Senator Chuck Grassley, Ranking Member
Questions for the Record
Lauren J. King
Nominee to be United States District Judge for the Western District of Washington

1. **You are very experienced in matters of Indian Law, which is an important part of a federal docket out West.**

    a. **What experience do you have litigating constitutional issues?**

    RESPONSE: On behalf of the plaintiffs in *Muscogee (Creek) Nation et al. v. Poarch Band of Creek Indians*, No. 2:12-cv-1079-MHT-CSC (M.D. Ala.), I filed a Second Amended Complaint asserting a cause of action under the Free Exercise clause of the First Amendment in connection with defendants' exhumation (or granting permits for exhumation) of over 55 Muscogee (Creek) ancestors in order to build a casino over a site that is sacred to the Muscogee (Creek) Nation. On March 15, 2021, the district court issued an order finding that although the plaintiffs established a basis to sue the tribal defendants under the *Ex Parte Young* doctrine, a narrow and limited exception applied to that doctrine that preserved the sovereign immunity of the tribal defendants. Due to the immunity of the tribal defendants and the court's finding that those defendants were indispensable to the case, the court dismissed the case without addressing the First Amendment claim. The case is now on appeal in the Eleventh Circuit.

    b. **If you were to face a constitutional issue as a judge, what is the general procedure you would follow for determining what the law required?**

    RESPONSE: If the constitutional provision at issue had previously been interpreted by the Supreme Court or Ninth Circuit, I would follow that precedent. If no precedent existed, I would first analyze the text of the provision. I generally would look to evidence of the original meaning of any constitutional provision at issue. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . . is a critical tool of constitutional interpretation") (emphasis in original). If other federal or state courts had interpreted the constitutional provision, I would look to those courts' decisions as persuasive, though not binding, authority. I would apply relevant canons of construction as needed, looking to Supreme Court and Ninth Circuit precedent for guidance.

2. **One of the federal courts' important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.**

    a. **How would you determine whether statutory or regulatory text was ambiguous?**

RESPONSE: If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding determination of ambiguity. "'[T]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Yates v. United States*, 574 U.S. 528, 537 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). To be ambiguous, "[a] statute must be 'susceptible to more than one reasonable interpretation.'" *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1173 (9th Cir. 2017) (quoting *Alaska Wilderness League v. E.P.A.*, 727 F.3d 934, 938 (9th Cir. 2013)); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (interpreting ambiguous regulations "involves a choice between (or among) more than one reasonable reading"). I would use traditional tools of statutory construction, including textual analysis, analysis of statutory context, and canons of construction, to determine whether the statute at issue is "susceptible to more than one reasonable interpretation" and is therefore ambiguous. Please also see my responses to Question 4.

b. Would you apply different standards to determining whether statutory text and regulatory text were ambiguous? If so, how would the ambiguity standards differ?

RESPONSE: If confirmed, I would apply Supreme Court and Ninth Circuit precedent regarding determining whether statutory text and regulatory text are ambiguous. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Yates v. United States*, 574 U.S. 528 (2015); *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168 (9th Cir. 2017). Please also see my responses to Question 4.

c. When interpreting ambiguous text, what tools would you use to resolve the ambiguity?

RESPONSE: If confirmed, my general approach to resolving textual ambiguity in the event that there were no binding precedent on the meaning of the text would be to first examine statutory context, including the rest of the provision at issue, the act as a whole, and similar provisions elsewhere in the law. If courts other than the Supreme Court and Ninth Circuit had addressed the meaning of the text, I would also look to those courts' decisions as persuasive, though not binding, authority. I would also apply relevant canons of construction, looking to Supreme Court and Ninth Circuit precedent for guidance. *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20 (2003) (applying grammatical "rule of the last antecedent"); *Duncan v. Walker*, 533 U.S. 167 (2001) (applying the rule against surplusage). If those tools of interpretation did not resolve the ambiguity, I would consult legislative history, as the Supreme Court permits. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006).

d. When interpreting ambiguous text, how would you handle two competing and contradictory canons of statutory interpretation?

RESPONSE: I would first attempt to resolve the ambiguity by examining the text and statutory context. If that did not resolve the ambiguity, I would apply the relevant canons of statutory interpretation. If two relevant canons were in conflict with one another, I would look to Supreme Court and Ninth Circuit precedent for guidance on resolving the conflict. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (noting "apparent tension" between two canons and resolving the conflict). If the issue were one that other federal or state courts had addressed, I also would look to those courts' decisions as persuasive, though not binding, authority. If necessary, I would consult the legislative history of the statute, as the Supreme Court permits, to resolve the ambiguity.

3. You gave what appears to be a CLE presentation at a Tribal Water Law Conference in 2018, which said there were differences between the law of treaties and the reality of treaties. One potential difference you highlighted was between the "ethnocentric plain meaning" of a treaty and the treaty as understood through the lens of tribal legal canons.

a. When federal courts seek to understand a treaty between the United States and a tribal nation, what role do you believe tribal laws and canons should play?

RESPONSE: If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding interpretation of Indian treaties. The "Indian canons" are legal canons that have been established and reaffirmed by the Supreme Court. Supreme Court precedent requires that Indian treaties "'be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 206 (1999)). "[T]he words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Id.* (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 676 (1979)). In the above-referenced CLE presentation, I contrasted Supreme Court law regarding treaty rights with the arguments that are sometimes made in litigation that depart from Supreme Court law. The bullet titled "ethnocentric 'plain meaning' arguments" referred to arguments made in litigation that departed from the plain meaning of a treaty term in 1855 and that were based on a taxonomic distinction that did not exist in the tribes' languages or in common English usage at treaty time. *See Makah Indian Tribe v. Quileute Indian Tribe*, Br. in Opp., 2018 WL 3740577, at *23 (U.S. 2018) (describing this theory of the "plain meaning" as "anything but plain, landing somewhere between the two meanings provided by contemporary dictionaries" and "nowhere to be found in the vast trial record"). To the extent the phrase "tribal laws and canons" in this Question refers to a tribe's own laws and canons and not the above-described Indian canons, under Supreme Court

precedent, a tribe's own laws and canons from the time of a treaty may be relevant in interpreting the treaty to the extent such laws and canons reflect the contemporaneous understanding of one or more of the parties to the treaty.

b. As a federal judge, how would you analyze a case in which there was a discrepancy between the way that United States law would interpret a treaty and the way that another sovereign nation's law would interpret the treaty?

RESPONSE: If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding interpretation of treaties.

4. Federal courts usually examine the law de novo because each court is usually obligated to correctly interpret the law to the best of its own ability. But in some cases, federal courts defer to how others interpret the law. A number of Supreme Court decisions outline this deference.

a. What is *Skidmore* deference? Please summarize the Ninth Circuit's *Skidmore* jurisprudence.

RESPONSE: *Skidmore* deference takes its name from the Supreme Court's 1944 opinion in *Skidmore v. Swift & Company*, 323 U.S. 134 (1944). As the Supreme Court explained in *United States v. Mead Corp.*, under *Skidmore* deference, where the *Chevron* doctrine does not apply, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." 533 U.S. 218, 234–235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140 (1944)). *Skidmore* deference similarly applies where an agency's interpretation of its own regulation is not eligible for *Auer* deference. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). A court applying *Skidmore* deference accords the agency's interpretation "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Id.* (quoting *Mead Corp.*, 533 U.S. at 228) (additional citation and quotation marks omitted). The Ninth Circuit's current *Skidmore* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. *See, e.g.*, *Scalia v. Dep't of Transportation & Pub. Facilities*, 985 F.3d 742, 748 (9th Cir. 2021).

b. What is *Chevron* deference? Please summarize the Ninth Circuit's *Chevron* jurisprudence.

