Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Daniel Calabretta
Judicial Nominee to the United States District Court for the Eastern District of California

1. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: The Supreme Court has held that certain unenumerated rights are protected by the Due Process Clause of the Fourteenth Amendment. In *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that such rights are objectively "deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."

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

   Response: This is not how I approach my current job as a superior court judge. If I were confirmed to the federal bench, I likewise would not apply my value judgments in reaching any decision. Rather, I would apply the binding precedent of the Supreme Court and the Ninth Circuit and make my decisions in accordance with the law as it applies to the facts before me.

3. **Please define the term "living constitution."**

   Response: *Black's Law Dictionary* (11th ed. 2019) defines the term living constitution as "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values."

4. **Do you think that election integrity is a problem in this country? Please explain.**

   Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. In general, questions related to ensuring election integrity are best left to policymakers.

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

   Response: I am unfamiliar with Justice Ketanji Brown Jackson's statement or her views on a living constitution. However, I believe the Constitution has a fixed meaning, and can only be altered through the process set forth in Article V.

6. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

Response: As a Superior Court Judge, I am keenly aware of how important cases are to the litigants in a trial court. I acknowledge that fact by treating each litigant with respect, ensuring that they have the opportunity to be heard, and keeping an open mind. For each case before me, I ensure that I am adequately prepared and that I am knowledgeable about the facts and law of each case so that I can make a fair and impartial decision. If I were confirmed, I would take that same approach to deciding cases as a federal district court judge. I am unaware of a particular Supreme Court decision that exemplifies my judicial philosophy.

7. **Please identify a Ninth Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: Please see may answer to Question 6. I am unaware of a particular Ninth Circuit decision that exemplifies my judicial philosophy.

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

   Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. In general, questions related to law enforcement funding are best left to policymakers.

9. **Is the right to petition the government a constitutionally protected right?**

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

10. **What role should empathy play in sentencing defendants?**

    Response: While a judge can and should treat all parties with dignity and respect, empathy should not play a role in a judge's consideration of a case. Rather, the judge is bound to apply the law and binding precedent to the facts of the case.

11. **Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?**

    Response: While criminal defendants have a right to an attorney under the Sixth Amendment, civil litigants generally do not have a right to an attorney under federal law. I do not have a further opinion about this statement.

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

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

Response: Yes. As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. However, because *Brown v. Board of Education* is so widely accepted and unlikely to be relitigated, I believe I can state my view that *Brown* was correctly decided.

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

Response: Yes. As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. However, because *Loving v. Virginia* is so widely accepted and unlikely to be relitigated, I believe I can state my view that *Loving* was correctly decided.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit. Furthermore, *Roe v. Wade* was overruled in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and is no longer good law.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit. Furthermore, *Planned Parenthood v. Casey* was overruled in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and is no longer good law.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit, including *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

i. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

j. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

13. **Is threatening Supreme Court justices right or wrong?**

Response: Depending on the underlying facts, threats against Supreme Court Justices may violate the law.

14. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 criminalizes picketing or parading in or near a building housing a court of the United States, or in or near a building or residence occupied or used by a judge, juror, witness, or court officer with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty.

15. **Under Supreme Court precedent, is 18 USC § 1507 or a state analog statute constitutional on its face?**

Response: I am unaware of any decisions interpreting 18 U.S.C. § 1507 or a state analogue.

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

Response: Under the "fighting words" doctrine, words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected under the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However, the Supreme Court has cautioned that any restriction on fighting words must be content neutral. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

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

Response: The "true threat" doctrine "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

18. **During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

Response: No.

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

Response: No.

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

Response: In early 2021, a former colleague who is associated with the American Constitution Society asked if I was applying to be a federal district court judge, and if so whether she could pass along my name to the American Constitution Society, and I responded affirmatively. I have not had any contact with anyone associated with the American Constitution Society since.

21. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New**

Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

    Response: No.

23. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

24. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

Response: I received an email from Mr. Brooks that was sent to all former clerks of Judge William Fletcher. In addition, I spoke to Mr. Brooks and Mr. Goldberg for approximately 15 minutes in October 2021 regarding the application process generally.

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

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

Response: No.

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

Response: Not applicable.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

27. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

28. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**
    a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert**

Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?

Response: No.

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

Response: In February 2021, I submitted an application to be a United States District Judge for the Eastern District of California to the Selection Committees of Senators Dianne Feinstein and Alex Padilla. I was interviewed by members of Senator Padilla's committee in December 2021. I was interviewed by members of Senator Feinstein's committee in January 2022 and in March 2022. On April 28, 2022, I interviewed with a member of Senator Padilla's committee. On May 18, 2022, I interviewed with attorneys from the White House Counsel's Office. Since May 21, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

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

Response: I received the questions on October 19, 2022, from the Office of Legal Policy. I drafted my response to each question after reviewing the questions and conducting any necessary legal research. I provided my draft responses to the Office of Legal Policy at the Department of Justice. I received feedback from the Office of Legal Policy regarding my draft responses, which I considered before finalizing my responses.

Questions for the Record for Daniel J. Calabretta
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
Daniel Calabretta, Nominee to the United States District Court for the Eastern District of California

1. How would you describe your judicial philosophy?

Response: As a Superior Court Judge, I am keenly aware of how important cases are to the litigants in a trial court. I acknowledge that fact by treating each litigant with respect, ensuring that they have the opportunity to be heard, and keeping an open mind. For each case before me, I ensure that I am adequately prepared and that I am knowledgeable about the facts and law of each case so that I can make a fair and impartial decision. If I were confirmed, I would take that same approach to deciding cases as a federal district court judge.

