which the term is used. If the issue as to the meaning of either term came before me as a Magistrate Judge or, if confirmed, as a District Court Judge, I would apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 24, above.

27. How do you define "systemic racism?"

Response: I am aware that people have various understandings of what "systematic racism" means and that the meaning may depend on the particular context in which the term is used. I do not have a personal definition of the term. If the issue as to the meaning of "systematic racism" came before me as a Magistrate Judge or, if confirmed, as a District Court Judge, I would apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: I am aware that people have various understandings of what "critical race theory" means and that the meaning may depend on the particular context in which the term is used. I do not have a personal definition of the term. If the issue as to the meaning of "critical race theory" came before me as a Magistrate Judge or, if confirmed, as a District Court Judge, I would apply relevant United States Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Questions 27 and 28, above.

Questions from Senator Thom Tillis
for Jacqueline Scott Corley
Nominee to be United States District Judge for the Northern District of California

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

   Response: Yes, I believe that a judge's personal views are irrelevant to interpreting and applying the law.

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

   Response: "Judicial activism" means different things to different people. In my ten-plus years as a Magistrate Judge I have consistently applied Ninth Circuit and Supreme Court precedent to determine the law to apply to the facts in the cases before me so that I reach a decision driven by the governing law and facts without regard to my personal views, if any.

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

   Response: When I became a Magistrate Judge I took an oath to decide cases fairly and impartially. I have done so and will continue to do so if confirmed as a District Court Judge.

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

   Response: The obligation of a judge is to decide issues and cases based on the governing law and the facts in the record regardless of the judge's personal beliefs, if any, about the issue. Thus, a judge should not second-guess decisions by Congress or state legislative bodies.

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

   Response: A trial judge's obligation is to apply governing precedent to the facts in the record regardless of what the outcome may be. A judge's personal views are irrelevant to interpreting and applying the law.

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

   Response: Please see my response to Question 5, above.

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

Response: I do not recall specifically addressing a Second Amendment issue in my ten years as a Magistrate Judge. When a legal issue is raised before me, I consider the parties' written submissions, as well as my own research into Ninth Circuit and Supreme Court precedent, which I am bound to and do apply. Any Second Amendment analysis would involve faithfully applying the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and Ninth Circuit precedent applying *Heller. See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), petition for cert. filed (May 11, 2021), along with any subsequent precedent.

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: In general, a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits would involve applying the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and Ninth Circuit precedent applying *Heller*. *See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), petition for cert. filed (May 11, 2021), along with any subsequent Supreme Court or Ninth Circuit precedent.

As a siting Magistrate Judge it is not appropriate for me to opine on what the outcome of a hypothetical issue may be. If a similar issue came before me, I would faithfully apply governing Supreme Court and Ninth Circuit precedent to decide the issue.

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: When considering the application of qualified immunity, I review the parties' written submissions, oral argument, if any, and conduct my own research into the governing precedent to determine the law that I apply to the facts in the record. My understanding is that under current binding precedent, a law enforcement officer is entitled to qualified immunity if the officer's conduct does not violate clearly established statutory or constitutional rights of which every reasonable officer would have known. *See, e.g., Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021).

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

Response: As a sitting Magistrate Judge, and District Court nominee, it is inappropriate for me to answer this question. My obligation is to apply United States Supreme Court precedent, described in my response to Question Number 9.

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

Response: Please see my response to Question 10, above.

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: As a current Magistrate Judge, and District Court nominee, it is not appropriate for me to comment on Supreme Court jurisprudence. In my ten-plus years as a Magistrate Judge, I have faithfully applied Supreme Court and Federal Circuit precedent to patent issues before me, and will continue to do so if confirmed to a position on the District Court.

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 current Magistrate Judge and District Court nominee, it is not appropriate for me to comment on the outcome of a hypothetical case, especially as the Northern District of California has a heavy load of patent cases and patent issues frequently come before me as a Magistrate Judge and will continue to do so if I am confirmed as a District Court Judge. I have also learned, in my more than 10 years of judging, that the outcomes of legal issues are often heavily dependent on the specific facts in the record. As a sitting Magistrate Judge I have faithfully applied Supreme Court and Federal Circuit precedent to patent issues before me, and will continue to do so if confirmed to a position on the District Court.