RESPONSE: *Chevron* deference takes its name from the Supreme Court's opinion in *Chevron U.S.A., Incorporated v. Natural Resources Defense Council,*

Incorporated, in which the Court stated that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. 467 U.S. 837, 842 (1984). An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. First, a court must evaluate "whether Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If Congress has not "directly addressed the precise question at issue," and "if the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's construction of the ambiguous statute is reasonable, then the court will defer to the agency's construction. *Id.* at 845. The Ninth Circuit's current *Chevron* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. *See, e.g.*, *Route v. Garland*, 996 F.3d 968, 978–82 (9th Cir. 2021) (applying *Chevron* deference to a Board of Immigration Appeals decision).

c. What is *Auer* deference? Please summarize the Ninth Circuit's *Auer* jurisprudence.

RESPONSE: *Auer* deference takes its name from the Supreme Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* followed an earlier Supreme Court decision holding that an agency's interpretation of its own ambiguous regulation is generally "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In examining *Auer*, the Supreme Court has stated that courts "must make an independent inquiry into whether the character and context of the agency interpretation entitles [the interpretation] to controlling weight" because "not every reasonable agency reading of a genuinely ambiguous rule" receives deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). *Auer* deference will be warranted where (1) the regulation is genuinely ambiguous after the reviewing court "exhaust[s] all the 'traditional tools' of construction" and considers the regulation's "text, structure, history, and purpose," *id.* at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9); (2) the agency's interpretation of the regulation is reasonable, *id.* at 2416; (3) the interpretation is the agency's "authoritative" or "official position," *id.*; (4) the agency's interpretation "in some way implicate[s] its substantive expertise," *id.* at 2417; and (5) the interpretation reflects the agency's "fair and considered judgment," *id*. The Ninth Circuit's current *Auer*

jurisprudence is consistent with the Supreme Court's articulation of the doctrine. *See, e.g.*, *Goffney v. Becerra*, 995 F.3d 737, 744–46 (9th Cir. 2021).

d. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference? If so, please explain the difference.

RESPONSE: It appears that the Supreme Court has treated *Seminole Rock* deference as interchangeable with *Auer* deference: "Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference—for the 1945 decision in which we declared that when 'the meaning of [a regulation] is in doubt,' the agency's interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Supreme Court "has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times." *Id.* at 2422. The Ninth Circuit has relied on those two cases interchangeably as well. *See Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009) ("[*Seminole* Rock] provides the basis for . . . *Auer*'s articulation of the proper degree of deference to an ambiguous regulation"); *Goffney v. Becerra*, 995 F.3d 737, 744 (9th Cir. 2021) ("Although *Seminole Rock* represents one of the Supreme Court's earliest expositions of that principle, the doctrine has come to be associated with the Court's more recent decision in *Auer v. Robbins*"). Whatever analytical differences exist between *Seminole Rock* and *Auer*, *Kisor v. Wilkie* is the current controlling authority concerning deference to an agency's interpretations of its own regulations.

5. What is the standard of review in the Ninth Circuit in immigration cases?

RESPONSE: As the Ninth Circuit stated in *Virdiana v. Holder*:

> The proper standard of review in immigration proceedings depends on the nature of the decision under review. Factual determinations are reviewed for substantial evidence. Under this deferential standard, the [Immigration Judge]'s determination must be upheld unless the petitioner can show that a reasonable fact finder would have been compelled to reach a different conclusion. Questions of law are reviewed de novo.

646 F.3d 1230, 1233 (9th Cir. 2011) (internal citations omitted); *see also Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995) (discussing standards); *see also* 8 U.S.C. § 1252(b)(4) and Ninth Circuit Standards of Review Outline.

6. What is the legal basis for a nationwide injunction? What factors would you consider in issuing one?

RESPONSE: Federal Rule of Civil Procedure 65 governs injunctions. The Ninth Circuit has stated that, "[a]lthough 'there is no bar against . . . nationwide relief in federal district court or circuit court,' such broad relief must be '*necessary* to give prevailing parties the relief to which they are entitled.'" *California v. Azar*, 911 F.3d 558, 582–83 (9th Cir. 2018) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987)) (emphasis in *Bresgal* removed in part by *Azar*). The Ninth Circuit also stated that "'nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals.'" *Id.* at 583 (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)).

7. **In *McGowan v. Maryland*, 366 U.S. 420, 442 (1961), the Supreme Court wrote that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." Do you agree that secular actions with some religious overlap can be constitutional?**

   RESPONSE: Yes. The Supreme Court has reaffirmed the above-quoted principle in subsequent cases. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 712 (1989); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983). If confirmed, I would be bound by the Supreme Court's interpretation of the First Amendment and I would follow this binding precedent.

8. **Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? Please describe your view on whether and/or how the Supreme Court has placed limits on church autonomy.**

   RESPONSE: The Supreme Court recently reaffirmed that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, the Supreme Court held that the "ministerial exception," grounded in the First Amendment, "precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. 171, 188 (2012). The Court further held that "it is impermissible for the government to contradict a church's determination of who can act as its ministers"; "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 185, 188. "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188–89. If

confirmed, I would be bound by Supreme Court and Ninth Circuit decisions regarding church autonomy.

9. **After many years of relative quiet, Second Amendment jurisprudence developed into a substantially larger body of law during the past decade. I would appreciate understanding your thoughts on several related questions.**

   a. **According to the Supreme Court, what are the permissible limits on an individual's right to keep and bear arms?**

      RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). The Court stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited"; the right is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The Court instructed that its opinion should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. Furthermore, the "sorts of weapons protected" under the Second Amendment include those "'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). If confirmed, I would be bound by Supreme Court precedent regarding the Second Amendment, and I would follow that precedent.

   b. **Do the Supreme Court's precedents leave room for other constitutionally permissible limits—on an individual's right to keep and bear arms—that the Supreme Court has not already specified?**

      RESPONSE: In *District of Columbia v. Heller*, the Supreme Court stated that it identified "presumptively lawful regulatory measures only as examples" and that its list "does not purport to be exhaustive." 554 U.S. 570, 627 n.26 (2008).

   c. **Is the Second Amendment individual right to "keep" arms at all different from the right to "bear" arms?**

      RESPONSE: In *District of Columbia v. Heller*, the Supreme Court stated that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" 554 U.S. 570, 582 (2008). "Bear arms" "refers to carrying [arms] for a particular purpose—confrontation." *Id.* at 584. "Putting all of these textual elements together," the Court found that they "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 592.

10. You gave a joint presentation for the Oregon State Bar's Indian Law Section in November 2020, where you discussed the Supreme Court's landmark decision in *McGirt v. Oklahoma*. Near the end of your presentation, you had a slide captioned "Possibility of Reversal," which included a picture of Justice Barrett being sworn in by Justice Thomas.

a. What was the purpose of including the slide captioned "Possibility of Reversal" in your presentation?

RESPONSE: The "Possibility of Reversal" slide was suggested by a co-panelist as part of his portion of the joint presentation. I recall that the joint presentation reached its allotted time before all slides could be discussed, including the "Possibility of Reversal" slide. While I suspect that my co-panelist was referring to the fact that Justice Ginsburg, who was part of the 5-4 majority opinion in *McGirt*, had recently passed away and Justice Barrett had been confirmed as her replacement, I am not certain.

b. What effect, if any, do you believe Justice Barrett's confirmation will have on the future of *McGirt v. Oklahoma* and similar decisions regarding treaty law?

RESPONSE: All judges, including Supreme Court Justices, must faithfully apply the law, including law regarding Indian treaties. As a pending nominee, it would be inappropriate for me to speculate regarding what effect, if any, Justice Barrett's confirmation will have on the future of *McGirt v. Oklahoma*, similar decisions regarding treaty law, or any other Supreme Court precedent.