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

Response: If confirmed, in deciding a case that turned on the interpretation of a federal statute I would start with the text itself, accompanied by any binding precedent that interprets the statute at issue. If there is no binding precedent, I would consult dictionary definitions and canons of construction. If that did not resolve the issue, I would consult precedents from other circuits, as well as decisions interpreting similar texts. If the text was ambiguous after taking these steps, only then would I consult legislative history that provides clear evidence of congressional intent.

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

Response: If confirmed, in deciding a case that turned on the interpretation of a constitutional provision, I would follow the precedents of the Supreme Court and Ninth Circuit. In the unlikely event that there was no binding precedent, I would look to the plain text, and would adhere to the plain meaning of the text if that resolved the issue. If the constitutional provision were ambiguous, I would look to other circuit courts for persuasive authority, and I would apply the interpretative tools specified by Supreme Court and Ninth Circuit precedent.

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 original meaning of the text should guide judges in interpreting certain provisions of the Constitution. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). If I were confirmed as a district court judge, I would follow Supreme Court and Ninth Circuit precedent and apply the interpretive tools required by those decisions.

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

Response: Please see my response to Question 2.

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

Response: The plain meaning of a statute or constitutional provision generally refers to the public understanding at the time of enactment. If confirmed, I would follow Supreme Court and Ninth Circuit precedent in determining the plain meaning of a statute or constitutional provision.

6. What are the constitutional requirements for standing?

Response: Under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the "irreducible constitutional minimum of standing" contains three elements. First, a plaintiff must have suffered an "injury-in-fact," which refers to a legally protected interest that is concrete and particularized, the invasion of which is actual or imminent. Second, there must be a causal connection between the injury and the defendant's conduct. Third, it must be likely that the injury will be redressed by a favorable decision by the court.

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

Response: Yes. Under Article I, Section 8, Congress has 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 this Constitution in the Government of the United States, or in any Department or Officer thereof." A prime example of these implied powers is the creation of a federal bank which was the subject of *McColloch v. Maryland*, 17 U.S. 316 (1819).

8. 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 apply Supreme Court and Ninth Circuit precedent to evaluate the constitutionality of that law.

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

Response: The Supreme Court has held that certain unenumerated rights are protected by the Due Process Clause of the Fourteenth Amendment. In *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that such rights are objectively "deeply rooted in this Nation's history and

tradition" and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Those rights include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and to use contraception, *id.; Eisenstadt v. Baird*, 405 U.S. 438 (1972).

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9.

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

Response: My personal beliefs would not factor into a decision regarding which rights are protected by substantive due process. Rather, if confirmed I would follow Supreme Court and Ninth Circuit precedent in determining which rights are protected under substantive due process. In addition, under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), abortion is not a right that is protected by substantive due process, and *Lochner* was abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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

Response: The Commerce Clause permits Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., Art. I, § 8. In *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005), the Supreme Court recognized three general categories of interstate commerce that Congress is authorized to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.

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

Response: In order to constitute a suspect class, the trait that defines the group must be immutable, the group must have been historically discriminated against and lack political power, and the trait must bear no relation to the ability to perform or contribute to society. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973); *San Diego Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lyng v. Castillo*, 477 U.S. 635 (1986). The Supreme Court has recognized race, national origin, alienage, and religion as suspect classes to which strict scrutiny would apply.

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

Response: The Constitution divides power between three co-equal branches of Government: the executive, the legislative, and the judicial branches. By dividing power into three branches, each of which operates to check the others, the Framers sought to protect against tyranny and preserve liberty.

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

Response: If confirmed, I would review the facts of the case as well as binding precedent of the Supreme Court and Ninth Circuit in order to determine if one branch had improperly assumed an authority not granted it by the text of the Constitution.

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

Response: While a judge can and should be treat all parties with dignity and respect, empathy should not play a role in a judge's consideration of a case. Rather, the judge is bound to apply the law and any binding precedent to the facts of the case.

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

Response: Both outcomes are inconsistent with the rule of law and should be avoided.

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

Response: I have not researched what may have caused an increase in the invalidation of federal statutes. If confirmed, I would apply binding precedent of the Supreme Court and Ninth Circuit, and I would only invalidate a federal statute if compelled to do so by those authorities.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines judicial review as "[a] court's power to review the actions of other branches or levels of government; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional." Judicial supremacy, on the other hand, is defined as the "doctrine

that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

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

Response: All elected officials take an oath to support the Constitution of the United States and have a personal obligation to follow the Constitution in performing their duties. That obligation includes following the decisions of the Supreme Court even if the official disagrees with that decision.

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

Response: Federalist 78 is based on the fact that the role of the judiciary is limited to deciding the cases or controversies before them based on the applicable law, and without regard to judges' personal views.

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

Response: If confirmed, I would apply Supreme Court and Ninth Circuit precedent to any case before me. It would not be appropriate for me to question the wisdom of a particular precedent.

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

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including

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

Response: I am unfamiliar with this statement or the context in which it was made, and I do not have an opinion with respect to this definition of equity or any other.

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

Response: Other than referring to dictionary definitions of the terms, I do not have a view of the difference between those terms as a judicial nominee.

