Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Kenly Kiya Kato
Judicial Nominee to the United States District Court for the Central District of California

1. **Judge Kato, during your nomination hearing, I asked you about a book review you coauthored in law school. The book review took a particular position on people you described as Asian American neo-conservatives, so I wanted to understand your current thoughts on the topic. You responded: "I will admit, and I'm dating myself a bit here, I and a classmate of mine wrote that book review together over 25 years ago, and it's been quite some time since I visited it. So, while I don't doubt that that's what we wrote, I have not looked back at it. And so at the moment, I don't have really any recollection of what it was we were trying to convey by the language that you've just quoted."**

   Later, Senator Cruz asked you about this. He said: "Senator Grassley asked you about this article you wrote in law school. And your response was, well gosh, I haven't read that. In my experience, when people are nominated to be a judge, they do some preparation. Did you not reread it in preparation or did the Biden team tell you, 'Don't read it because you don't want to answer questions about it'?"

   You replied: "Senator, I read it."

   Could you please explain the distinction you were drawing between having "not looked back at it" and having "read it"?

   Response: Thank you for giving me an opportunity to clarify my testimony. Both you and Senator Cruz were quoting specific language, including a footnote, from the book review that I co-authored with a law school classmate when I was a second-year student at Harvard Law School 27 years ago in 1995. During my preparation for the committee hearing, I briefly reviewed hundreds of documents I drafted during the past nearly 30 years. While that law review book review was among those documents that I briefly reviewed, I did not read it in any detail, and I did not focus on any footnotes in that article (or the footnotes in the hundreds of other documents I reviewed in preparation for the hearing), primarily because I did not have the time to look at every document with that level of detail. Moreover, to this day, I have no detailed recollection of working on that article 27 years ago, including what portions were written by me, my co-author, or the two of us jointly. I, therefore, did not have any specific recollection regarding the language that you were quoting.

2. **In the book review that we discussed, you and your coauthor shared the book's definition of neo-conservatives. You and your coauthor also provided your own definition for Asian American neo-conservatives. You said that they are "members of historically disenfranchised groups who have achieved success in status-quo institutions." You also wrote that, "Instead of attributing their successes to the efforts of progressives within the disenfranchised group they internalize the**

dialogue of oppressors, believing in the values of the status quo and condemning the activism of their group."

In this article, you and your coauthor called for directly addressing neo-conservatives "in order to counteract the view that current institutions serve the needs of and are able to empower Asian Americans." You went on to say that, if the neo-conservative is excluded from the coalition, she "may join oppressive institutions and, thus, contribute to the oppression of herself, her people, and other marginalized groups."

As you noted in a different article that you coauthored during law school—an article focusing on Justice Breyer—Senate confirmation hearings "offer the nation a final opportunity to inquire into the values and sensibilities of those who will sit on our highest court." The same is often true of individuals who will sit in our nation's federal trial courts. Having read the book review, please answer the following questions:

a. **Do you still see neo-conservative or conservative-leaning Asian Americans as people who have "internalize[d] the dialogue of oppressors"?**

   Response: As an initial matter, it should be noted that this law review article was a book review, relying on much of what my co-author and I gleaned from our reading of the book we were reviewing. Additionally, I drafted this article when I was a second-year law student. My experiences in the 27 years since I co-wrote that book review – as a law clerk, a federal public defender, a private practice attorney, and a United States Magistrate Judge – have given me many new perspectives that I did not have as a 23-year-old law student. Nevertheless, as a sitting United States Magistrate Judge and judicial nominee, I am bound by the Code of Conduct for United States Judges. The issues you have identified in your question have been and continue to be vigorously debated in the policy sphere. Therefore, it would be inappropriate and contrary to the Code of Conduct for me to provide any additional comment on this issue. In addition, my personal views, if any, are not relevant to my role as a sitting United States Magistrate Judge or, if confirmed, as a United States District Judge. My role as a judge is to faithfully and impartially apply the law to the facts of each case.

b. **Do you still believe that the neo-conservative Asian American risks "contribut[ing] to the oppression of herself, her people, and other marginalized groups"?**

   Response: Please see my response to Question 2.a.

3. **When you were in law school, you coauthored an article on Justice Breyer's nomination to the Supreme Court. Your article called for senators to "ask the hard questions about Breyer's conception of racial justice, one of our country's most important and troubling legal issues." The article focused on *Munoz-Mendoza v.***

***Pierce*, 711 F.2d 421 (1st Cir. 1983), a First Circuit decision that then-Judge Breyer authored. His decision was expressly limited to the question of standing. While his opinion reversed the district court—in holding that a number of plaintiffs did have standing to bring their case—he agreed with the district court that certain plaintiffs lacked standing. He explained:**

> **Mrs. Lee is a resident of the South Cove neighborhood; the Task Force represents the residents of Chinatown. According to the most recent census figures provided by the parties, the population of the Chinatown-South Cove area is 80 percent Asian and Pacific Islander and only 14.5 percent Caucasian. As a result, any foreseeable displacement of poorer residents by rent increases is likely to make the two neighborhoods more, rather than less, racially integrated. That is not to say that Mrs. Lee, and their neighborhoods will suffer no harm; the character of their neighborhood may change, as they believe, for the worse. But this harm is not the special legal harm of residential segregation that the Supreme Court held sufficient to confer standing under *Gladstone Realtors* and *Trafficante*.**

In your article, you quoted from this section of Judge Breyer's opinion, saying: "Gentrification in minority neighborhoods, in Breyer's opinion, did not offend fair housing laws even if it was induced by government action and would disproportionately displace minorities." You said that Judge Breyer's decision "exhibits a very narrow conception of the objectives of the Fair Housing Act." While preventing segregation is one purpose, "[p]reventing discriminatory effects of government policy on minorities groups is another." In your article's view, Judge Breyer had allowed the government to create discriminatory effects that violated the Act.

