Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Jinsook Ohta
Nominee to be United States District Judge, Southern District of California

1. **Do you believe in a "living constitution"?**

   Response: No. I do not believe in a "living" Constitution," i.e., the doctrine that the Constitution should be interpreted in accordance with changing circumstances and changes in social values. I believe the Constitution has unchanging core precepts that are broad enough to be applied to new factual contexts while being true to the original principles.

2. **When you were appointed to the California Supreme Court, you noted that Governor Newsom's judicial selection process was a "values-driven" process.**
   a. **Do you believe that the Biden Administration's judicial selection process is values-driven?**

      Response: For clarification, I was not appointed to the California Supreme Court. When I mentioned a "values-driven" selection process during my swearing-in ceremony as San Diego Superior Court judge, I was referring to the personal values of humility, hard work, kindness, and dedication to public service. I stated "Going through this process, I came to understand what a values-driven selection process this was and how deeply they looked at the person and not just the resume. It is my deepest resolve to live up to what they saw in me." I made that comment because most of my interview with the Judicial Appointments Advisor for the Governor focused on the above personal values or character traits. I do not know what factors influenced President Biden's judicial selection process.

   b. **How do your values influence your approach as a judge?**

      Response: I am determined to live up to my personal values of humility in decision-making, hard work in preparing for each of my cases, kindness and respect for litigants, and dedication to public service every day that I sit on the bench. While these personal values will help me live up to my oath to provide equal justice in the courtroom, any personal, political, or religious views or preferences have no role in my courtroom or and no influence on my judicial decision-making.

3. **After the *Little Sisters of the Poor* decision, the Lawyers Club of San Diego issued a press release condemning the Supreme Court's decision to allow religious and moral exemptions to the ACA's contraceptive mandate.**

a. **Please specifically explain why the *Little Sisters of the Poor* decision was a "devastating blow to women's reproductive justice."**

Response: The press release issued by the Board of Directors of Lawyers Club of San Diego expressed concern about decreased access to contraceptive care for women through their employer health insurance. Upon becoming a state court judge, I stepped away from the Board of this organization just as I set aside all of my prior work as an advocate. If confirmed as a federal district court judge, I would faithfully apply precedent and decide cases before me without regard to any personal, political, or religious views, as I already have done as a state court judge.

b. **Please specifically explain why the *Little Sister of the Poor* decision "perpetuates inequality."**

Response: The press release issued by the Board of Directors of Lawyers Club of San Diego expressed concern about decreased access to contraceptive care for women through their employer health insurance. Upon becoming a state court judge, I stepped away from the Board of this organization just as I set aside all of my prior work as an advocate. If confirmed as a federal district court judge, I would faithfully apply precedent and decide cases before me without regard to any personal, political, or religious views, as I already have done as a state court judge.

c. **Do you believe in granting religious exemptions in other contexts, such as vaccine mandates?**

Response: As a sitting judge and nominee, it would not be appropriate to comment on any personal beliefs regarding religious exemptions from vaccine mandates as this is an issue that is currently before the courts. The free exercise of religion is an important foundational right that is enshrined in our Bill of Rights and, if faced with this issue, I would faithfully apply all Supreme Court and Ninth Circuit precedent to the issue.

4. **Please discuss your criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, and how many times you have argued before the court in a criminal matter.**

Response: My seventeen-year legal career focused primarily on complex civil litigation so I have only tried one criminal misdemeanor case before a jury and I have handled no felony cases. I have, however, clerked for two years in the district to which I have been

nominated, and am familiar with issues involved in the border crimes that make up most of the criminal docket in the Southern District of California.

5. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
    a. **How often have you cited to either of these tomes during the course of your work?**

       Response: In the hopes of being confirmed, I have studied the Federal Rules of Criminal Procedure and reviewed the Sentencing Guidelines calculation process but I have not cited to or worked within these constructs during the course of my career.

    b. **How often have you had an opportunity to work within these constructs during the course of your career?**

       Response: See response to 5(a) above.

6. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

   Response: As a sitting judge and nominee, it is not appropriate for me to discuss my personal views on the goals of sentencing. In confirmed, I will use the Sentencing Guidelines and apply the factors listed in 18 U.S.C. §3553(a) as required by Ninth Circuit and Supreme Court precedent without regard to any personal views or beliefs.

7. **Is second-degree murder a crime of violence under 18 U.S.C. § 924(c)(1)(A)?**

   Response: The Ninth Circuit ordered an *en banc* hearing on whether a second-degree murder constitutes a crime of violence under the elements test at18 U.S.C. § 924(c)(3)(A), vacating its prior decision in *United States v. Begay*, 934 F.3d 1033, 1038 (9th Cir. 2019). The Supreme Court held that the "residual clause" test at 18 U.S.C. § 924 (c)(3)(B)) for a crime of violence was unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). If confirmed, I would follow all binding precedent at the time of my decision on this issue.

8. **Do you believe that "[t]here is no such thing as a non-racist or race-neutral policy"?**

Response: I am not aware of the source of that quote or the larger context from which that quote was drawn. Taking those words at face value, I do not agree that there is no such thing as a non-racist or race-neutral policy.

9. **Do you believe that "[a]nti-racism requires acknowledging that racist beliefs and structures are pervasive in education"?**

   Response: I am not aware of the source of the quote or the larger context from which the quote was drawn. I do not have an opinion on what anti-racism requires with regard to education. Systemic racism and education are issues for policymakers and legislators; as a judicial officer, I take cases as they are brought before me by parties and decide them narrowly based on the precedent and the facts in the record.

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

    Response: No. A judge is bound by her oath to decided cases that come before her on the facts and the applicable law only, without taking into consideration broader questions of social equity or personal, political, or religious beliefs.