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

Response: The Equal Protection Clause does not utilize the term equity, but rather provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent in analyzing any claim brought under the Equal Protection Clause.

27. How do you define "systemic racism?"

Response: While there are likely many definitions of systemic racism, I understand it to refer to unequal treatment or disparate impact on individuals on the basis of race that is due to institutional systems or structures.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines the term as "A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

Response: Other than referring to the definitions in Questions 27 and 28, I do not have an opinion on this issue.

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

Questions for the Record for Daniel J. Calabretta, nominated to be United States District Judge for the Eastern District of California

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

   Response: Racial discrimination is illegal, and any law or governmental action that discriminates on the basis of race is subject to strict scrutiny.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

   Response: The Supreme Court in *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997), provided the framework for considering whether the Constitution protects an unenumerated right. If I were confirmed, and confronted with a claim that an unenumerated right not recognized by the Supreme Court exists, I would apply the framework in *Glucksburg* and any other precedent of the Supreme Court and the Ninth Circuit.

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

   Response: As a Superior Court Judge, I am keenly aware of how important cases are to the litigants in a trial court. I acknowledge that fact by treating each litigant with respect, ensuring that they have the opportunity to be heard, and keeping an open mind. For each case before me, I ensure that I am adequately prepared and that I am knowledgeable about the facts and law of each case so that I can make a fair and impartial decision. If I were confirmed, I would take that same approach to deciding cases as a federal district court judge. While I do not believe that any particular Justice embodies that philosophy more than any other, as a former law clerk to Justice Stevens I would strive to embody the humility and kindness that Justice Stevens evinced while he was a member of the Supreme Court.

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

   Response: I understand originalism to be a method of constitutional interpretation whereby the meaning of the Constitution is derived from the meaning the document had at the time it was adopted. I do not subscribe to a particular method of constitutional interpretation. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents, including using the interpretive method of originalism where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: I understand living constitutionalism to be a doctrine whereby the meaning of the Constitution can change in response to changing circumstances and changing social values. I do not subscribe to a particular method of constitutional interpretation. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents.

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

Response: If I were confirmed and presented with a constitutional issue of first impression whose resolution is not controlled by binding precedent, and the original public meaning of the Constitution was clear, I would follow that original public meaning.

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

Response: Unless required by binding Supreme Court or Ninth Circuit precedent, I do not believe the public's current understanding of a constitutional or statutory provision would be relevant in determining its meaning.

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

Response: No.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. However, because *Brown v. Board of Education* is so widely accepted and unlikely to be relitigated, I believe I can state my view that *Brown* was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: 18 U.S.C. § 3142(e)(3) lists offenses for which it is presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community. Those offenses include (1) certain drug offenses carrying a maximum term of imprisonment of ten years or more; (2) certain acts of terrorism; (3) acts involving slavery or human trafficking; (4) crimes involving younger victims.

a. **What are the policy rationales underlying such a presumption?**

Response: The presumption in favor of pretrial detention reflects Congress's determination that defendants accused of the certain crimes present a greater flight risk or danger to the community.

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

Response: Yes. Supreme Court precedent requires that the government show that any law that burdens religious exercise is neutral and generally applicable; if it is not, then the government is required to show that it is narrowly tailored to meet a compelling governmental interest. *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). If the law treats any comparable secular activity more favorably than religious exercise, or if the government acts in a manner that is hostile to religious beliefs, then strict scrutiny would apply. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Under the Religious Freedom Restoration Act (RFRA), any federal law that substantially burdens the exercise of religion must serve a compelling governmental interest, and be the least restrictive means of furthering that compelling state interest. *See* 42 U.S.C. § 2000bb-1; *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: Supreme Court precedent requires that the government show that any law that burdens religious exercise is be neutral and generally applicable; if it is not, then the government is required to show that it is narrowly tailored to meet a compelling governmental interest. *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). If the law treats any comparable secular activity more favorably than religious exercise, or if the government acts in a manner that is hostile to religious beliefs, then strict scrutiny would apply. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). A government action that discriminates against a religious organization or religious people is not neutral and generally applicable and would be subject to strict scrutiny.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court enjoined an Executive Order issued by the Governor of New York in response to the COVID-19 pandemic capping the number of individuals who could participate in religious services in certain designated areas. While the order restricted the number of individuals at religious gatherings, it treated secular businesses differently, allowing essential businesses to admit an unlimited number of individuals. *Id*. at 66. Because the law was not neutral and generally applicable, the Supreme Court applied strict scrutiny to the Executive Order. *Id*. at 67, *citing Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Considering the requirements for injunctive relief, the Court first concluded that the petitioner had shown a likelihood of success on the merits. Although the Court concluded that preventing the spread of COVID-19 was a compelling interest, it concluded the law was not narrowly tailored to meet that interest. The Supreme Court noted the regulations were much tighter than those adopted in other jurisdictions and far more severe than were required to prevent the spread of COVID-19. As to irreparable harm, the Court concluded that the loss of First Amendment freedoms unquestionably constitutes irreparable injury. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. Finally, the Court concluded that granting the injunction was in the public interest. *Id*. at 68.