Do you believe that, for procedural reasons or reasons such as standing, it may be legally inappropriate for federal judges to reach the merits of a case?

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on a hypothetical scenario. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound by Supreme Court and Ninth Circuit precedent, including precedent regarding standing.

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

Response: I am not aware of any universally accepted definition of the term "super precedent," nor am I aware of its use by the Supreme Court or the Ninth Circuit. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I faithfully and impartially apply the law to the facts of each case.

5. **You can answer the following questions yes or no:**

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 (A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently) mandates, "A judge should not make public comment on the merits of a matter pending or impending in any court." However, consistent with the practice of other judicial nominees and because the holding in *Brown v. Board of Education* is unlikely to be challenged or litigated, I am comfortable stating I believe the case was correctly decided.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 (A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently) mandates, "A judge should not make public comment on the merits of a matter pending or impending in any court." However, consistent with the practice of other judicial nominees and because the holding in *Loving v. Virginia* is unlikely to be challenged or litigated, I am comfortable stating I believe the case was correctly decided.

c. Was *Griswold v. Connecticut* correctly decided?

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 (A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently) mandates, "A judge should not make public comment on the merits of a matter pending or impending in any court." Since the issues raised in this case may come before me as a judge, it would be inappropriate and contrary to the Code of Conduct for me to provide an opinion on the correctness or legitimacy of this Supreme Court decision. Additionally, as a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound to follow Supreme Court precedent regardless of any personal opinions I may or may not have.

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

Response: Please see my response to Question 5.c.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: Please see my response to Question 5.c.

f. Was *Gonzales v. Carhart* correctly decided?

Response: Please see my response to Question 5.c.

g. Was *District of Columbia v. Heller* correctly decided?

Response: Please see my response to Question 5.c.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: Please see my response to Question 5.c.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: Please see my response to Question 5.c.

j. Was *Sturgeon v. Frost* correctly decided?

Response: Please see my response to Question 5.c.

k. Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?

Response: Please see my response to Question 5.c.

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

Response: I am not aware of nor familiar with the comment or context of the quote that has been attributed to Judge Jackson. I am also not aware of any universally accepted definition of the term "living constitution." However, to the extent the term "living constitution" means the Constitution changes or evolves over time, I do not agree with that concept. I believe the Constitution has an enduring, fixed quality, and as a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I faithfully and impartially apply the law to the facts of each case.

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

Response: I am not familiar with the statement or context in which the statement was made. However, I do not agree with the statement. A judge's role is to apply the applicable law and precedent to the facts of each case. A judge's personal views or values are not relevant to this process.

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

Response: The Supreme Court has held that parents have the right to direct their children's education. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

Response: In *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014), the Ninth Circuit held scientific evidence is relevant to determining whether a specific substance caused cancer in a human. *See also, e.g.*, *GE v. Joiner*, 522 U.S. 136 (1997) (considering testimony by scientific experts as relevant to the question of whether a specific substance causes cancer in humans).

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

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the Supreme Court stated, "[A]dvances in neonatal care have advanced viability to a point somewhat earlier" than the point of viability identified in *Roe v. Wade*. The Supreme Court noted viability occurred at approximately 23 to 24 weeks at the time of *Casey* as compared 28 weeks in 1973 when *Roe* was decided. *Id.* The Court further stated viability may occur "at some moment even slightly earlier in pregnancy . . . if fetal respiratory capacity can somehow be enhanced in the future." *Id.*

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

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), the Supreme Court stated, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

13. Is threatening Supreme Court justices right or wrong?

Response: It may be unlawful to threaten a Supreme Court Justice under certain circumstances. My personal views, if any, regarding whether it is "right or wrong" are not relevant to my role as a sitting United States Magistrate Judge or, if confirmed, as a United States District Judge. My role as a judge is to faithfully and impartially apply the law to the facts of each case.

14. Do you believe that we should defund or decrease funding for police departments and law enforcement? Please explain.

Response: That is a question for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the law to the facts of each case.

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

Response: That is a question for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the law to the facts of each case.

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

Response: That is a question for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the law to the facts of each case.