11. **How, if at all, does the Second Amendment personal right to "keep" arms differ from the right to "bear" arms?**

    Response: The Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008). The decision discussed the original meaning of these words but did not distinguish between the two in terms of Second Amendment protection.

12. **Is censoring speech on social media a form of consumer protection?**

    Response: As a sitting judge and nominee, it is inappropriate for me to comment on issues that might come before me. Any government restriction on speech would have to be examined with the appropriate level of scrutiny. If faced with that issue, I would faithfully apply all Supreme Court and Ninth Circuit precedent.

13. **Several weeks ago, Attorney General Merrick Garland announced imminent action against parents protesting various policies being implemented at public schools across the country. Which of the following groups of people have the right to protest government intrusion or overreach and why?**
    a. **Concerned parents about the curricula in public schools?**
    b. **Black Lives Matter protestors?**
    c. **Climate change protestors?**
    d. **Religious groups protesting abortion?**

Response: All of the above have the First Amendment right to engage in political or ideological speech and any government regulation that burdens such speech generally would be subject to strict scrutiny. Certain speech, such as true threats, fall outside First Amendment protections. If faced with these issues as a judge, I would faithfully apply all Supreme Court and Ninth Circuit precedent in analyzing these rights.

14. **Is the federal judiciary systemically racist?**

Response: Systemic racism is an important question for policymakers. As a sitting judge, my role does not involve looking at systems or larger questions of social policy. I decide each case based on the applicable precedent and the facts in the record only, setting aside any personal or political views.

15. **What is implicit bias?**

Response: Social scientists have posited that implicit or unconscious bias can affect decision-making.

16. **Do you have any implicit biases? If so, what are they?**

Response: I am not aware of any specific implicit biases that I have but I do not assume that I am immune from implicit bias. The concept of implicit bias serves as motivation for me to pause and make sure that my judicial decision-making is not impacted by personal biases of any nature.

17. **What is the legal standard for a "true threat" in the Ninth Circuit?**

Response: The Supreme Court has held that "true threats" are speech with such low value that they fall outside the protections of the First Amendment. The Ninth Circuit has held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (2005).

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

Response: The best allocation of public safety resources is an important question for policymakers. As a sitting judge and nominee, I do not get involved in policymaking, and it is inappropriate for me to weigh in on any matters that may come before me.

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

Response: The best allocation of public safety resources is an important question for policymakers. As a sitting judge and nominee, I do not get involved in policymaking, and it is inappropriate for me to weigh in on any matters that may come before me.

20. **How do you understand the difference, if any, between freedom of religion and freedom of worship?**

    Response: I understand "freedom of religion" to be the broader term that encompasses not only freedom to worship however one likes but also includes the rights of believers to act upon their religion in various ways, such as running schools and charitable institutions.

21. **Do you believe that the federal government should decriminalize possession of all drugs?**

    Response: I believe the criminal laws around drug possession are an important issue for policymakers and legislators. As a sitting judge, I do not get involved in policymaking, and it is inappropriate for me to weigh in on any matters that may come before me.

22. **Please explain the current standard for issuing a nationwide injunction in the Ninth Circuit and discuss the Ninth Circuit's explanation for how a nationwide injunction is consistent with a court's role under Article III of the United States Constitution.**

    Response: Federal Rule of Civil Procedure 65 provides for injunctions as an equitable remedy. The Ninth Circuit has held such broad relief must only be granted when necessary to give the plaintiff complete relief. *City & County of San Franscisco v. Barr*, 965 F.3d 753 (9th Cir. 2020). In overturning a nationwide injunction issued by the lower court, the Ninth Circuit clarified that the appropriate inquiry would be whether Plaintiffs will continue to suffer their alleged injuries even if the injunction were limited just to California. *Id.*

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

    Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) held that the right to bear arms is an individual right and that it applies to the states. The Ninth Circuit analyzes challenges to restrictions on Second Amendment rights using the following two-step test: First, the court asks "if the challenged law affects conduct that is protected by the Second Amendment," basing "that determination on the historical understanding of the scope of the right." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021). Second, if the court finds that the challenged restriction burdens Second Amendment conduct, it must then determine the appropriate level of scrutiny. *Young*, 992 at 784. If a regulation amounts to a destruction of the Second Amendment right, then it is unconstitutional. *Id.* A law that

implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny. *Id.* In cases where the Second Amendment rights are less affected, the court applies intermediate scrutiny. *Id.* If confirmed, I would faithfully follow all Supreme Court and Ninth Circuit precedent.

24. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**
    a. **Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**

    Response: The Religious Freedom Restoration Act provides that the government may not substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 20000bb-1. The RFRA sets forth the following balancing test. The religious adherent must establish that a government action substantially burdens the exercise of his religion. Once the religious adherent has established a substantial burden, the burden then shifts to the government to show that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

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

    Response: The Supreme Court has admonished that courts must not presume to determine the plausibility or validity of a religious belief. The court's narrow function is to determine whether the religious beliefs reflect an honest conviction or sincerely held belief. The Court's analysis of a substantial burden looks at the type of religious exercise the law burdens and the impact the law has on that exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

25. **Does illegal immigration impose costs on border communities?**

Response: That is a question for policymakers and an issue of public debate. As a sitting judge and nominee, it would be inappropriate for me to comment on this matter as criminal illegal entry cases are likely to come frequently before me if I am confirmed.

26. **Do Blaine Amendments violate the Constitution?**

Response: *Espinoza v. Montana Department of Revenue*, 140 S. Ct 2246 (2020) concerned a "no aid" provision in the Montana Constitution that barred religious schools from receiving public benefits. In that case, the state provided scholarship funds for

students who attended private schools but declined to provide scholarship funds for students to attend religious private schools. The Supreme Court held this rule violated the Free Exercise Clause because it barred religious schools from generally available public benefits solely because of the religious character of the schools. The Supreme Court held that this burden on the free exercise of religion would be subject to strict scrutiny.