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

Response: As in *Roman Catholic Diocese of Brooklyn*, the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), enjoined a COVID-19 restriction in California that prohibited more than three households from gathering for religious worship. Because

California treated some secular activities more favorably than it did religious activities, strict scrutiny applied. The Supreme Court concluded that "where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id*. at 1297. California was unable to make that showing, and the Supreme Court rejected the distinction California officials drew between activities in public versus private buildings. *Id*.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018), the Supreme Court concluded that the Colorado Civil Rights Commission violated the Free Exercise Clause of the First Amendment when it treated petitioner's case with a "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." In that case, a baker declined to bake a wedding cake for a same-sex couple based on his religious opposition to their marriage. In reviewing the complaint filed by the same-sex couple, members of the Commission made disparaging remarks regarding the baker's religious beliefs. *Id.* The Court concluded the statements "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint," *id*. at 1731, and invalidated the Commission's order.

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

Response: Yes. The Supreme Court has concluded that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Court are not arbiters of scriptural interpretation." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981); *see also Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829, 833 (1989).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: I am uncomfortable opining on the official position of any religion on any particular topic.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020), the Supreme Court applied the ministerial exception to elementary school teachers at a private Catholic school. The Court concluded that although the teachers were not ministers, "educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught," and "they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith." *Id.* Because the ministerial exception applied, the First Amendment barred application of the Age Discrimination and Employment Act to the teachers' employment.

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

Response: In *Fulton v. City of Pennsylvania*, 141 S. Ct. 1868 (2021), the Supreme Court prohibited Philadelphia from requiring that a Catholic foster care agency agree to certify same-sex couples in order to contract with the city, where doing so would violate the foster care agency's religious beliefs. The Court concluded that the city ordinance at issue was not generally applicable because it granted city officials discretion to waive the prohibition on refusing to serve families regardless of their sexual orientation. *Id*. at 1878. Accordingly, the Supreme Court applied strict scrutiny to Philadelphia's refusal to grant an exception to the ordinance, and concluded that Philadelphia did not meet that high bar. The Court reasoned that granting an exception to the foster care agency would increase, not decrease, the number of foster parents, and Philadelphia's interest in minimizing liability was speculative. *Id.* at 1881-82.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the**

Court's holding and reasoning in the case.

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Court held that Maine's refusal to allow parents to utilize Maine's tuition assistance program for sectarian schools that otherwise met the requirements of the program violated the Free Exercise Clause of the First Amendment. Because the religious nature of the schools was the only reason why they were not eligible for tuition assistance under Maine law, the law had the effect of penalizing the free exercise of religion, triggering strict scrutiny. *Id*. at 1997. In applying that standard, the Court observed that excluding religious schools from the tuition assistance program was not required by the Establishment Clause, and Maine's "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." *Id*. at 1998 (internal quotations and citations omitted). Accordingly, Maine's refusal to allow parents to use the tuition assistance program for religious schools did not satisfy strict scrutiny and was held to violate the First Amendment.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court concluded that both the Free Speech and Free Exercise Clauses of the First Amendment prohibited a school district from disciplining a football coach who engaged in a quiet prayer of thanks midfield after football games. The Supreme Court rejected the school's argument that it was justified in restricting the football coach's right to free exercise and free speech under the Establishment Clause, concluding that the coach's actions did not coerce other students to engage in prayer. *Id*. at 2429.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch concurred in the Court's decision to vacate the decision of the Court of Appeals for Minnesota for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). The ordinance at issue required most homes to have a modern septic system for the disposal of gray water, a technology which was forbidden under the Swartzentruber Amish's faith. Justice Gorsuch concluded that the lower court's decision under the Religious Land Use and Institutionalized Persons Act was erroneous in that it treated "the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules" to the Swartzentruber Amish community. *Id.* at 2432 (Gorsuch, J., concurring). Rather, he wrote, "Courts cannot rely on broadly formulated governmental interests, but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id*. (internal citations omitted).

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment**

right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: 18 U.S.C. § 1507 prohibits picketing or parading in or near a courthouse or a residence of a judge with the intent of influencing a judge. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on how this statute should be interpreted in any particular context.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: While I am unsure what role I may have in selecting the content of any trainings offered by the Court, to the extent I have a role I will advocate that such trainings should be designed to ensure that everyone who is employed by or has business before the Court is treated fairly without regard to their race or sex.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

29. **Is it appropriate to consider skin color or sex when making a political**

appointment? Is it constitutional?

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on either the appropriateness or constitutionality of the Executive's consideration of race or sex in making political appointments.

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

Response: Whether the criminal justice system is systemically racist is a matter for policymakers and academics to determine. As a sitting judge, my responsibility is to ensure that each and every decision I make is fair and impartial and is not based on the race of the litigants before me, which is what I would continue to do if confirmed as a federal district court judge.

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

Response: The Constitution leaves the composition of the Supreme Court to Congress. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. I will faithfully follow any decision of the Supreme Court regardless of its composition or size.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

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

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: In *New York State Rifle & Piston Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court held that where the Second Amendment's plain text covers an individual's conduct, the Government must show that any regulation of that conduct is "consistent with this Nation's historical tradition of firearm regulation."

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

Response: Yes.

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

Response: In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2130 (2022), the Supreme Court discussed that the standard articulated in that case for analyzing restrictions on conduct that falls within the Second Amendment's protection "accords with how we protect other constitutional rights."