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

Response: In *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the right to bear arms is an individual right and that it applies to the states. The Ninth Circuit requires a two-step process for analyzing whether a regulation or statute infringes on Second Amendment rights. "First, we ask if the challenged law affects conduct that is protected by the Second Amendment." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (citing *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). "If the challenged restriction burdens conduct protected by the Second Amendment—either because 'the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful'—we move to the second step of the analysis and determine the appropriate level of scrutiny." *Id.* (quoting *Silvester*, 843 F.3d at 821). *Heller* requires one of three levels of scrutiny: if a regulation "amounts to a destruction of the Second Amendment right," it is unconstitutional under any level of scrutiny; a law that "implicates the core of the Second Amendment right and severely burdens that right" receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny. *Id.*

18. 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 court determines whether a law "substantially burdens the exercise of religion." *Burwell v. Hobby Lobby*, 573 U.S. 682, 690 (2014).

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: Under current case law, a burden is "substantial" if non-compliance would impose "severe" economic costs and compliance would force the plaintiff to violate their sincere religious belief. *Burwell v. Hobby Lobby*, 573 U.S. 682, 720–22 (2014).

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

Response: I am not familiar with this statement or the context in which it was made. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the law to the facts of each case.

20. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?

Response: There is no constitutional right to appointed counsel in civil rights actions. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). A court has no direct way to pay appointed counsel and cannot compel an attorney to represent a plaintiff. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 301-10 (1989). In exceptional circumstances, a court may request counsel to voluntarily provide representation. 28 U.S.C. § 1915(e)(1); *see also Mallard*, 490 U.S. at 301-10. Additionally, my personal views, if any, are not relevant to my role as a sitting United States Magistrate Judge or, if confirmed, as a United States District Judge. My role as a judge is to faithfully and impartially apply the law to the facts of each case.

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

Response: The Supreme Court defines "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942); *see also Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021).

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

Response: Under *Virginia v. Black*, a "true threat" "encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 359 (2003) (citation omitted). A speaker need not actually intend to carry out the threat.

Id. at 60. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.*

23. 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.

24. 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.

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

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

26. 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.

27. 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.

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

Response: In November of 2020, I submitted an application to the judicial selection committee for Senator Feinstein. In February of 2021, I submitted an application to the judicial selection committee for Senator Padilla. On April 9, 2021, I interviewed with Senator Padilla's judicial selection committee via video conference. On April 23, 2021, I interviewed with Senator Feinstein's judicial selection committee via video conference. On May 13, 2021, I interviewed with Senator Feinstein's statewide chairperson via video conference. On August 22, 2021, I was contacted by White House Counsel's Office to schedule an interview, and on August 24, 2021, I interviewed with attorneys from the White House Counsel's Office via video conference. Since that time, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 15, 2021, my nomination was submitted to the Senate.

29. 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: I did not and I am not aware of anyone doing so on my behalf.

30. 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: In 2021, I attended a webinar regarding the federal judicial nomination process. I believe the American Constitution Society was one of the hosts. I did not have any discussions with the organization and I am not aware of anyone doing so on my behalf.

31. 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: I did not and I am not aware of anyone doing so on my behalf.

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

Response: I did not and I am not aware of anyone doing so on my behalf.

33. 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: I did not and I am not aware of anyone doing so on my behalf.

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

Response: Please see my response to Question 28. In addition, following my nomination on December 15, 2021, I was in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding preparation for my appearance before the Senate Judiciary Committee.

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

Response: I received these questions on February 8, 2022. I prepared draft answers, which I submitted to the Office of Legal Policy for feedback. After receiving feedback, I finalized my answers for submission on February 14, 2022.

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

Questions for the Record for Kenly Kiya Kato, Nominee for the United States District Court for the Central District of California

I. Directions

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

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

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

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

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

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

II. Questions

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

   Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to fulfill the oath I have taken to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. I approach each case with an open mind, free from any bias or preconceived notions; faithfully and impartially apply the law to the facts of each case; and treat every litigant with dignity and respect. I have not studied the philosophies of the

Supreme Court Justices and, therefore, cannot identify which Supreme Court Justice's philosophy is most analogous to mine.

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

   Response: According to Black's Law Dictionary, originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). I do not categorize myself using any labels. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I do not categorize myself using any labels. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: In *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound by Supreme Court and Ninth Circuit precedent.

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

   Response: In *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

   Response: The Constitution has an enduring, fixed quality and can only be amended pursuant to Article V. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

   Response: The Supreme Court has held there are limits as to what the government may impose or require of private institutions. Constitutional limits include the First Amendment's Free Exercise Clause as identified and discussed in *Tandon v. Newsom*, 142 S. Ct. 1294 (2021). The Supreme Court has also identified and discussed the limits imposed by the Religious Freedom Restoration Act. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

   Response: The Supreme Court has held laws that are not neutral to religion must be justified by a compelling interest and must be narrowly tailored to advance that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Supreme Court has also held the government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

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

   Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held the applicants were entitled to a preliminary injunction blocking enforcement of the executive order. The Court found: (1) the applicants had demonstrated a likelihood of success on their First Amendment claim because the restrictions violated a "minimum requirement of neutrality" to religion; (2) "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"; and (3) the government had not shown that granting the applications would "harm the public[,]" because

it failed to show "public health would be imperiled if less restrictive measures were imposed."