11. Please explain, with detail, the process by which you became a district-court nominee.

RESPONSE: On December 10, 2020, Senators Murray and Cantwell published an "Announcement of Judicial Appointments to the United States District Court for the Western District of Washington." The Announcement stated that the Senators had engaged a bipartisan committee to screen and interview candidates, and directed individuals who were interested in being considered for appointment to any of the five vacant positions on the federal bench in the Western District of Washington to submit an application to the committee by January 4, 2021. On January 4, 2021, I submitted an application to the committee. On February 11, 2021, I interviewed with the committee. On February 16, 2021, I received a notification from the committee chairs that I had been recommended to Washington State's Senators for their consideration. I interviewed with Senator Murray's staff on February 23, 2021, and spoke with Senator Murray on March 8, 2021. I interviewed with Senator Cantwell's staff on February 26, 2021. On March 8, 2021, Senator Murray's staff informed me that the Senators had recommended my name along with six others for the vacancies. On March 8, 2021, I was contacted by attorneys from the White House Counsel's Office to schedule an interview. On March 9, 2021, I interviewed with attorneys from the White House Counsel's Office. Since then, I have

been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 12, 2021, the President announced his intent to nominate me.

12. Have you had any conversations with individuals associated with the group Demand Justice—including, but not limited to, Brian Fallon or Chris Kang—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

RESPONSE: No.

13. Have you had any conversations with individuals associated with the American Constitution Society—including, but not limited, to Russ Feingold—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

RESPONSE: I have not spoken with Russ Feingold. After I submitted my application to the bipartisan committee, I had a conversation with an individual located in Washington State who stated that he was working with the American Constitution Society. During the conversation, this individual provided general information about how the judicial nominations process works in response to my questions regarding the process.

14. Please explain with particularity the process by which you answered these questions.

RESPONSE: I received these questions from the Office of Legal Policy on June 16, 2021. I prepared draft answers by reviewing the questions, conducting research as needed, and reviewing my own writings as needed. After I returned my draft answers, I received feedback from the Office of Legal Policy. I considered this feedback before finalizing and submitting my answers on June 21, 2021.

15. Do the answers in this document reflect your true and personal views?

RESPONSE: Yes.

Nomination of Lauren J. King
to be United States District Judge for the Western District of Washington Questions for the Record
Submitted June 16, 2021

QUESTIONS FROM SENATOR COTTON

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

   RESPONSE: No.

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

   RESPONSE: No.

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

   RESPONSE: As a pending judicial nominee, it would not be appropriate for me to opine on whether Supreme Court precedent was rightly decided, with limited exceptions. *District of Columbia v. Heller* is binding Supreme Court precedent and I would faithfully apply it if confirmed, as I would apply all binding Supreme Court and Ninth Circuit precedent.

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

   RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms unconnected to service in a militia, for traditionally lawful purposes such as self-defense within the home. 554 U.S. 570 (2008).

5. **Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. _____ (2021).**

   RESPONSE: In *Greer v. United States*, the Supreme Court held that "[i]n felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon." No. 19-8709, 2021 WL 2405146, at *7 (U.S. June 14, 2021).[1] When confronted with such an argument or representation, an appellate court "must determine whether the defendant

[1] In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Court "clarified the *mens rea* requirement for firearms-possession offenses, including the felon-in-possession offense"; after *Rehaif*, "the Government must prove not only that the defendant knew he possessed a firearm, but also that *he knew he was a felon* when he possessed the firearm" in felon-in-possession cases. *Greer*, 2021 WL 2405146, at *2 (emphasis in original).

has carried the burden of showing a 'reasonable probability' that the outcome of the district court proceeding would have been different." *Id.*

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. _____ (2021).**

   RESPONSE: In *Terry v. United States*, the Supreme Court held that Section 2(a) of the Fair Sentencing Act modified the statutory penalties only for offenses that triggered mandatory-minimum penalties, and that the First Step Act's authorization of reduction in sentences for such "covered offenses" therefore did not apply to an offender whose prior crack offense did not trigger mandatory-minimum penalties. No. 20-5904, 2021 WL 2405145, at *2, *4–5 (U.S. June 14, 2021).

7. **Please describe what you believe to be the Supreme Court's holding in *Jones v. Mississippi*, 593 U.S. _____ (2021).**

   RESPONSE: In *Jones v. Mississippi*, the Supreme Court held that "a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18," and "an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility" is likewise not required. 141 S. Ct. 1307, 1318–19, 1231 (2021).

8. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 593 U.S. _____ (2021).**

   RESPONSE: In *Tandon v. Newsom*, the Supreme Court held that religious adherents were entitled to an injunction pending appeal because they met the standards for a preliminary injunction in their claim that California's COVID-19 regulations violated the Free Exercise Clause. 141 S. Ct. 1294, 1296–97 (2021). Specifically, California's regulations were not neutral and generally applicable because they treated some comparable secular activities more favorably than at-home religious exercise, thus triggering strict scrutiny. *Id.* at 1297. California failed to satisfy strict scrutiny because it failed to show that "public health would be imperiled" by employing less restrictive measures. *Id.*

9. **Please describe what you believe to be the Supreme Court's holding in *Sanchez v. Mayorkas*, 593 U.S. _____ (2021).**

   RESPONSE: In *Sanchez v. Mayorkas*, the Supreme Court held that the United States' grant of Temporary Protected Status to an individual who entered the United States unlawfully does not render the individual eligible to become a lawful permanent resident under 8 U.S.C. § 1255. No. 20-315, 2021 WL 2301964, at *2, *5 (U.S. June 7, 2021).

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

    RESPONSE: Some litigants choose arbitration as a litigation alternative in civil cases. As a pending judicial nominee, it would be inappropriate for me to opine on the merits or demerits of arbitration as a litigation alternative. If confirmed, I would faithfully apply relevant law, including the Federal Arbitration Act, to the record before me.

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

    RESPONSE: I received these questions from the Office of Legal Policy on June 16, 2021. I prepared draft answers by reviewing the questions, conducting research as needed, and reviewing my own writings as needed. After I returned my draft answers, I received feedback from the Office of Legal Policy. I considered this feedback before finalizing and submitting my answers on June 21, 2021.

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

    RESPONSE: No.

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

Questions for the Record for Lauren Jennifer King, Nominee for the United States District Court for the Western District of Washington

I. Directions

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

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

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

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

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

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

II. Questions

1. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.

RESPONSE: My judicial philosophy is to respect the role of judges in our tripartite system of government, to adjudicate all cases impartially and with absolute fidelity to the law, and to treat all litigants with respect and dignity. As a tribal court judge, my practice has been to carefully review the filings and arguments of the parties, to research relevant law, and to faithfully apply the law to the record before me. If confirmed, I would follow

all Supreme Court precedent regardless of which Justice authored the opinion for the Court, and my decisions would therefore not reflect the approach of any particular Justice.

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

RESPONSE: I do not believe that the meaning of the Constitution changes over time absent changes through the Article V amendment process. I believe that the text of the Constitution expresses core principles that remain constant over time. The Supreme Court has stated that evidence of "*the public understanding* of a legal text in the period after its enactment or ratification . . . . is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original). However, lower court judges must follow Supreme Court precedent regardless of the interpretive approach of a given precedent.

3. 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 pending judicial nominee, it would be inappropriate for me to evaluate proposals to increase or decrease the number of Justices on the Supreme Court. If confirmed, I would be bound by Supreme Court precedent regardless of the number of Justices.

4. Do you personally own any firearms? If so, please list them.

RESPONSE: I do not own any firearms.

5. Have you ever personally owned any firearms?

RESPONSE: I have never owned any firearms.

6. Have you ever used a firearm? If so, when and under what circumstances?

RESPONSE: I have never used a firearm.