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

Response: Please see the response to Question 36. I am unaware of any Supreme Court or Ninth Circuit authority that would suggest that the right to own a firearm receives less protection than the right to vote.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: I understand that prosecutorial discretion refers to the prosecutor's ability to choose from a variety of options in a criminal matter, including whether to file charges, what charges to file, which plea bargain to accept, and what sentence to recommend to the Court. As a state court judge, I have not encountered a case involving a substantive administrative rule change, but if presented with the issue I would follow the law and precedent of the Supreme Court and the Ninth Circuit.

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

Response: No.

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

Response: In *Alabama Association of Realtors v. HHS*, 131 S. Ct. 2485 (2021), the Supreme Court concluded that petitioners were likely to succeed on the merits of their claim that the Centers for Disease Control (CDC) lacked the authority to issue a nationwide moratorium on the eviction of any tenants who live in a county that was experiencing high or substantial levels of COVID-19 transmission and who make declarations of financial need. The Court concluded that the statute on which the CDC

relied did not authorize such a moratorium, and that it would have expected "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id*. at 2489 (internal citations and quotations omitted).

42. **In an article for the *Sacremento Lawyer* titled "Reflections on the Life and Career of Justice John Paul Stevens," you discussed your former boss's jurisprudence. You wrote, "…he [Justice Stevens] would consult text and precedent, but he also relied on his good judgment, the values he believed undergirded the Constitution, and his own lived experience in reaching a result in a given case."**

a. **Are one's "lived experiences" a proper mechanism with which to interpret the Constitution?**

Response: I do not believe it is appropriate for lower federal court judges to interpret the Constitution according to their lived experiences. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents.

b. **In what way are a judge's personal experiences consistent with a system of democratically-enacted, neutrally-applied laws?**

Response: Please see the answer to Question 42(a).

Senator Ben Sasse
Questions for the Record for Daniel J. Calabretta
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 12, 2022

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

   Response: No.

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

   Response: As a Superior Court Judge, I am keenly aware of how important cases are to the litigants in a trial court. I acknowledge that fact by treating each litigant with respect, ensuring that they have the opportunity to be heard, and keeping an open mind. For each case before me, I ensure that I am adequately prepared and that I am knowledgeable about the facts and law of each case so that I can make a fair and impartial decision. If I were confirmed, I would take that same approach to deciding cases as a federal district court judge.

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

   Response: I do not subscribe to a particular method of constitutional interpretation. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents, including using the interpretive method of originalism where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: I do not subscribe to a particular method of statutory interpretation. If confirmed, in deciding a case that turned on the interpretation of a federal statute, I would start with the text itself, accompanied by any binding precedent that interprets the statute at issue.

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

   Response: I believe the Constitution has a fixed meaning, and can only be altered through the process set forth in Article V. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents.

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

   Response: There is no particular Supreme Court whose jurisprudence I most admire. I admire their collective service to our Nation, their collegiality, and desire to interpret the Constitution and the laws of our country to the best of their ability. However, if I were confirmed, as a former law clerk to Justice Stevens I would strive to embody the humility and kindness that Justice Stevens evinced while he was a member of the Supreme Court.

7. **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: In the absence of controlling Supreme Court precedent, a Circuit Court would be required to apply its own precedent unless and until it is overruled through an en banc proceeding. *See* Fed. R. App. P. 35(a).

8. **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 7.

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

   Response: If confirmed, in deciding a case that turned on the interpretation of a federal statute, I would start with the text itself, accompanied by any binding precedent that interprets the statute at issue. If there is no binding precedent, I would consult dictionary definitions and canons of construction. If that did not resolve the issue, I would consult precedents from other circuits, as well as decisions interpreting similar texts. If the text was ambiguous after taking these steps, only then would I consult legislative history that provides clear evidence of congressional intent.

10. **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: Race and ethnicity should not factor into sentencing a defendant for a particular crime. 18 U.S.C. § 3553(a), which provides the factors judges should consider in imposing a sentence, includes as a factor the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. If defendants of a particular race or ethnicity receive longer sentences despite this command, that is a matter for policymakers.

Senator Josh Hawley
Questions for the Record

Daniel Calabretta
Nominee, U.S. District Court for the Eastern District of California

1. **In the past, you have written applaudingly about the work of utilitarian philosopher Peter Singer. Singer is well known for defending a right to abort children *after birth*.**

    a. **Do you believe that criticisms of Singer's support for infanticide are unfounded?**

    Response: I have not written about or studied Peter Singer or his views since I was a bioethics ethics major in college more than two decades ago. Respectfully, I disagree with the characterization that I wrote "applaudingly" about Peter Singer's work in the article I wrote 24 years ago. While I am unfamiliar with the specific criticisms of Peter Singer's work to which the question refers, I strongly disagree with the conclusions Singer drew from his utilitarian philosophy regarding infanticide.

    b. **You began your writing on Singer with this quote: "The effect that the death of the child will have on its parents can be a reason for, rather than against, killing it." Do you think that a parent taking pleasure in taking the life of their newborn child can ever justify that behavior?**

    Response: No. In the article I wrote 24 years ago, I was summarizing Peter Singer's views, not stating my own. Taking the life of a newborn child would be illegal and immoral.

    c. **What exactly do you appreciate about Singer's work?**

    Response: In the article I wrote 24 years ago as a bioethics major in college, I was commenting on whether Peter Singer's views on utilitarianism were internally consistent. I did not then, nor do I now, agree with many of the conclusions he drew from his philosophical views. In the 24 years since I wrote that piece I have attended law school, worked as a practicing attorney, and served as a superior court judge. Peter Singer's views or the views of any philosopher have no impact on my judicial decisionmaking, nor would they have any impact on my judicial decisionmaking if I was confirmed to the

federal district court bench. My decisions as a federal district court judge would be guided by Supreme Court and Ninth Circuit precedent.

2. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    Response: If I were confirmed, in any sentencing decision I would analyze the facts and circumstances of the specific case, and I would consider application of all relevant Sentencing Guidelines, as well as the factors listed in 18 U.S.C. § 3553(a). In addition, I would consider any binding precedent of the United States Supreme Court and the Ninth Circuit.

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

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

    c. **The enhancement for offenses involving the use of a computer**

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

    d. **The enhancements for the number of images involved**

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

3. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    Response: As a sitting judge and a judicial nominee, it would be inappropriate to express an opinion on this issue. Questions related to statutory criminal penalties are best left to policymakers.

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

Response: Please see my response to Question 3(a).

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

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

      Response: No.

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

      Response: I believe that a federal judge is obligated to apply the law and binding precedent to each case as established by the Supreme Court and the relevant circuit court, which is what I would do if confirmed.

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

   Response: I am aware of four types of federal abstention: *Pullman* abstention, *Burford* abstention, *Younger* abstention, and *Colorado River* abstention. While not referred to as an abstention, the *Rooker-Feldman* doctrine can also require federal courts to abstain from deciding an action.

   The first type of abstention, *Pullman* abstention, is appropriate when a decision in the case requires resolution of a sensitive federal constitutional issue, the constitutional issue could be resolved by a definitive ruling on state law issues, and the state law determination is unclear. *United States v. Morros*, 268 F.3d 695, 703-04 (9th Cir. 2001); *see also R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941).

   The second type of abstention, *Burford* abstention, applies where a federal court is asked to review what are essentially local issues arising out of a complicated state regulatory scheme. Under Ninth Circuit precedent, it applies in cases where the state has chosen to concentrate suits challenging agency action in a particular court, the federal issues cannot be separated easily from complex state law issues to which the state court may have special competence, and federal review might interrupt state efforts to establish a coherent policy. *Knuden Corp. v. Nev. State Dairy Com.*, 676 F.2d 364, 377 (9th Cir. 1982); *see also Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943).

   The third type of abstention, *Younger* abstention, applies where a federal suit would interfere in ongoing state criminal, civil, and administrative proceedings. Under Ninth Circuit precedent, *Younger* abstention is appropriate where (1) there is an

ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding. *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018); *see also Younger v. Harris*, 401 U.S. 37 (1971).

The Supreme Court has recognized situations that are not governed by *Pullman*, *Burford*, or *Younger* abstention, but in which "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" warrant abstaining from exercising federal jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). The Ninth Circuit applies eight factors in determining whether *Colorado River* requires abstention: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Seneca Ins. Co. v. Strange Land*, 862 F.3d 835, 841-42 (9th Cir. 2017).

Finally, the *Rooker-Feldman* doctrine requires that federal courts decline to exercise jurisdiction over cases in which a litigant is effectively seeking appellate review over final state court judgments. Generally, only the Supreme Court has jurisdiction to review the final decision of the highest court of a State. A federal district court dealing with a suit that is, in part, a de facto appeal from a judicial decision of a state court must refuse to hear the de facto appeal as well as any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision. *Noel v. Hall*, 341 F.3d 1148, 1158; see also *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983).

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

Response: No.

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

Response: Not applicable.

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

Response: The Supreme Court has stated that the original public meaning of the text should guide judges in interpreting certain provisions of the Constitution. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). If I were confirmed as a district court judge, I would follow binding Supreme Court and Ninth Circuit precedent and apply the interpretive tools required by those decisions.

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

Response: In interpreting legal texts, I start with the text itself, accompanied by any binding precedent that interprets the legal text at issue. If there is no binding precedent, I would consult dictionary definitions and canons of statutory construction. If that did not resolve the issue, I would consult precedents from other circuits, as well as decisions interpreting similar texts. If the text was ambiguous after taking these steps, only then would I consult legislative history that provides clear evidence of congressional intent.

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

   Response: If I were to consider legislative history, I would follow Supreme Court and Ninth Circuit precedent in determining what weight to give a particular piece of legislative history. For example, the Supreme Court has stated that floor statements are less reliable than committee reports. *See Garcia v. United States*, 469 U.S. 70 (1984).

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

   Response: I would follow Supreme Court and Ninth Circuit precedent in interpreting the provisions of the U.S. Constitution. I am unaware of any precedent that requires consulting the laws of foreign nations in interpreting the Constitution, and absent any such precedent I would decline to do so.

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

Response: Under *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 576 U.S. 863 (2015), a petitioner challenging an execution protocol under the Eighth Amendment has the burden of showing 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." *Baze*, 533 U.S. at 50 (internal citations and quotations omitted). A petitioner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative, but must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. The Ninth Circuit has indicated a petitioner must show an objectively intolerable risk of pain to satisfy this standard. *See Villeges Lopez v. Brewer*, 680 F.3d 1068, 1074 (9th Cir. 2012).

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

Response: Yes.

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

Response: No. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009) ("[Petitioner] asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right."); *see also Morrison v. Peterson* 809 F.3d 1059 (9th Cir. 2015).