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that applicants were entitled to injunctive relief blocking enforcement of COVID-19 restrictions as applied to at-home religious gatherings. The Court found (1) government regulations "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise"; (2) activities should be analyzed with respect to "the risk various activities pose, not the reasons why people gather"; (3) the government must show "measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID" or "the religious exercise at issue is more dangerous than [other activities the government permits to proceed with precautions] even when the same precautions are applied"; and (4) the government cannot moot a case by changing the regulations if "the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions."

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's cease-and-desist order issued as a result of the owner's refusal to sell a wedding cake to a same-sex couple violated "the religious neutrality that the Constitution requires." *Id.* at 1724.

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

Response: In *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989), the Supreme Court "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. The operative question is whether the professed belief is "sincerely held." *Id.*

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

Response: If this question was presented in a case before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent, including *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989).

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

Response: Please see my response to Question 13.a.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would not be appropriate for me to comment or opine on the official position of any church.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception" to employment discrimination claims is not dependent on an employee's title, but rather, depends on whether the employee is performing "vital religious duties." *Id.* at 2066. The Court followed and clarified the holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), which applied the "ministerial exception" to an employee who held a religious title. The "ministerial exception" is derived from the First Amendment.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. The Court held the City's policy was subject to strict scrutiny because it was not neutral and generally applicable because it "incorporate[d] a system of individual exemptions." The Court further held that because the City had offered "no compelling reason why it has a particular interest in denying an exception to CSS," its decision to deny an exception to CSS did not satisfy strict scrutiny and, therefore, violated the First Amendment. *Id.* at 1882.

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

Response: In his concurrence in the Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*, Justice Gorsuch identified several errors in the state court's analysis of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and highlighted three aspects of *Fulton v. City of Philadelphia* that apply in strict scrutiny cases. First, the government "must scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." Second the government must demonstrate why it cannot provide the same exemption given to other groups and why it cannot follow the rules from other jurisdictions. Third, the government must demonstrate "with evidence" that its policy is narrowly tailored.

17. What role does a judge's conception of racial justice play in matters of statutory and constitutional interpretation?

Response: A judge's conception of racial justice plays no role in matters of statutory and constitutional interpretation.

18. Is it appropriate for the court to provide its employees trainings which include the following:

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

Response: I am not aware of any trainings of the type described. As a sitting United States Magistrate Judge, the trainings I have participated in have been consistent with the law.

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

Response: I am not aware of any trainings of the type described. As a sitting United States Magistrate Judge, the trainings I have participated in have been consistent with the law.

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

Response: I am not aware of any trainings of the type described. As a sitting United States Magistrate Judge, the trainings I have participated in have been consistent with the law.

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

Response: I am not aware of any trainings of the type described. As a sitting United States Magistrate Judge, the trainings I have participated in have been consistent with the law.

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

Response: To the extent I have a say in the types of trainings provided, I commit that I will encourage our Court to continue to have trainings that are consistent with the law.

20. Explain your understanding of the U.S. Supreme Court's holding and reasoning in *Regents of the University of California v. Bakke*.

Response: In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court upheld affirmative action and held race could be one of several factors utilized in college admission policies. The Supreme Court, however, ruled that racial quotas were unconstitutional.

21. Explain your understanding of the U.S. Supreme Court's holding and reasoning in *Gratz v. Bollinger.*

Response: In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Supreme Court held the University of Michigan's admissions policy – which awarded an automatic 20-point bonus towards the admissions score for members of underrepresented minorities – was not narrowly tailored to meet the asserted interest in diversity and was, therefore, unconstitutional.

22. Is the criminal justice system systemically racist?

Response: The question of whether the criminal justice system is systemically racist is one for policymakers. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would decide any case involving allegations of racism by faithfully and impartially applying the law to the facts of the case.

23. What are the key rationales for granting bail reduction and when is such relief appropriate?

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I faithfully and impartially apply the law to the facts of each case. In the context of bail, the Bail Reform Act, 18 U.S.C. § 3142 *et seq.*, governs.

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

Response: In my seven and a half years as a sitting United States Magistrate Judge and 18 years as a practicing attorney and federal law clerk, I have not handled a case involving this issue. If this issue was presented in a case before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound by Supreme Court precedent irrespective of its size. It would, therefore, be inappropriate for me to comment on this issue.

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

Response: In *Dist. of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held this was a fundamental right fully applicable to states and municipalities.

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

Response: No.

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

Response: No.

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

Response: If this issue was presented in a case before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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

Response: Prosecutorial discretion refers to the authority vested in a prosecuting agency to decide whether and how to enforce a particular law. Substantive administrative rule change refers to the change that occurs pursuant to the authority vested in an administrative agency. The Administrative Procedures Act governs rulemaking procedures for federal government agencies.

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

Response: No. Congress has passed the Federal Death Penalty Act, 18 U.S.C. 3591(a), which sets forth the relevant law regarding the federal death penalty and pursuant to Article I only Congress may change or modify the law. The President has the power to grant reprieves and pardons for federal offenses in individual cases pursuant to Article II.

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

Response: In *Alabama Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court ruled that the Centers for Disease Control and Prevention had exceeded its authority in issuing a nationwide eviction moratorium. The Supreme Court, therefore, vacated the District Court's stay of its judgment vacating a nationwide eviction moratorium for certain residential properties.