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

    Response: Yes.

28. **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.

29. **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.

30. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

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

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

32. **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.

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

Response: On January 30, 2021 and February 15, 2021, I submitted my application for the United States District Court, Southern District of California to Senator Feinstein and Senator Padilla, respectively. On March 12, 2021, I was interviewed by Senator's Feinstein's selection committee. On April 13, 2021, I was interviewed by Senator

Padilla's selection committee. On, April 29, 2021, I was interviewed by the statewide chair of Senator Feinstein's selection committee. On April 30, 2021, I was interviewed by the statewide chair of Senator Padilla's selection committee. On July 21, 2021, I interviewed with White House staff members. On July 26, 2021, I was advised that the Justice Department would begin vetting me. Since that time, I have had several communications with Justice Department and White House staff members. On September 29, 2021, I received a phone call from a White House staff member advising me I would be nominated. On September 30, 2021, the President nominated me.

34. **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.

35. **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: My former colleague and friend is a member of the American Constitution Society. We have had many work-related and personal conversations, but none in which she was speaking to me on behalf of the organization or in her official capacity as a member of the organization.

36. **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.

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

    Response: No.

38. **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.

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

Response: See response to No. 33.

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

Response: I received these questions on November 10, 2021. I prepared answers based legal research and previous knowledge. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 15, 2021.

Senator Marsha Blackburn
Questions for the Record to Jinsook Ohta
Nominee for the Southern District of California

1. **Does the right to an abortion appear in the text of the constitution?**

   Response: The text of the Constitution does not explicitly mention the right to an abortion.

2. **Does the First Amendment specifically protect religious liberty?**

   Response: Yes. The First Amendment includes the Free Exercise Clause which protects religious liberty.

3. **You have been involved in leadership roles with the Lawyers Club of San Diego, which frequently advocates for pro-abortion policies and other liberal positions, such as racially discriminative affirmative action policies. In a 2020 press release, the Lawyers Club criticized the U.S. Supreme Court decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, claiming the decision to allow religious and moral exemptions to the contraception mandate in the Affordable Care Act "perpetuates inequality."[1] Does the right to an abortion supersede the right to religious liberty, a bedrock right guaranteed by the text and history of the First Amendment?**

   Response: I agree that religious liberty is a foundational principle and one that is enshrined in the text of the First Amendment. The right to an abortion is a substantive due process right under Supreme Court precedent. The right to an abortion does not supersede the right to religious liberty; both are rights under Supreme Court precedent and each is analyzed on its own terms.

   The Lawyers Club of San Diego is a local bar association. Upon becoming a state court judge, I stepped away from the Board of this organization just as I set aside all of my prior work as an advocate. If confirmed as a federal district court judge, I would faithfully apply precedent and decide cases before me without regard to any personal, political, or religious views, as I already do as a state court judge.

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[1] SJQ 12(c) at 400.

Nomination of Jinsook Ohta
to be United States District Judge for the Southern District of California Questions for the Record
Submitted November 10, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: As a sitting judge and nominee for the federal district court, it would be generally inappropriate for me to comment on binding precedent which relates to issues that may come before me.

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

   Response: *District of Columbia v. Heller*, 554 U.S. 570 (2008) held that the right to bear arms is an individual right belonging to individual persons.

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

   Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that governmental regulations are not neutral and generally applicable when they treat any comparable secular activity more favorably than religious exercise. Any regulation that does so would, therefore, trigger strict scrutiny.

6. **Please describe what you believe to be the Supreme Court's holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).**

Response: In order to have standing to sue in federal court, plaintiffs must demonstrate that they suffered a concrete harm. In a class action lawsuit against Transunion, the Supreme Court held that 6,332 of the 8,185 class members suffered no concrete harm because, while their internal credit files contained inaccuracies, no misleading information had been provided to third parties. Unlike the 1,853 class members who had suffered concrete reputational harm when TransUnion provided misleading credit reports about them to third parties, the 6,332 class members suffered no concrete injury and, therefore, lacked standing.

7. **Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).**

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court considered President Donald Trump's Proclamation restricting travel to the United States by citizens from eight countries and concluded that President Donald Trump had broad authority under the Immigration and Nationality Act to suspend the entry of non-citizens into the United States. The Supreme Court also found that his executive actions did not violate the Establishment Clause because they did not favor or disfavor any particular religion and instead were based on a sufficient national security justification.

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

Response: I would faithfully apply all Supreme Court and Ninth Circuit precedent on the enforceability of the arbitration agreements. As I may have cases that require me to evaluate the enforceability of arbitration clauses, it would be inappropriate for me to express any opinion about the benefits or disadvantages of arbitration.

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

Response: I received these questions on November 10, 2021. I prepared answers based legal research and previous knowledge. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 15, 2021.

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

Response: No.

Senator Josh Hawley
Questions for the Record

Judge Jinsook Ohta
Nominee, U.S. District Court for the Southern District of California

1. **In 2020, while you were serving as a member of the Board of Directors of the Lawyers Club of San Diego, the Club released a statement blasting the Supreme Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*. The statement said that the decision to allow religious and moral exemptions to the contraception mandate in the Affordable Care Act was a "devastating blow to women's reproductive justice" and that the decision "perpetuates inequality."**

   When I asked you about this statement at your hearing, you said that you had "stepped away from all advocacy" since becoming a judge, and that at present you "decide all the cases that come before [you] on the facts and the law only, without regard to previous advocacy positions."

   a. **Why did the Lawyers Club decide to issue this statement?**

      Response: The Lawyers Club is a local San Diego bar organization that focuses on women's issues. The 15-member Board of Directors issued this statement because the Supreme Court had issued a decision that impacted women. The statement expressed concern about the decreased access to contraceptive care for women from health insurance provided by certain employers. Upon becoming a state court judge, I stepped away from this Board just as I set aside all of my prior work as an advocate. I decide cases before me on the applicable law and the facts in the record, without regard to personal beliefs or views.

   b. **In that statement, what did you and the other members of the Lawyers Club mean by the term "reproductive justice"?**

      Response: It is my understanding that the 15-member Board of Directors of Lawyers Club of San Diego intended reproductive justice to mean the ability of women to control whether and when to have children. Upon becoming a state court judge, I stepped away from the Board just as I set aside all of my prior work as an advocate. I decide cases before me on the applicable law and the facts in the record, without regard to personal beliefs or views.

c. Do you believe that "reproductive justice" is a value consideration relevant to the task of judging?