12. 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.

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

Response: Under the Supreme Court's decision in *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993), a "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." If the law treats any comparable secular activity more favorably than religious exercise, or if the government acts in a manner that is hostile to religious beliefs, then strict scrutiny would apply. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The Ninth Circuit follows this approach. *See Fellowship of Christian Athletes v. San Juan Unified Sch. Dist. Bd. of Ed.*, 46 F.4th 1075 (9th Cir. 2022).

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

Response: Please see my response to Question 13. A government action that discriminates against a religious group or religious belief is not neutral and generally applicable and would be subject to strict scrutiny.

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

Response: The Supreme Court has held that the determination of what constitutes a religious belief "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Moreover, the Supreme Court has held that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Court are not arbiters of scriptural interpretation." *Id*. at 716; *see also Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981).

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

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

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

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

Response: No.

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

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

Response: In his dissent, Justice Holmes was expressing his view that the "Constitution is not intended to embody a particular economic theory. . ." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a sitting judge and a judicial nominee, it would not be appropriate for me to express an opinion regarding the merits of Justice Holmes's statement.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: I am unaware of any Supreme Court opinions that have not been formally overruled by the Supreme Court that are no longer considered good law under binding precedent of the Supreme Court or the Ninth Circuit. I would follow any such precedents if I were to be appointed.

a. If so, what are they?

Response: Not applicable.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully apply all binding precedent of the Supreme Court and the Ninth Circuit as to what constitutes a monopoly.

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

Response: Please see my response to Question 19(a).

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

Response: The Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992) concluded that Kodak's control of nearly 100% of the parts market and 80% to 95% of the service market was sufficient to survive a motion for summary judgment. In that decision, the Supreme Court cited to cases indicating 87% of the market can constitute a monopoly, *United States v. Grinnell Corp.,* 384 U.S. 563, 571 (1966), and that two-third of a market can constitute a monopoly, *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

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

Response: Generally speaking, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Rather, courts typically apply federal statutory law or state law, depending on the basis for the court's subject matter jurisdiction. The Supreme Court has recognized, however, certain areas where there is no statutory law, such as admiralty matters or certain controversies between the States. *See Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: The interpretation of a state constitution is a matter for state courts, and if confirmed I would defer to the interpretation given by the highest court of the state.

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

Response: Generally speaking, identical texts should be interpreted in an identical matter. In the context of this question, however, state courts may give a different interpretation to a state constitutional right than federal courts give to the identically phrased provision in the federal constitution.

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

Response: A state constitution may give greater protections to its citizens than the United States Constitution.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. However, because *Brown v. Board of Education* is so widely accepted and unlikely to be relitigated, I believe I can state my view that *Brown* was correctly decided.

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

Response: I do not believe the Supreme Court has addressed this issue. The Ninth Circuit has concluded that "although 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 (9th Cir. 2018).

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

Response: The authority to issue injunctions is found in Federal Rule of Civil Procedure 65.

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

Response: If confirmed, I would follow binding precedent of the Supreme Court and Ninth Circuit in determining the propriety and scope of a nationwide injunction.

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

Response: Please see my response to Question 23(b).

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

Response: Central to our form of government is the division of power between the federal government and the States. While the federal government has primacy in the areas over which it has authority, that authority is limited to the powers specifically enumerated in the Constitution. The States, on the other hand, retain all powers not specifically reserved to the federal government by the Constitution. By dividing power between the States and federal government, the framers sought to ensure greater protection for our fundamental liberties. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: Please see my answer to Question 5.

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

Response: Generally speaking, damages are appropriate to remedy a past harm, whereas injunctive relief is appropriate to prevent a future harm. I believe litigants should request which form of relief they conclude would be most beneficial to them. If confirmed, my role would be to evaluate the facts of the case and the applicable law and determine whether the litigant is legally entitled to the requested relief.

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

Response: The Supreme Court has held that certain unenumerated rights are protected by the Due Process Clause of the Fourteenth Amendment. In *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that such rights are objectively "deeply rooted in this Nation's history and tradition" and are "implicit

in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Those rights include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and to use contraception, *id.; Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

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

Response: The Free Exercise Clause of the First Amendment protects the right of individuals to practice their religion. If the government burdens that right through a law that is not neutral or generally applicable, it must demonstrate that it has a compelling interest, and that the law is narrowly tailored to meet that interest. *See Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

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

Response: No. The Free Exercise Clause of the First Amendment protects the right to harbor religious beliefs inwardly as well as the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life. *See, e.g., Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421-22 (2022). That protection is greater than the right to participate in religious services.

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

Response: Please see my response to Question 13.

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

Response: Please see my response to Question 15.

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

Response: Under the Religious Freedom Restoration Act (RFRA), any federal law that substantially burdens the exercise of religion must serve a compelling governmental interest, and be the least restrictive means of furthering that compelling state interest. *See* 42 U.S.C. § 2000bb-1; *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: While I am unfamiliar with this quote, I take it to mean that a judge must decide cases based solely on the law and binding precedent. At times, the result of that inquiry may result in a decision that the judge personally disagrees with, but the judge has a duty to reach the decision compelled by law.