Senator Josh Hawley
Questions for the Record

Kenly Kato
Nominee, U.S. District Court for the Central District of California

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

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

      Response: I am not aware nor familiar with the comment or context of the quote. However, a judge's role is not to do what they "think is right." Rather, a judge's role is to faithfully and impartially apply the law to the facts of each case.

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

      Response: Judges take a judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States."

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

   Response: *Younger* abstention "generally precludes federal courts from intervening in ongoing state criminal prosecutions." *Trump v. Vance*, 140 S. Ct. 2412, 2420–21 (2020) (citations omitted). Specifically, *Younger* abstention "applies to only three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Company v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020), *cert. denied* 141 S. Ct. 2796 (2021) (citations and quotation marks omitted).

   Pullman abstention provides that "federal courts have the power to refrain from hearing cases . . . in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1209 (9th Cir. 2021) (alteration in original) (citation omitted). Abstention under *Pullman* is appropriate if: "(1) there are sensitive issues of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open, (2) constitutional adjudication could be avoided by a state ruling, and (3) resolution of the state law issue is uncertain." *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (citation and internal quotation marks omitted).

Burford abstention permits federal district courts "to abstain from exercising jurisdiction if the case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if decisions in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) (citations and internal quotation marks omitted).

Colorado River abstention provides that "in situations of concurrent state and federal jurisdiction over a controversy, a district court must exercise its jurisdiction unless exceptional circumstances ... serv[ing] an important countervailing interest are present." *Seneca Insurance Company, Inc. v. Strange Land, Inc.*, 862 F.3d 835, 839 (9th Cir. 2017) (citations and internal quotation marks omitted). To determine whether "exceptional circumstances" exist warranting abstention, the Ninth Circuit analyzes the following eight factors: "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *Id.* at 841-842 (citation omitted).

Rooker-Feldman abstention "bars federal district courts from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment." *Wolfe v. Strankman*, 392 F.3d 358, 363 (9th Cir. 2004) (citation and internal quotation marks omitted). Abstention under *Rooker-Feldman* is appropriate if "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Id.* (citations omitted).

3. 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.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound by the methods of interpretation and frameworks set forth by the Supreme Court. For example, in *Dist. of Columbia v. Heller*, 554 U.S. 570, 576

(2008), the Supreme Court instructed that a textual analysis of the Constitution should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" In such cases where the Supreme Court has stated that the original meaning of the constitutional provision applies, I would be bound by such precedent.

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

   Response: If a federal statute had been previously interpreted by the Supreme Court or Ninth Circuit, that interpretation would be binding precedent that I would follow. In the absence of such binding precedent, I would consider the text of the statute. If the text was unclear or ambiguous, I would look to canons of construction used by the Supreme Court or Ninth Circuit to interpret analogous statutes or persuasive authority outside of the Ninth Circuit. I would then consider other tools of statutory construction and interpretive aids, such as legislative history. I would note that the Supreme Court has stated that legislative history should be used in limited circumstances to "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

   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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound by Supreme Court and Ninth Circuit precedent regarding the treatment and use of legislative history.

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

      Response: It is never appropriate to consult the laws of foreign nations when interpreting the provisions of the United States Constitution.

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

   Response: In *Glossip v. Gross*, 576 U.S. 863, 878 (2015), the Supreme Court held that a prisoner must demonstrate (1) the existence of a known and available method of execution that entails a lesser risk of pain, and (2) the State's refusal to adopt the alternative method is not supported by a legitimate penological reason. *See also Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

7. **Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available**

alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Under the Supreme Court's holding in *Glossip v. Gross*, 576 U.S. 863, 878 (2015), a prisoner must demonstrate (1) the existence of a known and available method of execution that entails a lesser risk of pain, and (2) the State's refusal to adopt the alternative method is not supported by a legitimate penological reason.

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

   Response: I am not aware of any Supreme Court or Ninth Circuit precedent recognizing such a constitutional right.

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

   Response: I have no doubt.

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

    Response: The Supreme Court has held that a law which incidentally burdens religion ordinarily is not subject to strict scrutiny under the Free Exercise Clause if the law is neutral and generally applicable. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 878-82 (1990). A neutral law, therefore, must only satisfy rational basis scrutiny. *Id.*

    A law that is not neutral, however, must satisfy strict scrutiny. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 533-34 (1993). The Supreme Court has stated that a law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Lukumi* at 533. The Supreme Court has also stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296.

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

Response: Please see my response to Question 10.

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

Response: A religious belief is sincerely held if it is a "meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption[.]" *United States v. Seeger*, 380 U.S. 163, 176 (1965). A religious belief is sincere if it not "obviously" a "sham" or an "absurdit[y]". *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). However, the trier of fact may not inquire into the truth or falsity of the claimant's religious beliefs although they might seem incredible or preposterous. *United States v. Ballard*, 322 U.S. 78, 87–88 (1944); *Callahan v. Woods*, 658 F.2d at 685. A sincerely held religious belief does not need to be held by all members of a religion. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981).