Response: No. Reproductive justice is an issue for policymakers. Upon becoming a state court judge, I stepped away from the Board just as I set aside all of my prior work as an advocate. I decide cases before me on the applicable law and the facts in the record, without regard to personal beliefs or views. As a judicial officer, I don't involve myself in broader questions of social policy and I don't bring those concerns or considerations into my courtroom.

d. If so, how?

e. Is "reproductive justice" a value codified in the U.S. Constitution?

Response: No.

f. Conversely, does the Constitution recognize a right to free exercise of religion?

Response: Yes.

g. Do you believe that statements made by a judicial nominee prior to their nomination are irrelevant to an assessment of that nominee's qualifications?

Response: I believe that varies depending on the statement itself, the context of the statement, the nexus between the statement and judicial responsibilities, and the criteria used by the assessor to evaluate qualifications.

h. When I asked you about your Lawyers Club's statement, you stated that you "regret[ted] the extent to which the wording of that statement may give the impression that I would not take religious liberty very seriously in my courtroom." How would you reword or rephrase the Lawyers Club's statement today, if you were deciding whether or not to issue it as a member of the board?

Response: As I stated at my hearing, as one of 15-member of the Lawyers Club of San Diego, I approved the release of that statement before I became a state court judge. I would regret if any litigant thought that any prior advocacy I had engaged in before I became a judge would impact my ability to fairly decide their case. Upon becoming a state court judge, I stepped away from the Board just as I set aside all of my prior work as an advocate. I decide cases before me on the

applicable law and the facts in the record, without regard to personal beliefs or views.

i. Do you believe that the Supreme Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* was wrongly decided?

Response: As a sitting judge and nominee for the federal district court, it would generally be inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segegration) and *Marbury v. Madison* (judicial review). Because *Little Sisters of the Poor* deals with issues that are currently being litigated, I cannot comment on its merits.

j. When questioned further about this issue, you agreed that *Marbury v. Madison* and *Brown v. Board of Education* were correctly decided. Please state whether you believe each of the following cases were correctly decided:

i. *Wisconsin v. Yoder*

Response: As a sitting judge and nominee for the federal district court, it would generally be inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me, such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review).

ii. *Employment Division, Department of Human Resources of Oregon v. Smith*

Response: See response to No. 1(j)(i) above.

iii. *Burwell v. Hobby Lobby Stores, Inc.*

Response: See response to No. 1(j)(i) above.

iv. *Trinity Lutheran Church of Columbia, Inc. v. Comer*

Response: See response to No. 1(j)(i) above.

v. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

Response: See response to No. 1(j)(i) above.

k. On the basis of what criteria do you believe it is appropriate for a judicial nominee to express their approval of some past Supreme Court decision, but not others?

Response: As a sitting judge and nominee, I do not comment on Supreme Court cases involving issues that may come before me because I do not wish to create the impression that I have prejudged matters. That concern does not exist with regard to Supreme Court decisions involving issues like judicial review or *de jure* racial segregation that are highly unlikely to be litigated before me.

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

l. Do you agree with that philosophy?

Response: I am not familiar with that quote or its context so I do not know what Justice Marshall meant by those words. I do not believe judges should be driven by personal, political, and/or religious beliefs in his or her decision-making in the court room. Judges are duty-bound to decide cases based on the applicable law and facts in the record only, leaving aside both broader questions of social policy and any personal beliefs of right or wrong.

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

Response: See above response.

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

Response: Abstention is a principle of judicial comity between the state and federal court systems. Various abstention doctrines govern when federal courts abstains from resolving an issue in situations where both court systems would otherwise have jurisdiction.

Rooker-Feldman: Abstention from direct review of state court decisions unless specifically authorized by Congress, such as in *habeas corpus* cases.

Younger: Abstention from hearing constitutional or other federal challenges to ongoing state court actions to enforce state laws, such as ongoing criminal proceedings.

Pullman: Abstention from hearing cases that present both a federal constitutional issue and state issues, until the state law question can be resolved by the state courts. This gives

the state courts an opportunity to resolve the issue on state grounds and avoids unnecessary resolution of federal constitutional questions.

Burford: Abstention from reviewing certain decisions of state administrative agencies or from otherwise assuming the functions of state courts in the development and implementation of a state's public policies.

Thibodaux: Abstention to allow a state court to decide difficult issues of importance in order to avoid unnecessary friction between federal and state authorities.

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

   Response: No.

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

      Response: None.

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

   Response: The Supreme Court has used the original public meaning to interpret the Constitution's text in cases such as *Heller* and *McDonald*. If confirmed, I will faithfully apply all Supreme Court precedent, whether that precedent is based on the original public meaning of a constitutional provision or not.

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

   Response: As a sitting judge, I start with the plain meaning of the text in the larger context of the document. If the meaning of the text is unambiguous, the inquiry ends there. If ambiguity remains after examining the plain meaning, I would turn to canons of statutory construction and examine analogous statutes and binding or persuasive case law interpreting those statutes. As a last step, I would examine 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 am aware of the cases that caution that certain legislative history, such as the comments of individual legislators, are less probative than others.

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

Response: I am not aware of any scenarios in which a court would have to consult the laws of foreign nations to interpret the U.S. Constitution.