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

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). In *McDonald v. City of Chicago*, the Court further held that the Second Amendment right to keep and bear arms is a fundamental right that applies to the states as well the federal government. 561 U.S. 742, 750, 778 (2010).

8. Is the criminal justice system systemically racist?

RESPONSE: I am aware that there are studies on various aspects of the criminal justice system, including studies regarding racial disparities in sentencing, but I am not in a position to evaluate the criminal justice system as a whole. If confirmed, it would be my duty to impartially apply the law to matters that come before me, and I would evaluate claims of racial discrimination on a case-by-case basis consistent with Supreme Court and Ninth Circuit precedent and other applicable law.

9. In October 2018, you gave a presentation at a Tribal Water Law Conference, for which there is little surviving documentation, about "Development Litigation Claims: *Winans*-Based Fishery Claims." In that presentation, you contrasted what you called the "law" on treaties with the "reality" of treaties. You said the "law" included things like "tribes reserve all rights not expressly granted to the United States" and "a treaty must be construed as the signatory tribes would have understood it, with any ambiguities resolved in their favor." By contrast, you said, the "reality" was shaped by "[t]he abrogation parade" and "[e]thnocentric 'plain meaning.'" Please explain the following:

a. **What does "ethnocentric plain meaning" mean?**

RESPONSE: In the above-referenced CLE presentation, I contrasted Supreme Court law regarding treaty rights with arguments that are sometimes made in litigation that depart from Supreme Court law. Supreme Court precedent requires that Indian treaties "'be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 206 (1999)). "[T]he words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Id.* (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 676 (1979)). The bullet in my presentation titled "ethnocentric 'plain meaning' arguments" referred to "plain meaning" arguments made by the opposing party in *Makah Indian Tribe v. Quileute Indian Tribe*, Case No. 17-1592 (U.S. 2018) that departed from the plain meaning of a treaty term in 1855 and that were based on a taxonomic distinction that did not exist in the tribes' languages or in common English usage at treaty time. In that case, I argued on behalf of the Quileute Tribe that the opposing tribe's theory regarding the meaning of the treaty term in 1855 was "anything but plain, landing somewhere between the two meanings provided by contemporary dictionaries," and was "nowhere to be found in the vast trial record." *Makah Indian Tribe v. Quileute Indian Tribe*, Br. in Opp., 2018 WL 3740577, at *23 (U.S. 2018). I argued that the appropriate meaning of the term was "in accordance with the 'popular understanding' at treaty time" and with the "'practical construction adopted by the parties'" at treaty time. *Id.* at *20 (quoting *Mille Lacs,* 526 U.S. at 196).

b. **What does ethnocentric mean?**

RESPONSE: In matters relating to tribal rights under applicable law, the federal government has defined "ethnocentrism" as "viewing the world and the people in it

only from the point of view of one's own culture, and being unable to sympathize with the feelings, attitudes, and beliefs of someone who is a member of a different culture." *See, e.g.*, U.S. Dep't of the Interior, National Park Service, *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* at 4 (1998).

c. **What is plain meaning?**

RESPONSE: *Black's Law Dictionary* defines "plain meaning" as "[t]he meaning attributed to a document (usu[ally] by a court) by giving the words their ordinary sense, without referring to extrinsic indications of the author's intent."

d. **How does the plain meaning of text embody "ethnocentricity"?**

RESPONSE: As my response to Question 9(a) explains, the word "ethnocentric" in my CLE presentation referred to certain litigation arguments regarding the meaning of a treaty term that departed from the term's plain meaning.

10. When you chaired the Washington State Bar Association's Indian Law Section in 2016, the state bar proposed a measure that would either prohibit religious practice at any Washington Bar event or allow limited religious practice under newer, stricter rules. You worked with the Indian Law Section to draft a letter opposing the measure, explaining that it would "effectively preclude[] full study and appreciation of Indian Law"—and that learning about other peoples' cultures fosters "the understanding and tolerance intended by our First Amendment protections." This letter concluded by suggesting that, rather than an outright ban on religious activities, the state bar should permit short blessings or ceremonies that are relevant to a practice area.

a. **When you advocated for this, did you intend for the exception allowing short blessings or ceremonies to apply to all people, of all religious faiths? Please explain.**

RESPONSE: Yes. The letter broadly stated that "The Executive Committee of the Washington State Bar Association's ('WSBA') Indian Law Section ('ILS') strongly urges the WSBA Board of Governors not to prohibit religious practices at CLEs by WSBA Sections." The letter did not limit its proposed exception to a particular group or religion, and instead encouraged the WSBA to "permit short blessings or ceremonies relevant to the practice area."

Senator Josh Hawley
Questions for the Record

Lauren J. King
Nominee, U.S. District Court for the Western District of Washington

1. **Under Supreme Court and U.S. Court of Appeals for the Ninth Circuit precedent, 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: Prisoners "cannot successfully challenge a method of execution unless they establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees,* 553 U.S. 35, 50 (2008)) (additional citation and internal quotation marks omitted). "To prevail on such a claim, 'there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze*, 553 U.S. at 50) (additional citation and internal quotation marks omitted). Prisoners "'cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.'" *Id.* (quoting *Baze*, 553 U.S. at 51). Instead, "prisoners must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52).

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

   RESPONSE: Yes. "[A] requirement of all Eighth Amendment method-of-execution claims" is that the petitioner "identify a known and available alternative method of execution that entails a lesser risk of pain." *Glossip*, 576 U.S. at 867 (2015).

3. **Has the Supreme Court or the U.S. Court of Appeals for the Ninth Circuit 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 case in which the Supreme Court or Ninth Circuit recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime. In *District Attorney's Office for the Third Judicial District v. Osborne*, the Supreme Court "reject[ed] the invitation" of a petitioner to "recognize a freestanding right to DNA evidence untethered from the liberty interests he hope[d] to vindicate with it," and

concluded that, "in the circumstances of this case, that there is no such substantive due process right." 557 U.S. 52, 72 (2009). The Court noted that "[t]here is no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'" *Id.* (quoting *Reno v. Flores,* 507 U.S. 292, 303 (1993)). "[T]he Court's decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing," rejecting "the extension of substantive due process to this area" and leaving "slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (citing *Osborne*, 557 U.S. at 71, 72).

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

   RESPONSE: No.

5.

   a. **Under Supreme Court and U.S. Court of Appeals for the Ninth Circuit precedent, 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 "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–882 (1990)). A law that is both neutral and generally applicable (see my response to Question 5(b) below) need only be rationally related to a legitimate governmental interest to survive a constitutional challenge under the Free Exercise Clause. *See Smith*, 494 U.S. 872; *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). If the state action were subject to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), the Act would provide the legal standard. RLUIPA generally forbids state governments from imposing a substantial burden on religious exercise, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. *Id.* A state government action substantially burdens the free exercise of religion when "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert* [*v. Verner*, 374 U.S. 398 (1963)]) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions ([*Wisconsin v.] Yoder*[, 406 U.S. 205 (1972)])." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–

70 (9th Cir. 2008). The Supreme Court has interpreted the Free Exercise Clause in a number of cases. *See, e.g.*, *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). *See also Holt v. Hobbs*, 574 U.S. 352 (2015) (holding that the Arkansas Department of Correction's grooming policy violated RLUIPA in preventing an inmate from growing a half–inch beard in accordance with his religious beliefs). If confirmed, I would be bound by the Supreme Court and Ninth Circuit and would faithfully follow precedent.

b. Under Supreme Court and U.S. Court of Appeals for the Ninth Circuit precedent, 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: State laws that discriminate against a religious group or religious belief are evaluated under the strict scrutiny standard. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). "Although a law targeting religious beliefs as such is never permissible," if the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," and it is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123, 2021 WL 2459253, at *4 (U.S. June 17, 2021). Furthermore, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990)) (internal quotation marks and citation omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at *5. If the state action were subject to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), the Act would provide the legal standard, as described in my response to Question 5(a). The Supreme Court has adjudicated numerous cases involving a claim that a state governmental action discriminated against a religious group or religious belief. *See, e.g.*, *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012

(2017); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). If confirmed, I would be bound by the Supreme Court and Ninth Circuit and would faithfully follow precedent.

c. What is the standard in the U.S. Court of Appeals for the Ninth Circuit for evaluating whether a person's religious belief is held sincerely?