13. 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 *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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.

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: Based on my reading of Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), I understand him to mean the Fourteenth Amendment does not support any particular economic theory.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound to follow Supreme Court precedent and it would be inappropriate for me to opine on the correctness of a Supreme Court decision. I am aware, however, that in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Supreme Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded."

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

a. If so, what are they?

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound to follow Supreme Court precedent and it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would continue to faithfully and impartially follow Supreme Court precedent.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would continue to faithfully and impartially follow Supreme Court precedent.

16. 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: As a sitting United States Magistrate Judge and judicial nominee, I am bound to follow Supreme Court precedent and it would be inappropriate for me to opine on this issue which could come before me. If confirmed as a United States District Judge, I would continue to faithfully and impartially follow Supreme Court and Ninth Circuit precedent. The Supreme Court has held that more than 80% share of a market "with no readily available substitutes" can support a finding that an entity is a monopoly. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). The Ninth Circuit has held that a "65% market share" generally "establish[es] a prima facie case of market power." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997).

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

Please see my response to Question 16.a.

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

Response: Please see my response to Question 16.a.

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

Response: Black's Law Dictionary defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." *Common Law*, Black's Law Dictionary (11th ed. 2019). The Supreme Court has stated, "there is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

18. 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: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938). State constitutional provisions can confer greater protections than the United States Constitution.

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

Response: Please see my response to Question 18.

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

Response: State constitutional provisions can confer greater protections than the United States Constitution, but all states are bound by the provisions of the United States Constitution.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 (A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently) mandates "A judge should not make public comment on the merits of a matter pending or impending in any court."

However, because the holding in *Brown v. Board of Education* is unlikely to be challenged or litigated, I am comfortable stating I believe the case was correctly decided.

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

Response: Yes. *See, e.g.*, *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087–89 (2017) (upholding nationwide injunction); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343–44 (1999) (upholding nationwide injunction).

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

Response: Please see my response to Question 20. Federal Rule of Civil Procedure 65 governs injunctions.

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

Response: Federal Rule of Civil Procedure 65 governs injunctions. A plaintiff seeking a preliminary injunction must establish likelihood of success on the merits and irreparable harm in the absence of preliminary relief; that the balance of equities favors issuing the injunction; and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The Supreme Court has instructed that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

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

Response: Please see my response to Question 20.

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

Response: Black's Law Dictionary defines "federalism" as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." *Federalism*, Black's Law Dictionary (11th ed. 2019). This relationship and distribution of power is foundational to our constitutional system.

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

Response: Please see my response to Question 2.

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

Response: The question of whether to award monetary damages or injunctive relief and relatedly, the advantages and disadvantages of awarding damages versus injunctive relief, is dependent upon the facts and circumstances of each case.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." *Id.* (internal quotation marks omitted). The Supreme Court has held that such rights include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

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

Response: Please see my responses to Questions 10-12.

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

Response: In *Lee v. Weisman*, the Supreme Court explained that "freedom of worship" is one aspect of the right to free exercise. 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship[.]").

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

Response: Please see my response to Question 10.

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

Response: Please see my response to Question 12.

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

Response: The Religious Freedom Restoration Act (RFRA) provides that "Government shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

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: I have conducted a search of Westlaw and have identified the following recommendations adjudicating Free Exercise Clause claims, which were adopted by the district judges:

Miller v. Acosta, No. CV 15-2285-GW (KK), 2019 WL 3035120 (C.D. Cal. May 8, 2019), *report and recommendation adopted*, No. CV 15-2285-GW (KK), 2020 WL 4366020 (C.D. Cal. July 29, 2020) (recommending dismissal of complaint including free exercise claim for failure to state a claim).

Ransom v. Lee, No. CV 14-600-DSF (KK), 2017 WL 10525951 (C.D. Cal. Apr. 20, 2017), *report and recommendation adopted*, No. CV 14-600-DSF (KK), 2017 WL 10510170 (C.D. Cal. June 27, 2017) (recommending granting in part and denying in part defendants' motion to dismiss, including granting defendants' motion to dismiss free exercise claim).

27. 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 is to faithfully and impartially apply the law to the facts of each case, irrespective of any personal beliefs.

28. 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: I do not recall any occasion where I have taken the position in litigation or a publication that a federal or state statute was unconstitutional.

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

Response: No.

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

Response: I am not aware of a universally accepted definition of the phrase "systemically racist" and the phrase likely has different meaning for different individuals. Regardless, the issue is one for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I apply Supreme Court and Ninth Circuit precedent to the facts of the case before me when deciding any case involving allegations of race discrimination.

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

Response: I cannot recall any specific situation. However, when I represented clients, I set aside any personal views I might have had regarding their case and zealously and ethically advocated on their behalf.

32. How did you handle the situation?

Response: Please see my response to Question 31.

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

Response: Yes.

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

Response: My views of the law have not been shaped by any specific Federalist Paper.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I cannot comment on this issue because it could come before me and is the subject of litigation. I will continue to faithfully follow Supreme Court and Ninth Circuit precedent, and I would do so with respect to any matter that comes before me involving this question.

36. 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.

37. 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.