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

   Response: A prisoner must demonstrate (1) the existence of a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and (2) that the State's refusal to adopt the alternative is not supported by a legitimate penological reason. *Glossip v. Gross*, 576 U.S. 863 (2015).

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

   Response: Yes.

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

   Response: Not to my knowledge.

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

    Response: None. It is a judge's job to set aside any personal, religious, or political beliefs and decide cases before them based on applicable precedent and the facts in the record. For the past year, I have been doing so already as a state court judge.

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

    Response: Under the First Amendment, neutral and generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507 (1997). Neutral and generally applicable laws on religion are permissible even if the law has an incidental effect of burdening a religious practice. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); see also *Emp., Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878

(1990). If a law fails to satisfy the requirements of neutrality and general applicability, defendants must show that the law is narrowly tailored to advance a compelling governmental interest. *Church of the Lukumi Babalu v Aye*, 508 U.S. at 531-32.

Facially neutral regulations do not always meet constitutional requirements for neutrality. If the object of the law is to infringe upon or restrict practices because of their religious motivation, that law is not neutral. *Id.* at 533. Regulations are also not deemed neutral and of general applicability whenever they treat comparable secular activities more favorably than religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). When the law authorizes the government the discretion to grant exceptions to its anti-discrimination rule but does not grant that exception to an organization who invokes religious beliefs as a basis for the exception, the court does not deem the state action neutral. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). If the governmental body deciding the applicability of a neutral law exhibits hostility toward a person's religious beliefs, courts should not deem that a neutral government action. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). If confirmed, I would faithfully apply all binding precedent of the Supreme Court and Ninth Circuit precedent.

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

Response: See response to No. 11.

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

Response: The United States Supreme Court has held that the courts do not evaluate the plausibility or validity of sincerely held belief to Free Exercise purposes. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989).

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: I believe Justice Holmes was making the point that the Constitution does not espouse any particular economic theory. I agree that judges in deciding cases need to set aside personal views and larger policy preferences and decide cases driven by the facts and the law only.

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

Response: *Lochner* is no longer binding Supreme Court precedent so I would not follow it.

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: I understand this statement to mean that a judge's role requires making decisions required by the law, not according to personal preferences. A judge that faithfully interprets and applies the law wherever it leads may often reach results contrary to personal preferences.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a judge's role requires making decisions required by the law, not shaping the outcome according to personal preferences.

b. Do you agree or disagree with this statement?

Response: I agree that a judge's role requires making decisions required by the law, not shaping the outcome according to personal preferences.

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

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

Response: I am not sure what Justice Holmes meant but I agree that a judge is bound by his or her oath to decided cases that come before the court on the facts and the applicable law only, without taking into consideration broader questions of social policy or personal, political, or religious beliefs. Our democracy and our constitutional system of checks and balances does not work if any branch exceeds their purview.

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

Response: See above response to No. 17(a).

18. 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: In that case, the Supreme Court called the executive order in *Korematsu v. United States*, 323 U.S. 214 (1944) "morally repugnant."

19. 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 sitting judge and nominee for the federal district court, it would be generally inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review). I would faithfully apply all Supreme Court precedent.

a. If so, what are they?

Response: See above.

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

Response: I commit to faithfully applying all binding Supreme Court precedents without exceptions.

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

a. Do you agree with Judge Learned Hand?

Response: I was not previously aware of Judge Hand's statement and have formed no opinion about it. When faced with monopoly questions, I will faithfully apply all Supreme Court and Ninth Circuit precedent.

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

Response: See 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: See above.

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

Response: Common law is law derived from judicial decisions instead of statutes. While most common law development happens in state law, there is a limited body of federal common law.

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

Response: Under our system of federalism, sovereign states may provide greater protections than the federal constitution. State courts may interpret their constitutional provisions independently of provisions in the federal constitution although the scope of identical federal constitutional rights may provide persuasive authority.

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

Response: See response to No. 22 above.

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

Response: See response to No. 22 above.

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

Response: As a sitting judge and nominee for the federal district court, it would be generally inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review). I believe these cases were correctly decided.

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

Response: Federal Rule of Civil Procedure 65 provides the basis for federal courts to issue equitable relief in the form of temporary and preliminary injunctions. The injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The Ninth Circuit has held such broad relief must only be granted when necessary to give the plaintiff complete relief. *City & County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020). In overturning a nationwide injunction issued by the lower

court, the Ninth Circuit clarified that the appropriate inquiry would be whether the plaintiffs will continue to suffer their alleged injuries if DOJ were enjoined only in California. *Id.* I understand that the Supreme Court has recently expressed concerns about the legal basis for nationwide injunctions. If confirmed, I would carefully and faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: See response to No. 24 above.

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

Response: See response to No. 24 above.

25. 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: See response to No. 24.

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

Response: Federalism is a system of government in which power is shared between the national government and regional governments that govern issues of local concern. The Constitution set up a government that avoids the concentration of power. Federalism, along with out tri-partite system of government and the power of the people to elect representatives and sit on juries, is a key component in accomplishing that goal. Federalism also has the advantage of making local governments accountable to the people on the issues that affect them most directly on a day-to-day basis.

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

Response: See response to No. 3 above.

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

Response: I would need more facts in order to answer the question. When such requests for remedies are before me, I will make sure to apply the applicable law to the facts.

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

Response: In addition to rights enumerated in the Constitution, the Supreme Court has held that the due process also protects those fundamental rights and liberties that are objectively, deeply rooted in this Nation's history and "implicit in the concept of ordered liberty, such that neither liberty nor would exist if they were sacrificed." *Washington v.Glucksberg*, 521 U.S. 702, 72 (1997). These rights include the right to direct the education of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); to marital privacy and to use contraception (*Griswold v. Connecticut*, 381 US. 479 (1965)); to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); and to choose an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

30. 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: The Free Exercise Clause of the First Amendment provides a critical protection for religious liberty, a principle that is fundamental to our democracy. I will faithfully apply all Supreme Court and Ninth Circuit precedent regarding this important, fundamental right.