RESPONSE: The Ninth Circuit follows Supreme Court guidance for evaluating whether a person's religious belief is held sincerely. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). "'[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123, 2021 WL 2459253, at *4 (U.S. June 17, 2021) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)). The Ninth Circuit "recognize[s] that the protections of the free exercise clause do not 'turn upon a judicial perception of the particular belief or practice in question. . . . Courts are not arbiters of scriptural interpretation.'" *Scott v. Rosenberg*, 702 F.2d 1263, 1274 (9th Cir. 1983) (quoting *Thomas,* 450 U.S. at 714, 716). In cases involving free-exercise claims by prisoners, the Ninth Circuit employs a "sincerity test." *See Shakur v. Schriro,* 514 F.3d 878, 884–85 (9th Cir. 2008). Under the sincerity test, a prisoner's religious concern implicates the free exercise clause if it is (1) "sincerely held" and (2) "rooted in religious belief," rather than in secular philosophical concerns. *Malik v. Brown,* 16 F.3d 330, 333 (9th Cir. 1994) (quotations omitted); *see also Penwell v. Holtgeerts*, 386 F. App'x 665, 667 (9th Cir. 2010).

6. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?*

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). The "sorts of weapons protected" under the Second Amendment include those "'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court further held that the District of Columbia's ban on handgun possession in the home "violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635. If confirmed, I would be bound by Supreme Court precedent regarding the Second Amendment, and I would follow that precedent.

7. Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

RESPONSE: The above statement is consistent with the Supreme Court's statement that "our job is to interpret the words [of a statute] consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). If confirmed, I would be bound by Supreme Court and Ninth Circuit precedent, and I would follow that precedent.

Questions for the Record for Lauren J. King
From Senator Mazie K. Hirono

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

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

      RESPONSE: No.

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

      RESPONSE: No.

Senator Mike Lee
Questions for the Record
Lauren J. King, W.D. Washington

1. How would you describe your judicial philosophy?

RESPONSE: My judicial philosophy is to respect the role of judges in our tripartite system of government, to adjudicate all cases impartially and with absolute fidelity to the law, and to treat all litigants with respect and dignity. As a tribal court judge, my practice has been to carefully review the filings and arguments of the parties, to research relevant law, and to faithfully apply the law to the record before me. I describe my approach to interpreting statutes and constitutional provisions in my responses to Questions 2, 3, 4, and 23.

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

RESPONSE: If the statute at issue had previously been interpreted by the Supreme Court or Ninth Circuit, I would follow that precedent. If no precedent existed, I would first analyze the text of the statute. If the text were ambiguous, I would examine statutory context, including the rest of the provision at issue, the act as a whole, or similar provisions elsewhere in the law. If necessary, I would examine decisions of the Supreme Court and the Ninth Circuit interpreting similar provisions or discussing similar issues. If other federal or state courts had interpreted the statute, I also would look to those courts' decisions as persuasive, though not binding, authority. I would apply relevant canons of construction as needed, looking to Supreme Court and Ninth Circuit precedent for guidance. Finally, if necessary, I would consult legislative history, as the Supreme Court permits.

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

RESPONSE: If the constitutional provision at issue had previously been interpreted by the Supreme Court or Ninth Circuit, I would follow that precedent. If no precedent existed, I would first analyze the text of the provision. I generally would look to evidence of the original meaning of any constitutional provision at issue. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . . is a critical tool of constitutional interpretation") (emphasis in original). If other federal or state courts had interpreted the constitutional provision, I would look to those courts' decisions as persuasive, though not binding, authority. I would apply relevant canons of

construction as needed, looking to Supreme Court and Ninth Circuit precedent for guidance.

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

RESPONSE: The Supreme Court has stated that "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . . is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original). However, if confirmed as a lower court judge, I would be bound by both the precedents of the Supreme Court and its method of analysis regardless of whether a given precedent is regarded as "originalist" in approach or not.

5. What are the constitutional requirements for standing?

RESPONSE: The "irreducible constitutional minimum of standing" requires that (1) "the plaintiff must have suffered an injury in fact"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted).

6. Do you believe there is a difference between "prudential" jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

RESPONSE: The Supreme Court has stated that, although some elements of the doctrine of standing "express merely prudential considerations that are part of judicial self-government," the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992). In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, the Supreme Court explained that the "'prudential' branch of standing" is

> "not exhaustively defined" but encompass[es] . . . at least three broad principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."

572 U.S. 118, 126 (2014) (quoting *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 12 (2004)) (additional citation and internal quotation marks omitted). The

Court clarified that although "the modern 'zone of interests' formulation originated . . . as a limitation on the cause of action for judicial review conferred by the [APA]," the Court has since made clear "that it applies to all statutorily created causes of action." *Id.* at 129.

7. How would you define the doctrine of administrative exhaustion?

RESPONSE: "'The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law,'" and provides "'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006) (quoting *McKart v. United States,* 395 U.S. 185, 193 (1969)) (additional citation and internal quotation marks omitted).

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

RESPONSE: Congress's powers are enumerated in Article I, Section 8 of the Constitution. The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers" and "all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. In the seminal case *McCulloch v. Maryland,* Chief Justice Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 4 Wheat. 316, 421 (1819). The Supreme Court has stated that "[t]he scope of the Necessary and Proper Clause is broad"; it "allows Congress to 'adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.'" *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013) (quoting *James Everard's Breweries v. Day,* 265 U.S. 545, 559 (1924)); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000) ("[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution"). In *Kebodeaux*, the Supreme Court listed some of Congress's implied powers:

> The Constitution . . . makes few explicit references to federal criminal law, but the Necessary and Proper Clause nonetheless authorizes Congress, in the implementation of other explicit powers, to create federal crimes, to confine offenders to prison, to hire guards and other prison personnel, to provide prisoners with medical care and educational training, to ensure the safety of those who may come into contact with prisoners, to ensure the public's safety through

> systems of parole and supervised release, and, where a federal prisoner's mental condition so requires, to confine that prisoner civilly after the expiration of his or her term of imprisonment.

570 U.S. at 394–95. As the Supreme Court stated in *United States v. Lopez*, "'the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.'" 514 U.S. 549, 566 (1995) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)).

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

RESPONSE: If confirmed, I would follow the approaches of the Supreme Court and Ninth Circuit in evaluating the constitutionality of a law enacted without reference to a specific enumerated power. The Supreme Court has stated that "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). A court must be able to discern a Constitutional basis for Congress's exercise of power, but that does not mean that a "law must be struck down because Congress used the wrong labels." *Id.* at 569–70. The Supreme Court "ha[s] never required Congress to make particularized findings in order to legislate . . . absent a special concern such as the protection of free speech." *Gonzales v. Raich*, 545 U.S. 1, 21 (2005).