38. 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.

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

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

Response: I have never authored a brief that was filed in court without my name on it.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I am not aware of any circumstance wherein I have confessed error to a court.

41. 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: I understand I have a responsibility to answer all questions posed to me honestly and to the best of my ability consistent with the Code of Conduct for United States Judges.

Senator Mike Lee
Questions for the Record
Kenly Kato, Nominee to the United States District Court for the Central District of California

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

   Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to fulfill the oath I have taken to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. I approach each case with an open mind, free from any bias or preconceived notions; faithfully and impartially apply the law to the facts of each case; and treat every litigant with dignity and respect.

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

   Response: In approaching statutory interpretation, I first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction and note that the Supreme Court has stated that legislative history can only be used in limited circumstances to "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

   Response: I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent. In the rare instance where there was no binding precedent, I would consider the text of the provision at issue, methods of interpretation employed by the Supreme Court and Ninth Circuit interpreting similar provisions, and persuasive authority from circuit courts outside of the Ninth Circuit.

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

   Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I am bound by the methods of interpretation and frameworks set forth by the Supreme Court. For example, in *Dist. of Columbus v. Heller*, the Supreme Court instructed that a textual analysis of the Constitution should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" 554 U.S. 570, 576

(2008). In such cases where the Supreme Court has stated that the original meaning of the constitutional provision applies, I would be bound by such precedent.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I start issues of statutory interpretation by looking at the statutory text. If the plain language of the statute is clear and unambiguous, my inquiry ends there.

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

Response: Please see my responses to Questions 2 and 4.

6. What are the constitutional requirements for standing?

Response: The constitutional requirements for standing in federal court are: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that Congress has implied powers under the Necessary and Proper Clause to carry out the enumerated powers in the Constitution.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in evaluating the constitutionality of that law.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." *Id.* (internal quotation marks omitted). The

Supreme Court has identified these unenumerated rights to include the rights to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967); to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: Please see my response to Question 9.

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

Response: The Supreme Court has held Congress may only regulate three categories of activity pursuant to the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce and activities that threaten such instrumentalities, persons or things; and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: The Supreme Court has identified race, national origin, alienage, and religion as suspect classes such that laws affecting those groups must survive strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

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

Response: Checks and balances and separation of powers play critical and fundamental roles in our Constitution's structure. As the Supreme Court has stated, "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks and citation omitted).

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in deciding a case in which one branch was alleged to have assumed an authority not granted it by the text of the Constitution.

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

Response: Empathy should play no role in a judge's consideration of a case.

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

Response: Both are equally bad and judges should seek to avoid either outcome.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment as to any personal opinions I might have regarding Supreme Court decisions or trends.

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

Response: Black's Law Dictionary defines "judicial review" as "(1) A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. (2) The constitutional doctrine providing for this power. (3) A court's review of a lower court's or an administrative body's factual or legal findings." *Judicial Review*, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" as "The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Judicial Supremacy*, Black's Law Dictionary (11th ed. 2019).

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

Response: Elected officials are bound by their oath to support the Constitution and have a duty to respect judicial decisions. As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to opine as to how elected officials should balance these obligations.

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

Response: It is important to keep this in mind when judging in order to recognize that the role of the judiciary is limited to interpreting and deciding the law.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of each case. Any personal views I may have regarding the precedent in question are irrelevant to this process.

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

Response: None.

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

Response: I am not aware nor familiar with the comment or context of the quote. The quote appears to relate to issues for policymakers to consider. As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on policy debates. My role is to faithfully and impartially apply the law to the facts of each case.

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

Response: Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *Equality*, Black's Law Dictionary (11th ed. 2019). As these are issues that are vigorously debated, as a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to publicly comment on them. If the issues arose in a case before me, I would faithfully and impartially apply the law to the facts of the case.

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

Response: Please see my response to Question 24. Because the issue of whether the Fourteenth Amendment guarantees "equity" could come before me, it would be inappropriate for me to address the matter.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of the term "systemic racism." If a case involving this issue arose before me, I would faithfully and impartially apply the law to the facts of the case.

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

Response: I do not have a personal definition of the term "critical race theory." Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, Black's Law Dictionary (11th ed. 2019).

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

Response: Please see my responses to Questions 27 and 28. I do not have a personal definition for either term and, therefore, cannot distinguish the two terms.

Senator Ben Sasse
Questions for the Record for Kenly Kiya Kato
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
February 1, 2022

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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to fulfill the oath I have taken to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. I approach each case with an open mind, free from any bias or preconceived notions; faithfully and impartially apply the law to the facts of each case; and treat every litigant with dignity and respect.

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

   Response: I do not categorize myself using any labels. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: I do not categorize myself using any labels. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: I am not aware of any universally accepted definition of the term "living constitution." However, to the extent the term "living constitution" means the Constitution changes or evolves over time, I do not agree with that concept. I believe the Constitution has an enduring, fixed quality and as a sitting United States Magistrate Judge and if confirmed as

a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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 the Supreme Court Justices and, therefore, cannot identify which Supreme Court Justice or Justices' jurisprudence I most admire.