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

I understand the term "freedom of religion" to be a broader term that encompasses the freedom to worship however one believes, but also includes the rights of believers to act upon their religion in various ways, such as running schools and charitable organizations.

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: The Religious Freedom Restoration Act provides that the federal government may not substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 20000bb-1. (The RFRA does not apply to state actions.)

The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) reaffirmed the long-established principle that a court must not presume to determine the plausibility or validity of a religious claims but rather limit itself to analyzing substantial burden based on the type of religious exercise the law burdens and what type of impact the law has on that exercise.

Under the First Amendment, neutral and "generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507 (1997). Neutral and generally applicable laws on religion are permissible even if the law has an incidental effect of burdening a religious practice. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); see also *Emp., Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). If a law fails to satisfy the requirements of neutrality and general applicability, defendants must show that the law is narrowly tailored to advance a compelling governmental interest. *Church of the Lukumi Babalu v Aye*, 508 U.S. at 531-32.

Facially neutral regulations do not always meet constitutional requirements for neutrality. If the object of the law is to infringe upon or restrict practices because of their religious motivation, then that law is not neutral. *Id.* at 533. Regulations are also not deemed neutral and of general applicability whenever they treat comparable secular activities more favorably than religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). When the law authorizes the government the discretion to grant exceptions to its anti-discrimination rule but does not grant that exception to an organization who invokes religious beliefs as a basis for the exception, the court does not deem it a neutral law of general applicability. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). If the governmental body deciding the applicability of a neutral law exhibits hostility toward a person's religious beliefs, the courts should not deem that a neutral government action. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

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: The United States Supreme Court has made it clear that people who hold sincere religious beliefs are entitled to invoke the Free Exercise Clause without a judicial evaluation of the plausibility or validity of their interpretations. *Frazee v. Illinios Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989).

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

Response: The RFRA provides that the federal government "shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," except when the government demonstrates that the application of that burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a), (b).

With respect to the Affordable Care Act, in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) and in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Supreme Court applied the RFRA and concluded that the ACA substantially burdened the employers' free exercise of religious beliefs by requiring them to provide their employees with certain methods of contraception.

With respect to federal discrimination statutes, the Supreme Court concluded in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) that the ministerial exception under the First Amendment applied to the teacher who was claiming retaliation and barred her suit under the Americans With Disabilities Act (ADA). In *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court similarly held that religious institutions are exempt from anti-discrimination laws, such as the Age Discrimination in Employment Act (ADEA) and the ADA, in the hiring and firing of employees who qualify as "ministers." The case concluded that the First Amendment right of churches to decide matters of faith and doctrine without governmental intrusion, included deciding the people who should hold certain important positions.

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

Response: No.

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

Response: No specific Federalist Papers have most shaped my views of the law.

32. 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 nominee to the federal district court, it is inappropriate for me to comment on issues of *habeas corpus* law as these cases may come before me.

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: See response to No. 32(a).

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

Response: See response to No. 32(a).

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

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: As a nominee, it is inappropriate for me to comment on Circuit practices and protocols for issuing unpublished decisions. If confirmed, I would study and follow all applicable court rules and protocols.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: See response to No. 32(a).

c. If confirmed, would you treat unpublished decisions as precedential?

Response: No. Unpublished decisions are not precedent. If confirmed, I would follow applicable legal authority on what constitutes precedent.

d. If not, how is this consistent with the rule of law?

Response: See response to No. 32(a).

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: I would not consider unpublished decisions as binding precedent. If confirmed, I would follow applicable legal authority on use of unpublished decisions as persuasive authority.

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: I would be guided by the applicable court rules and protocols.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: I would be guided by the applicable court rules and protocols.

34. In your legal career:

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

Response: As first chair, I have tried two complex civil trials, one lasting nine weeks and resulting in a successful $343.9 million award and the other lasting five weeks and resulting in a $280 million award.

b. How many have you tried as second chair?

Response: I have tried one criminal misdemeanor case as second chair.

c. How many depositions have you taken?

Response: Approximately 30-35.

d. How many depositions have you defended?

Response: Approximately 20-25.

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

Response: One.

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

Response: None.

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: Approximately 10-15.

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

Response: I would estimate that I have argued more than 30 discovery motions, expert motions, motions *in limine* and in-trial motions before trial courts.

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

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

Response: I don't recall the exact numbers but I always exceeded the minimum requirements.

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

Response: I don't recall but I did engage in *pro bono* work while at private law firms. At the California Attorney General's office, I was ethically barred from engaging in *pro bono* representation.

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

a. If yes, please provide appropriate citations.

Response: No.

37. 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: I have not deleted or attempted to delete any content from my social media since I was first contacted about being under consideration for this nomination. I deactivated my Facebook account after my nomination became public to better protect family privacy.

38. What were the last three books you read?

Response: Klara and the Sun, Dune, and Gilead.

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

Response: Our country has had historical instances of racism that have come before our courts—for example, the forced relocation of Japanese Americans to internment camps during World War II at issue in the *Korematsu* case—but I do not believe our country is fundamentally or inherently racist. Systemic racism is an important question for policymakers and legislators. In the courtroom, I do not concern myself with systems or social policy issues but rather decide disputes brought to me by parties based on the law and the facts in the record only.

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

Response: I am most proud of my representation of the People of the State of California in a law enforcement action against Johnson & Johnson and Ethicon, Inc.

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

Response: Yes.

a. How did you handle the situation?

Response: I zealously and ethically advocated for my client's position setting aside my personal views.

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

Response: Yes, without reservation.

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

Response: I do not read any law professors' work on any regular basis.