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

RESPONSE: The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Supreme Court has determined that the Constitution protects certain rights that are not expressly enumerated in the Constitution. The Supreme Court has recognized unenumerated rights primarily through the due process clauses of the Fifth and Fourteenth Amendments, holding that due process protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "careful[ly] descri[bed]." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations and internal quotation marks omitted). The Supreme Court has also recognized unenumerated rights stemming from the Ninth Amendment and the Privileges and Immunities Clause of Article IV, section 2. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right of privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision

whether or not to terminate her pregnancy"); *Saenz v. Roe*, 526 U.S. 489, 501 (1999) ("by virtue of a person's state citizenship, a citizen of one State who travels in other States . . . is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits"). Among the unenumerated rights that the Supreme Court has recognized are a right to privacy that includes the right to marital privacy and to use contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)), the right to refuse unwanted medical treatment (*Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990)), the right to terminate a pregnancy in certain circumstances (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)), the right to procreate and direct children's upbringing (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)), the right to bodily integrity (*Rochin v. California,* 342 U.S. 165 (1952)), and the right to marry (*Obergefell v. Hodges*, 576 U.S. 644 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967)).

11. What rights are protected under substantive due process?

RESPONSE: The Supreme Court has held that due process protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "careful[ly] descri[bed]." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations and internal quotation marks omitted). My response to Question 10 lists some of these rights.

12. 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: The Supreme Court has held that due process protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "careful[ly] descri[bed]." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations and internal quotation marks omitted). In *Ferguson v. Skrupa,* the Court stated that "[t]he doctrine that prevailed in *Lochner [v. New York,* 198 U.S. 45 (1905)]*, Coppage [v. Kansas,* 236 U.S. 1 (1915)]*, Adkins [v. Children's Hospital,* 261 U.S. 525 (1923)]*, [Jay] Burns [Baking Co. v. Bryan,* 264 U.S. 504 (1924)], and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." 372 U.S. 726, 730 (1963). The Supreme Court has held that the federal government can regulate in a manner that restricts economic freedom if the regulation at issue is rationally related to a legitimate government interest. *See, e.g.*, *Hodel v. Indiana*, 452 U.S. 314, 331 (1981).

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

RESPONSE: The Supreme Court has held that Congress may regulate three categories of activity under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, . . . *i.e.,* those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558–59 (1995). The Court has further held that activities in the third category—those that "substantially affect" commerce—"may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016) (citing *Wickard v. Filburn,* 317 U.S. 111, 125 (1942)). "While this final category is broad, 'thus far in our Nation's history [Supreme Court] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.'" *Id.* at 2079–80 (quoting *United States v. Morrison,* 529 U.S. 598, 613 (2000)). In cases where the Supreme Court invalidated certain legislation as exceeding Congress's commerce power, the Court emphasized the non-economic nature of the regulated activity. *See, e.g.*, *Morrison*, 529 U.S. at 617–18; *Lopez*, 514 U.S. at 567.

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

RESPONSE: The Supreme Court has described classes possessing "the traditional indicia of suspectness" as those that have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1995) (suspect classifications are those that are "seldom relevant to the achievement of any legitimate state interest"). The Court has held that suspect classes include race, religion, and alienage. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

RESPONSE: As the Supreme Court stated in *Free Enterprise Fund v. Public Company Accounting Oversight Board*:

> The Framers created a structure in which "[a] dependence on the people" would be the "primary controul on the government." The Federalist No. 51, at 349 (J. Madison). That dependence is

> maintained, not just by "parchment barriers," *id.,* No. 48, at 333 (same), but by letting "[a]mbition . . . counteract ambition," giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.,* No. 51, at 349 . . . . And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher [v. Synar*, 478 U.S. 714,] 730[(1986)].

561 U.S. 477, 501 (2010). "Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). "Article III imposes some basic limitations" that serve "two related purposes": (1) protecting each branch from incursion by the others and (2) protecting the individual. *Id.* at 483.

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

RESPONSE: If confirmed, I would analyze a case in which it was alleged that one branch assumed an authority not granted it by the text of the Constitution consistent with Supreme Court and Ninth Circuit precedent analyzing allegations of unauthorized exercises of authority. *See, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *United States v. Morrison*, 529 U.S. 598 (2000); *Clinton v. City of New York*, 524 U.S. 417 (1998); *United States v. Lopez*, 514 U.S. 549 (1995); *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

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

RESPONSE: Judges must "administer justice without respect to persons." 28 U.S.C. § 453. Judges must decide cases impartially and in a manner consistent with the law and facts. Of course, empathy is an important human characteristic, and Canon 3 of the Code of Conduct for United States Judges provides that "[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."

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

RESPONSE: These actions are both improper under the law. I note that statutes generally enjoy a presumption of constitutionality, *see United States v. Morrison*, 529 U.S. 598, 607 (2000), and the Supreme Court recently reaffirmed that courts should "construe [ambiguous] statutes 'to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score,'" *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). If confirmed, I would abide by my duty to follow precedent and faithfully apply the law.

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

RESPONSE. Please see my response to Question 18. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent regardless of the frequency with which the higher courts reached certain conclusions. As a pending judicial nominee, it would be inappropriate for me to opine on the merits of aggressive exercise of judicial review or judicial passivity.

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

RESPONSE: Judicial review refers to the power of courts to review the actions of the other branches of government. *See Marbury v. Madison*, 1 Cranch 137 (1803). Judicial supremacy has been defined differently by scholars. *See, e.g.*, Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. L. Rev. 4, 92 (2001) (defining judicial supremacy as "the idea that the Supreme Court has the last word when it comes to constitutional interpretation (subject only to formal amendment)"); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1406 (2006) (defining judicial supremacy as "a situation in which (1) the courts settle important issues for the whole political system, (2) those settlements are treated as absolutely binding on all other actors in the political system, and (3) the courts do not defer to the positions taken on these matters in other branches (not even to the extent to which they defer to their own past decisions under a limited principle of stare decisis)").

21. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent

practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

RESPONSE: Elected officials have an obligation to follow the Constitution and respect duly rendered judicial decisions. If I were confirmed and confronted with a case regarding an elected official's compliance with the Constitution or judicial decisions, I would faithfully apply precedent and other relevant law to the record before me.

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

RESPONSE: In Federalist 78, Hamilton said that the "courts must declare the sense of the law," while "force" is the prerogative of the executive branch and "will" is the prerogative of the legislative. "[I]f [courts] should be disposed to exercise will instead of judgment, the consequence would be equally the substitution of their pleasure to that of the legislative body." Hamilton emphasized that the independence of the judiciary was essential for it to be an effective check on the other two branches of government. He also emphasized that "the liberty of the people can never be endangered" by a judiciary that "remains truly distinct" from the other branches. It is important for judges to keep the judiciary's limited authority in mind in accordance with the Supreme Court's interpretation of Article III as confining courts to the consideration of "cases" or "controversies" and to "say[ing] what the law is." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803).

23. How would you describe your approach to reading statutes—how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

RESPONSE: If the statute at issue had previously been interpreted by the Supreme Court or Ninth Circuit, I would follow that precedent. If no precedent existed, I would analyze the text of the statute. If the text were clear and unambiguous, I would generally not look further than the text. Statutory text should generally be construed in accordance with its meaning at the time Congress enacted the statute. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute'") (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)).

24. 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: A lower court judge is obligated to faithfully apply Supreme Court and circuit precedent that governs the resolution of the issue at hand. If precedent did not govern the issue at hand, I would apply the methodology described in my responses to Questions 2, 3, 4, and 23, along with relevant canons and rules, including those listed in my response to Question 18.

25. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

RESPONSE: No. Federal courts are courts of limited jurisdiction and have no authority to adjudicate cases over which they have no jurisdiction.