8. 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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would not be in a position to consider 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 Constitution. Further, I am bound by Supreme Court and Ninth Circuit precedent. A decision of the Ninth Circuit is binding on courts in the Ninth Circuit until it is overruled by the Supreme Court or an *en banc* panel of the Ninth Circuit.

9. 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: Please see my answer to Question 8.

10. 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: In approaching statutory interpretation, I first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction. The Supreme Court has stated legislative history can only be used in limited circumstances to "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

11. 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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I faithfully and impartially apply the law to the facts of each case. With respect to sentencing, the law is set forth in 18 U.S.C. § 3553(a) and the United States

Sentencing Guidelines. I would also be bound by Supreme Court and Ninth Circuit precedent.

Questions from Senator Thom Tillis
for Kenly Kiya Kato
Nominee to be United States District Judge for the Central District of California

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). I consider judicial activism inappropriate.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Yes, faithfully interpreting the law can sometimes result in an outcome that is undesirable from a judge's personal viewpoint. However, a judge must set aside any personal viewpoint and faithfully and impartially apply the law to the facts of each case.

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

   Response: No.

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

   Response: I would faithfully and impartially apply Supreme Court precedent, including *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as well as Ninth Circuit precedent including *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

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: As a sitting United States Magistrate Judge and judicial nominee, it would be contrary to the Code of Conduct for me to comment on a hypothetical legal scenario that may come before me. If this issue was presented in a case before me, I would faithfully and impartially apply the law to the facts of the case.

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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I faithfully and impartially apply the law to the facts of each case. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, (2015) (per curiam)). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

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: That is a question for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the qualified immunity standard as articulated in Question 9.

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

Response: That is a question for policymakers to consider. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the qualified immunity standard as articulated in Question 9.

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 United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on Supreme Court jurisprudence. As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, my role is to faithfully and impartially apply the law, including applicable Supreme Court precedent, to the facts of each case, including those involving patent eligibility.

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

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

    Response: As a sitting United States Magistrate Judge and judicial nominee, it would be contrary to the Code of Conduct for United States Judges for me to comment on a hypothetical legal scenario that may come before me. If this issue was presented in a case before me, I would faithfully and impartially apply the law to the facts of the case.

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

    Response: Please see my response to Question 13.a.

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

    Response: Please see my response to Question 13.a.

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

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: As sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on Supreme Court jurisprudence. In *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014), the Supreme Court described the two-part "framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Id.* at 217. First, the court must "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* Second, the court will "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Id.* at 217-18.

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 been a sitting United States Magistrate Judge for over seven and a half years and was a practicing attorney and federal law clerk for 18 years prior to that. In those nearly 26 years, I have had limited experience with copyright law. As a United States Magistrate Judge, I have ruled on several discovery-related motions that were referred to me by the district judge in copyright infringement actions.

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

Response: I have been a sitting United States Magistrate Judge for over seven and a half years and was a practicing attorney and federal law clerk for 18 years prior to that. In those nearly 26 years, I have had limited experience with the Digital Millennium Copyright Act.

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

Response: I have been a sitting United States Magistrate Judge for over seven and a half years and was a practicing attorney and federal law clerk for 18 years prior to that. In those nearly 26 years, I have had limited experience with addressing intermediary liability for online service providers that host unlawful content posted by users.

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: As a sitting United States Magistrate Judge, I have regularly handled civil rights actions filed by prisoners and persons proceeding *pro se* involving free speech issues and allegations of various First Amendment violations as well as discovery motions in civil cases involving intellectual property issues, including copyright.

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: In approaching statutory interpretation, I first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction.

The Supreme Court has stated that legislative history can only be used in limited circumstances to "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

Response: The Supreme Court has held that agency interpretations of a statute contained in opinion letters, "policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference" when a court interprets the statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Such interpretations are entitled to *Skidmore* deference, wherein they are "'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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 United States Magistrate Judge and judicial nominee, it would be contrary to the Code of Conduct for United States Judges for me to comment on a hypothetical legal scenario that may come before me. If this issue was presented in a case before me, I would faithfully and impartially apply the law to the facts of the case.

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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I will continue to faithfully and impartially apply the law to the facts of each 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: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I will continue to faithfully and impartially apply the law to the

facts of each case. I would continue to follow applicable Supreme Court and Ninth Circuit precedent with respect to any case before me.

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

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would continue to faithfully and impartially apply all applicable Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, I faithfully and impartially apply Supreme Court and Ninth Circuit precedent regarding issues of venue.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on the conduct of other judges. I faithfully and impartially apply and follow Supreme Court and Ninth Circuit precedent, the Federal Rules of Civil Procedure, and the Local Rules of the United States District Court for the Central District of California.

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

Response: As a sitting United States Magistrate Judge and if confirmed as a United States District Judge, I would continue to faithfully and impartially apply the law to the facts of each case consistent with applicable law and the Code of Conduct for United States Judges.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to

intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would continue to faithfully and impartially apply the law to the facts of each case.

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

Response: Please see my response to Question 18.c.

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

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

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

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

Response: In the Central District of California, there is no single-judge division, hence, the issue is not one that our court has needed to address.

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

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to opine on this issue.

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

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