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

Response: I can't recall any specific opinions or articles. As a sitting judge, arguments from counsel have caused me to change my mind. As a practicing attorney, discussions with other team members have caused me to change my mind.

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

Response: As a sitting judge and nominee, any personal beliefs I have regarding any issues would not be relevant to the decision I reached. If faced with a case where the status of an unborn child was in question, I would faithfully follow all Supreme Court and Ninth Circuit precedent.

45. 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: I don't have a numerical quantification of the beyond a reasonable doubt standard. If confirmed, I will follow applicable Supreme Court and Ninth Circuit precedent on this issue.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court ruled that the Second Amendment protects "an individual right to keep and bear arms" recognizing "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635.

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

Response: No.

47. 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

48. 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.

49. 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.

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

Response: Not that I recall.

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

51. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

52. 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 must tell the truth, including about their judicial philosophy when testifying before the Senate Judiciary Committee.

Questions for the Record for Jinsook Ohta
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Ben Sasse
Questions for the Record for Jinsook Ohta
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 03, 2021

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

3. **How would you describe your judicial philosophy?**

   Response: I believe judges must work hard to study the facts and the law in order to be scrupulously prepared for each matter that comes before them; engage with the arguments before them with an open mind; fairly and impartially apply the law to the facts of the case before them, setting aside all personal views or preferences; ensure that every litigant feels treated fairly and respectfully; and provide clear rulings in a timely fashion.

4. **Would you describe yourself as an originalist?**

   Response: I believe judges must work hard to study the facts and the law in order to be scrupulously prepared for each matter that comes before them; engage with the arguments before them with an open mind; fairly and impartially apply the law to the facts of the case before them, setting aside all personal views or preferences; ensure that every litigant feels treated fairly and respectfully; and provide clear rulings in a timely fashion. I do not identify with a specific philosophy or predetermined approach in terms of constitutional interpretation. I believe the United States Supreme Court has considered most constitutional provisions and set forth the applicable test or analytical framework for evaluating claims under those provisions. If confirmed, I would be bound by Supreme Court precedent and the analytical approach established in those cases.

5. **Would you describe yourself as a textualist?**

   Response: When faced with construing texts, I start with the plain meaning of the text within the larger context of the document, and if that language is unambiguous, the analysis ends there.

6. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: I do not believe in a "living" Constitution. I believe the Constitution has unchanging core precepts that are broad enough to be applied to new factual contexts while being true to the original principles.

7. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: I have not studied the jurisprudence of individual Justices enough to have identified one that I admire the most. If confirmed, I would faithfully follow all Supreme Court precedent.

8. **Was Marbury v. Madison correctly decided?**

   Response: As a sitting judge and nominee for the federal district court, it would generally be inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review). I believe these cases were correctly decided.

9. **Was Lochner v. New York correctly decided?**

   Response: This case is no longer binding Supreme Court precedent so I would not apply it in my court.

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

    Response: As a sitting judge and nominee for the federal district court, it would be generally inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review). I believe these cases were correctly decided.

11. **Was Bolling v. Sharpe correctly decided?**

    Response: See my response to No. 10 regarding cases concerning *de jure* racial segregation.

12. **Was Cooper v. Aaron correctly decided?**

    Response: See my response to No. 10 regarding cases concerning *de jure* racial segregation.

13. Was Mapp v. Ohio correctly decided?

Response: As a sitting judge and nominee for the federal district court, it would generally be inappropriate for me to comment on Supreme Court cases involving issues that may come before me. I only make an exception for cases involving issues that are not being litigated and unlikely to come before me such as *Brown v. Board of Education* (*de jure* racial segregation) and *Marbury v. Madison* (judicial review).

14. Was Gideon v. Wainwright correctly decided?

Response: See response to No. 13.

15. Was Griswold v. Connecticut correctly decided?

Response: See response to No. 13.

16. Was South Carolina v. Katzenbach correctly decided?

Response: See response to No. 13.

17. Was Miranda v. Arizona correctly decided?

Response: See response to No. 13.

18. Was Katzenbach v. Morgan correctly decided?

Response: See response to No. 13.

19. Was Loving v. Virginia correctly decided?

Response: See my response to No. 10 regarding cases concerning *de jure* racial segregation.

20. Was Katz v. United States correctly decided?

Response: See response to No.13.

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

Response: See response to No. 13.

22. Was Romer v. Evans correctly decided?

Response: See response to No. 13.

23. Was United States v. Virginia correctly decided?

Response: See response to No. 13.

24. Was Bush v. Gore correctly decided?

Response: See response to No. 13.

25. Was District of Columbia v. Heller correctly decided?

Response: See response to No. 13.

26. Was Crawford v. Marion County Election Board correctly decided?

Response: See response to No. 13.

27. Was Boumediene v. Bush correctly decided?

Response: See response to No. 13.

28. Was Citizens United v. Federal Election Commission correctly decided?

Response: See response to No. 13.

29. Was Shelby County v. Holder correctly decided?

Response: See response to No. 13.

30. Was United States v. Windsor correctly decided?

Response: See above.

31. Was Obergefell v. Hodges correctly decided?

Response: See above.

32. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: It is my understanding that Circuit courts can only overrule their own precedent through an *en banc* decision. If confirmed, as a lower court, I am bound to faithfully follow all Supreme Court and Ninth Circuit precedent.

33. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: It is my understanding that Circuit courts can only overrule their own precedent through an *en banc* decision. If confirmed, as a lower court, I am bound to faithfully follow all Supreme Court and Ninth Circuit precedent.

34. What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?

Response: I start with the plain meaning of the text in the larger context of the document. If the meaning of the text is unambiguous, the inquiry ends there. If ambiguity remains after examining the plain meaning, I would turn to canons of statutory construction and examine analogous statutes and binding or persuasive case law interpreting those statutes. As a last step, I would examine legislative history. General principles of justice do not enter into the process of statutory interpretation. Judges must decide cases based on the law, the applicable precedent, and the facts of the case, setting aside personal views on general justice and social policy.

35. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: No. If confirmed, I would apply the Sentencing Guidelines, the factors in 18 U.S.C. 3553(a), and any other applicable law in applying individual sentencing decisions, without regard to larger patterns of disparities or questions of social policy.

Questions from Senator Thom Tillis
for Jinsook Ohta
Nominee to be United States District Judge for the Southern 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: I believe that judges must set aside their personal views, preferences, and beliefs and apply the law based on the applicable law and the facts only.

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

   Response: Judicial activism occurs when a judge allows their personal views, preferences, or beliefs to drive their decision-making rather than the law and the facts of the case. I do not think judicial activism is appropriate.

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

   Response: I believe judges are expected and required to be impartial.

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

   Response: No. Policy questions should be left to policymakers and legislators. Judges who abide by their oath decide cases based on the applicable precedent and the facts presented by the parties; they do not decide questions of social policy or allow those concerns to drive their decisions.

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

   Response: A judge's role requires making decisions required by the law and the facts, not according to personal, political, or religious beliefs or preferences. A judge that faithfully interprets and applies the law wherever it leads may often reach results contrary to personal preferences. A judge following her oath understands that the desirable outcome is the one dictated by the law and the facts, not the one dictated by the judge's personal views.

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

   Response: No. A judge's role requires making decisions required by the law and the facts, not according to personal, political, or religious beliefs or preferences. A judge that faithfully interprets and applies the law wherever it leads may often reach results contrary to political or policy preferences.

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

   Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) held that the right to bear arms is an individual right belonging to individual persons. I will faithfully follow all Supreme Court and Ninth Circuit precedent on the Second Amendment.

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: If faced with this question, I would look to Supreme Court and Ninth Circuit precedent on the Second Amendment. The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) held that the right to bear arms is an individual rights that applies to the states. The Ninth Circuit analyzes challenges to restrictions on Second Amendment rights using the following two-step test. First, the court asks "if the challenged law affects conduct that is protected by the Second Amendment," basing "that determination on the historical understanding of the scope of the right." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021). Second, if court finds that the challenged restriction burdens Second Amendment conduct, it then determines the appropriate level of scrutiny. *Young*, 992 at 784. A regulation amounts to a destruction of the Second Amendment right is unconstitutional; a law that implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny; and cases where the Second Amendment rights are less affected, the court applies intermediate scrutiny. *Id.* If faced with this issue, I would carefully research and faithfully follow all Supreme Court and Ninth Circuit precedent and apply it to the facts presented to me regarding the Sheriff's actions and the pandemic situation.

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: I do not currently decide qualified immunity cases as a state court judge sitting in a family law department. If confirmed as a federal district judge, I would follow the process set forth in Supreme Court and Ninth Circuit precedent. The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) provided that government officials are shielded from civil liability arising from their performance of discretionary functions unless their conduct violates clearly established statutory or constitutional rights and a reasonable person would have known that he or she was violating those rights.

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

Response: The *Harlow* standard is the law of the land on qualified immunity and I would faithfully apply that Supreme Court precedent unless there was a change in the law through legislation or a change in binding precedent.

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

Response: The *Harlow* standard is the law of the land on qualified immunity and I would faithfully apply that Supreme Court precedent unless there was a change in the law through legislation or a change in binding precedent.

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 sitting judge and nominee, it would be inappropriate for me comment on Supreme Court precedent. As a lower court, I would be bound to faithfully follow Supreme Court and other applicable precent.

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: Because I would not want to give the impression that I have prejudged matters that might come before me, I must decline to provide my thoughts on how I would view this hypothetical. If confirmed, I would apply Supreme Court precedent and other applicable laws.

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: See 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: See 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: See 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: See 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: See 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: See 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: See 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: See 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: See 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: As a sitting judge and nominee, it would be inappropriate for me comment on Supreme Court precedent and the state of jurisprudence surrounding issues that may come before me. As a lower court, I would be bound to faithfully follow Supreme Court and other applicable precent.

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: I have not dealt with copyright law in my seventeen years of complex civil litigation and working for the courts. If faced with a copyright case, I would make sure to educate myself, research, and be fully prepared for the matter before me.

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

Response: I have not dealt with the Digital Millennium Copyright Act in my seventeen years of complex civil litigation and working for the courts. If faced with a case involving this Act, I would make sure to educate myself, research, and be fully prepared for the matter before me.

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

Response: I have not dealt with intermediary liability for online service providers in my seventeen years of complex civil litigation and working for the courts. If faced with a case on this topic, I would make sure to educate myself, research, and be fully prepared for the matter before me.

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: I have limited experience with free speech issues in the realm of consumer protection and commercial speech. In my seventeen years of complex civil litigation and working for the courts, I have not deal with free speech in the context of intellectual property issues. If faced with this issue, I would make sure to educate myself, research, and be fully prepared for the matter before me.

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: I start with the plain meaning of the text in the larger context of the document. If the meaning of the text is unambiguous, the inquiry ends there. If ambiguity remains after examining the plain meaning, I would turn to canons of statutory construction and examine analogous statutes and binding or persuasive case law interpreting those statutes. As a last step, I would examine 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: Interpretations and advice in the form of opinions letters from an agency would not be entitled to *Chevron* deference; they would be entitled to respect to the extent that the interpretation had the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)

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 sitting judge and nominee, it would not be appropriate to comment on an issue that might come before me. If confirmed, I would look to applicable law and precedent.

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: Until new legislation is passed, judges must apply the existing law to the facts as presented in the case.

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

Response: If confirmed, as a lower court, I would be bound to follow existing precedent of the higher courts. Circuit courts and the Supreme Court could overrule its earlier decisions under the appropriate circumstances.