26. 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: Generally, none. The factors to be considered in sentencing are set forth in 18 U.S.C. §3553(a). Race, gender, nationality, sexual orientation, and gender identity are not listed in 18 U.S.C. §3553(a). In addition, the Sentencing Commission has issued guidelines providing, among other things, that race, sex, national origin, creed, religion, and socioeconomic status "are not relevant in the determination of a sentence." United States Sentencing Commission, Guidelines Manual § 5H1.10 (Nov. 1992); *see also* 18 U.S.C. § 3553(a)(5) (directing judges to consider pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2)).

27. Ms. King, you gave a presentation in 2018 that described arguments based on the plain meaning of a treaty's text as "ethnocentric." In your testimony, you said you "didn't recall making that argument." For the record, could you explain the connection between "plain meaning" arguments and "ethnocentri[sm]?"

RESPONSE: I have reviewed my 2018 presentation since providing my testimony to refresh my recollection regarding that portion of the presentation. In that CLE presentation, I contrasted Supreme Court law regarding treaty rights with the

arguments that are sometimes made in litigation that depart from Supreme Court law. Supreme Court precedent requires that Indian treaties "'be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 206 (1999)). "[T]he words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" *Id.* (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 676 (1979)). The bullet in my presentation titled "ethnocentric 'plain meaning' arguments" referred to "plain meaning" arguments made by the opposing party in *Makah Indian Tribe v. Quileute Indian Tribe*, Case No. 17-1592 (U.S. 2018) that departed from the plain meaning of a treaty term in 1855 and that were based on a taxonomic distinction that did not exist in the tribes' languages or in common English usage at treaty time. In that case, I argued on behalf of the Quileute Tribe that the opposing tribe's theory regarding the meaning of the treaty term in 1855 was "anything but plain, landing somewhere between the two meanings provided by contemporary dictionaries," and was "nowhere to be found in the vast trial record." *Makah Indian Tribe v. Quileute Indian Tribe*, Br. in Opp., 2018 WL 3740577, at *23 (U.S. 2018). I argued that the appropriate meaning of the term was "in accordance with the 'popular understanding' at treaty time" and with the "'practical construction adopted by the parties'" at treaty time. *Id.* at *20 (quoting *Mille Lacs,* 526 U.S. at 196).

28. You also suggested, in the same presentation, that Indian legal canons might also have bearing on how treaties between the United States and tribal nations should be read. Do you believe it is acceptable to use non-U.S. legal doctrines in U.S. courts to interpret U.S. law?

RESPONSE: The "Indian canons" are United States legal doctrines that have been established and reaffirmed by the Supreme Court, so I would like to clarify that I was not arguing in favor of non-U.S. legal doctrines being used in U.S. courts to interpret U.S. law. As the Supreme Court explained in *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, *Choctaw Nation v. United States,* 318 U.S. 423, 431–432, 63 S.Ct. 672, 677–678, 87 L.Ed. 877 (1943); *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), with ambiguous provisions interpreted to their benefit, *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); *Winters v. United States,*

> 207 U.S. 564, 576–577, 28 S.Ct. 207, 211–212, 52 L.Ed. 340 (1908). "Absent explicit statutory language," *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979), this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. *Menominee Tribe v. United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). See generally F. Cohen, Handbook of Federal Indian Law 221–225 (1982 ed.)[.]

470 U.S. 226, 247 (1985) (noting that "[t]he Court has applied similar canons of construction in nontreaty matters"); *see also Confederated Tribes of Chehalis Indian Rsrv. v. State of Wash.*, 96 F.3d 334, 340 (9th Cir. 1996) (under heading "Indian Canons of Construction," stating that "[c]ourts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights," and that "[a]ny ambiguities in construction must be resolved in favor of the Indians").

29. If confirmed, will you commit to interpreting treaties based solely on binding Supreme Court and Ninth Circuit legal precedent?

RESPONSE: If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding interpretation of treaties, just as I would for all other legal topics.

30. Ms. King, in 2017, you joined a letter to then-Attorney General Jeff Sessions criticizing some of President Trump's comments regarding federal judges. The letter expressed concern that some of those comments "spread misunderstanding about the role of judges in a constitutional democracy, with potentially grave consequences." Do you believe it was appropriate for the current Majority Leader, Sen. Schumer, to threaten Justices Kavanaugh and Gorsuch on the steps of the Supreme Court by saying: "you have unleashed the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions?"

RESPONSE: As the 2017 letter states, "judges are ethically constrained from responding directly to such conduct." As a pending judicial nominee, it would be inappropriate for me to opine on Senator Schumer's conduct.

a. Relatedly, do you believe it was appropriate for Senate Democrats to write, in an amicus brief, that "the Supreme Court is not well . . . and the people know it. Perhaps the Court can heal itself before the public demands that it be "'restructured'"—which, of course, is a euphemism for courtpacking—do you think that was appropriate?

RESPONSE: Please see my response to the first part of Question 30. If confirmed, I would be bound by Supreme Court precedent regardless of the number of Justices.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 9, 2021

For Commissioner Lauren King:

1. **Please list some examples from your time as a judge of when your rulings conflicted with your personal policy preferences or personal sense of justice.**

   RESPONSE: Consistent with my oath as a tribal court judge, my personal policy preferences and personal sense of justice have played no role in my decision-making. I issued my decisions based solely upon the law and the record before me. As a pending judicial nominee and a sitting tribal court judge, I must act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and for that reason it would be inappropriate for me to list examples of decisions that conflicted with my personal preferences.

For all nominees:

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: My judicial philosophy is to respect the role of judges in our tripartite system of government, to adjudicate all cases impartially and with absolute fidelity to the law, and to treat all litigants with respect and dignity. As a tribal court judge, my practice has been to carefully review the filings and arguments of the parties, to research relevant law, and to faithfully apply the law to the record before me.

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

   RESPONSE: Because commentators' descriptions of the various judicial philosophies are not consistent, I would not use a particular label to describe my philosophy. I believe that the text of a law should generally be construed in accordance with its meaning at the time of enactment. The Supreme Court has stated that "the examination of a variety of legal

and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. . . . is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *see also Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("our job is to interpret the words consistent with their 'ordinary meaning ... at the time Congress enacted the statute'") (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). However, if confirmed as a lower court judge, I would be bound by both the precedents of the Supreme Court and its method of analysis regardless of whether a given precedent is regarded as "originalist" in approach or not.

5. Would you describe yourself as a textualist?

RESPONSE: Because commentators' descriptions of the various judicial philosophies are not consistent, I would not use a particular label to describe my philosophy. I believe that the text of a law should generally be construed in accordance with its meaning at the time of enactment. The Supreme Court has stated that "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. . . . is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *see also Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("our job is to interpret the words consistent with their 'ordinary meaning ... at the time Congress enacted the statute'") (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). However, if confirmed as a lower court judge, I would be bound by both the precedents of the Supreme Court and its method of analysis regardless of whether a given precedent is regarded as "textualist" in approach or not.

6. Do you believe the Constitution is a "living" document? Why or why not?

RESPONSE: I do not believe that the Constitution is "living" in the sense that it changes over time, but rather that the Constitution expresses core principles that remain constant over time. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, the Constitution was intended "to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." 4 Wheat. 316, 415 (1819).

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 admire all Supreme Court Justices for different reasons that would not be possible to rank. If confirmed, I would apply all Supreme Court precedent regardless of which Justice authored the opinion for the Court or which Justices joined in the majority opinion.

8. Was Marbury v. Madison correctly decided?

RESPONSE: As a pending judicial nominee, it would generally not be appropriate for me to opine on whether Supreme Court precedent was rightly decided, because if confirmed I would be bound to apply binding Supreme Court precedent regardless of any personal beliefs I had about the decision. However, as numerous prior judicial nominees have done,

I would make an exception to the practice of not opining on the correctness of Supreme Court decisions to acknowledge that *Marbury v. Madison*, *Brown v. Board of Education*, and *Loving v. Virginia* were correctly decided. If confirmed, I would faithfully apply all Supreme Court and Ninth Circuit precedent.