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 response to Question 13a, above.

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 response to Question 13a, above.

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 response to Question 13a, above.

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 response to Question 13a, above.

f. A business methods company, *FinancialServices 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 response to Question 13a, above.

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 *BioTech Co* 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 response to Question 13a, above.

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 response to Question 13a, above.

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 response to Question 13a, above.

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 response to Question 13a, above.

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 response to Question 12, above.

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: As a practicing attorney I litigated a copyright case. As a career law clerk, I assisted a district court judge with resolving many copyright issues. As a

Magistrate Judge I have managed discovery in copyright cases on referral from a District Court Judge, and have served as a settlement judge in many copyright cases. Finally, also as a Magistrate Judge, I have presided as the trial judge over several copyright cases with the parties' consent.

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

Response: As a Magistrate Judge, I have had issues involving the Digital Millennium Copyright Act come before me both on referral from a District Court Judge and in cases over which I presided as the trial judge with the parties' consent.

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

Response: As a practicing attorney I did not address the issue of intermediary liability for online service providers that host unlawful content posted by users. I also do not recall addressing the issue of intermediary liability for online service providers that host unlawful content as Magistrate Judge, although it is possible that the issue has arisen during my ten years on the bench.

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: During my ten years as a Magistrate Judge, I have presided over several cases that raise First Amendment issues, either as the discovery judge, settlement judge, or trial judge with the parties' consent. I believe that I have addressed the issue of free speech and intellectual property issues, and in particular, with respect to anonymous speech, although I cannot recall any specific cases.

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: When a court is interpreting a statute, it must first review the text and any relevant binding precedent. If the text is unambiguous, or there is binding precedent interpreting the statute, the court must apply the statute's plain meaning or the binding precedent. Only if the statute's meaning is ambiguous, and there is no applicable binding precedent, should the court review the 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: United States Supreme Court and the Ninth Circuit precedent governs the deference a court should give, if any, to a federal agency's analysis. If confirmed as a District Court Judge, I will faithfully follow that precedent when and if confronted with the issue of the deference to be afforded to a federal agency, including the United States Copyright Office.

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 current Magistrate Judge, and District Court nominee, it is not appropriate for me to comment on the outcome of a hypothetical case. I have also learned, in my more than 10 years of judging, that the outcomes of legal issues are often heavily dependent on the specific facts in the record. As a sitting Magistrate Judge I have faithfully applied Supreme Court and Ninth Circuit precedent to copyright issues before me, and will continue to do so if confirmed to a position on the District Court.

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: A judge's role is to apply the governing law to the facts in the record. Where new technologies have developed since the adoption of a particular statute, the judge must apply the plain language of the statute to that new technology using the canons of statutory interpretation and binding precedent. It is not the judge's role

to modify the statute to accommodate the new technology; that is the role of Congress.

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: Please see my response to Question 13a, above.

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: As a sitting Magistrate Judge, and District Court nominee, it is not appropriate for me to opine on whether something is a problem in litigation. As a Magistrate Judge I have always faithfully applied Ninth Circuit, United States Supreme Court and Federal Circuit precedent in deciding venue issues, and if confirmed as a District Court Judge I will continue to do.

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

Response: District Court Judges have a responsibility to faithfully apply United States Supreme Court and appropriate Circuit precedent to decide any venue issues that arise.

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 aware that this issue has recently been raised with respect to a particular District. As a sitting Magistrate Judge, and a nominee for the District Court, I do not believe it is appropriate to comment on the conduct of other judges.

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

Response: I commit to not engage in "forum selling."

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: Please see response to Question 18c.

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

Response: Please see response to Question 18c.

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?

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: Please see response to Question 18c.

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: The Northern District of California, where I sit as a Magistrate Judge, and have been nominated to serve as a District Court Judge, currently has such a rule.

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: Please see response to Question 18c.

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

Response: Please see response to Question 18c.