9. Was Lochner v. New York correctly decided?

RESPONSE: Please see my response to Question 8.

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

RESPONSE: Please see my response to Question 8.

11. Was Bolling v. Sharpe correctly decided?

RESPONSE: Please see my response to Question 8.

12. Was Cooper v. Aaron correctly decided?

RESPONSE: Please see my response to Question 8.

13. Was Mapp v. Ohio correctly decided?

RESPONSE: Please see my response to Question 8.

14. Was Gideon v. Wainwright correctly decided?

RESPONSE: Please see my response to Question 8.

15. Was Griswold v. Connecticut correctly decided?

RESPONSE: Please see my response to Question 8.

16. Was South Carolina v. Katzenbach correctly decided?

RESPONSE: Please see my response to Question 8.

17. Was Miranda v. Arizona correctly decided?

RESPONSE: Please see my response to Question 8.

18. Was Loving v. Virginia correctly decided?

RESPONSE: Please see my response to Question 8.

19. Was Katz v. United States correctly decided?

RESPONSE: Please see my response to Question 8.

20. Was Roe v. Wade correctly decided?

RESPONSE: Please see my response to Question 8.

21. Was Romer v. Evans correctly decided?

RESPONSE: Please see my response to Question 8.

22. Was United States v. Virginia correctly decided?

RESPONSE: Please see my response to Question 8.

23. Was Bush v. Gore correctly decided?

RESPONSE: Please see my response to Question 8.

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

RESPONSE: Please see my response to Question 8.

25. Was Crawford v. Marion County Election Bord correctly decided?

RESPONSE: Please see my response to Question 8.

26. Was Boumediene v. Bush correctly decided?

RESPONSE: Please see my response to Question 8.

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

RESPONSE: Please see my response to Question 8.

28. Was Shelby County v. Holder correctly decided?

RESPONSE: Please see my response to Question 8.

29. Was United States v. Windsor correctly decided?

RESPONSE: Please see my response to Question 8.

30. Was Obergefell v. Hodges correctly decided?

RESPONSE: Please see my response to Question 8.

31. 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: Generally, a Ninth Circuit panel "'will not overrule the decision of a prior panel of our court absent an en banc proceeding, or a demonstrable change in the underlying law.'" *United States v. Walker*, 953 F.3d 577, 579–80 (9th Cir. 2020) (quoting *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1070 (9th Cir. 2015)). Federal Rule of Appellate Procedure 35 provides that an en banc hearing or rehearing is not favored and ordinarily will not be ordered unless it is "necessary to secure and maintain uniformity of the court's decisions," as when a panel decision conflicts with Supreme Court precedent, or the case involves "one or more questions of exceptional importance." With respect to whether "a demonstrable change in the underlying law" has occurred, the Ninth Circuit has stated that "circuit precedent, authoritative at the time that it issued, can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent." *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (quoting *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1123 (9th Cir. 2002)). A Ninth Circuit panel "'may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.'" *Id.* (quoting *Galbraith,* 307 F.3d at 1123) (additional citation and internal quotation marks omitted). The issues decided by the Supreme Court "need not be identical in order to be controlling"; "[r]ather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900. If the Ninth Circuit "can apply [its] precedent consistently with that of the higher authority, [it] must do so." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019).

32. 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 response to Question 31.

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

RESPONSE: No. Judges must apply the sentencing guidelines to each defendant individually in accordance with the factors laid out in 18 U.S.C. § 3553(a). Among these factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Sentencing Commission has cautioned that unwarranted sentencing disparities based on race foster disrespect for, and lack of confidence in, the criminal justice system. *See Kimbrough v. United States*, 552 U.S. 85, 98 (2007).

Questions for the Record for
Senator Thom Tillis for
Questions for Ms. Lauren Jennifer King

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, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial activism, so defined, is not appropriate.

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

   RESPONSE: It is an expectation. Numerous statutes and the Code of Conduct for United States Judges require judges to adjudicate their cases impartially. *See, e.g.*, 28 U.S.C. §§ 144, 453, 455; Code of Conduct for United States Judges, Canon 3.

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: Faithfully interpreting the law is desirable because it promotes consistency and predictability in the justice system. A judge is to administer justice "without respect to persons," 28 U.S.C. § 453, including those persons' potential perceptions of the desirability or undesirability of the outcome.

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: If confirmed, I will faithfully apply the Constitution and Supreme Court and Ninth Circuit precedent regarding the Second Amendment, including but not limited to

District of Columbia v. Heller, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

RESPONSE: If confirmed, I would evaluate any lawsuit regarding handgun regulations or COVID-19 restrictions consistent with Supreme Court and Ninth Circuit precedent. I would evaluate such a lawsuit by carefully reviewing the parties' filings and arguments, analyzing the text of the relevant policy or law, researching relevant precedent and other applicable law, and applying the law to the record before me. The hypotheticals in this Question involve facts similar to those in ongoing litigation. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Corlett*, No. 20-843, 2021 WL 1602643, at *1 (U.S. Apr. 26, 2021) (granting certiorari on the question of "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment"); *Desrosiers v. Baker*, No. 20-1569, Petition for Certiorari (U.S. May 10, 2021) (constitutional challenge to COVID-19 regulations). Canon 3 of the Code of Conduct for United States Judges cautions against commenting on the merits of pending matters.

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: If confirmed, I would consider Supreme Court and Ninth Circuit precedent and other applicable law on qualified immunity. I would faithfully apply that law to the record before me to determine whether to grant qualified immunity to law enforcement personnel and departments. In *Harlow v. Fitzgerald*, the Supreme Court established an objective reasonableness test for qualified immunity based on whether the official violated clearly established federal law. 457 U.S. 800 (1982). 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." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *see also City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation and internal quotation marks omitted). An official who violated clearly established federal law of which a reasonable person would have known will not be protected by qualified immunity. *See, e.g.*, *C.B. v. City of Sonora*, 769 F.3d 1005, 1029–31 (9th Cir. 2014).

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: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a policy matter best left to legislative bodies to consider. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent and other applicable law on qualified immunity.

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

RESPONSE: The proper scope of qualified immunity protections for law enforcement is a policy matter best left to legislative bodies to consider. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent and other applicable law on qualified immunity.

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

RESPONSE: I am aware of ongoing commentary regarding the current state of Section 101 jurisprudence. *See, e.g.*, *Yu v. Apple Inc.*, No. 2020-1760, 2021 WL 2385520, at *7 (Fed. Cir. June 11, 2021) (Newman, J., dissenting); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, Case No. 20-891, *Amici Curiae* Brief of United States Senator Thom Tillis, Honorable Paul R. Michel, and Honorable David J. Kappos in Support of Petition for Certiorari (U.S. March 12, 2021). If confirmed, I would be bound to do my best to follow all Supreme Court precedent regardless of whether the precedent was clear or "muddled." I would faithfully apply Supreme Court and Ninth Circuit precedent and other applicable law regarding patent eligibility.

13. 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: The Supreme Court has set forth a two-step framework for "distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014) (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 132 S. Ct. 1289 (2012)). A court must first "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If the court determines that the claims are directed to a patent-ineligible concept, the court must then ask, "'What else is there in the claims before us?'" and accordingly "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.* (quoting *Mayo Collaborative Services*, 132 S. Ct. at 1297, 1298). The Court described the latter step of the framework as "a search for an 'inventive concept'—*i.e.,* an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more

than a patent upon the [ineligible concept] itself.'" *Id.* at 217–18 (quoting *Mayo Collaborative Services*, 132 S. Ct. at 1294). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent and other applicable law regarding patent ineligibility. I would also strive for clarity and consistency in my decisions.