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

Response: No. However, I represented the California Governor, Attorney General, and Director of the Department of Public Health on appeal in a challenge to California's Proposition 8, which amended the California Constitution to prohibit the marriage of same-sex individuals. My clients took the position that the state constitutional provision violated the Fourteenth Amendment of the United States Constitution. The Supreme Court ultimately reached the same conclusion in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

a. If yes, please provide appropriate citations.

Response: *Hollingsworth v. Perry*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011); 52 Cal.4th 1116 (2011) (answering certified question from the United States Court of Appeals for the Ninth Circuit); 671 F.3d 1052 (9th Cir. 2012), rev'd, 570 U.S. 698 (2013).

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

Response: No.

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

Response: Questions about whether or to what extent systemic racism is an issue for our country are best addressed by policymakers. As a judge, I work hard every day to ensure that every litigant who comes into my courtroom is treated fairly and respectfully regardless of their race.

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

Response: Yes.

35. How did you handle the situation?

Response: I put aside my personal views and fulfilled my ethical obligations to my client to zealously advocate for their position and to present any and all legal arguments in support of their position that I could make in good faith.

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

Response: Yes.

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

Response: There is no single Federalist Paper that has most shaped my views of the law.

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

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) recognized that this is a "profound moral issue" and directed that this question should be

left to the people's elected representatives rather than the courts. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: I was once called by the prosecution as a witness in a criminal trial involving property that was stolen from my vehicle. I am unable to find any available testimony.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: As a Deputy Legal Affairs Secretary in the California Governor's Office, I occasionally reviewed briefs filed by the Attorney General's Office in which the Governor was a named defendant.

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

Response: I do not recall the specific cases in which I edited a brief, and I have been unable to locate this information with due diligence. I would estimate I did so approximately five times.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: As a judicial nominee, I took an oath that the testimony I provided to the Senate Judiciary Committee would be the truth. I have attempted to answer each of these questions truthfully and to the best of my ability and in a manner consistent with my ethical obligations as a sitting judge and under Canon 3 of the Code of Conduct for United States Judges as it applies to judicial nominees.

Questions from Senator Thom Tillis
for Daniel Joe Powell Calabretta
Nominee to be United States District Judge for the Eastern District of California

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

   Response: Yes.

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

   Response: Judicial activism is defined as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Black's Law Dictionary* (9th ed. 2019). I do not believe judicial activism is appropriate. Rather, a judge should apply the law to the facts before him or her without regard to his or her personal views.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Yes. As a sitting judge, and as a federal district court judge if I were to be confirmed, my obligation is to apply the law to the facts before me, without regard to my personal views. It is for the executive and legislative branches to consider whether or not particular outcomes are desirable.

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 apply binding precedent of the Supreme Court and the Ninth Circuit and apply the law to the facts of each case before me. This includes cases brought

under the Second Amendment, to which I would apply recent cases decided by the Supreme Court including *District of Columbia v. Heller*, 554 U.S. 470 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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 the facts of the case and the applicable precedent of the Supreme Court and the Ninth Circuit, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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: Under the Supreme Court's decision in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), a court must follow a two-part inquiry: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. If both prongs are met, then qualified immunity would apply. *See also Pearson v. Callahan*, 555 U.S. 223 (2009).

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue, which is best left to policymakers.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue, which is best left to policymakers. I would apply binding Supreme Court and Ninth Circuit precedent in a case presenting a defense of qualified immunity.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case or body of cases was correctly decided. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to any case brought before me.

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

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

    Response: As a state court judge, I have not had the opportunity to consider whether any invention is patentable. Practicing in California, I understand the importance of suits involving intellectual property, and if confirmed I would verse myself in patent law so that I could adjudicate such cases. In a case raising the issue of whether an invention is patentable under 35 U.S.C. § 101, I would apply the two-step framework set forth in *Mayo Collaborative Services v. Prometheus Labs, Inc*., 566 U.S. 66 (2012). First, I would "determine whether the claims at issue are directed to one of those patent-ineligible concepts" which include laws of nature, natural phenomena, and abstract ideas. If they are directed to such a concept, I would "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*. In doing so, I would apply all binding precedents of the Supreme Court and the Federal Circuit, including *Bilski v. Kappos*, 561 U.S. 593 (2010), *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66, 72 (2012), and *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014).

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

    Please see my response to Question 13(a).

    c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by**

humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: Please see my response to Question 13(a). Additionally, I would apply the Supreme Court's analysis in *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576, 595 (2013), which held that "genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material." *See also BRCA1-&BRCA2-Based Hereditary Cancer Test Patent Litig. v. Ambry Genetics Corp*., 774 F.3d 755 (Fed. Cir. 2014).

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

Please see my response to Question 13(a).

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

Please see my response to Question 13(a).

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

Please see my response to Question 13(a).

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and

nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Please see my response to Question 13(a).

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

Please see my response to Question 13(a).

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

Please see my response to Question 13(a).

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

Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a). Additionally, as a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case or line of cases was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Federal Circuit in applying the Supreme Court's ineligibility tests.

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

a. What experience do you have with copyright law?

Response: In my 15 years of practicing law and 4 years as a state court judge, I do not recall having the opportunity to handle matters involving copyright law, with the exception of a few matters before the Supreme Court when I was a law clerk to Justice John Paul Stevens.

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

Response: In my 15 years of practicing law and 4 years as a state court judge, I do not recall having the opportunity to handle matters involving the Digital Millennium Copyright Act.

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

Response: In my 15 years of practicing law and 4 years as a state court judge, I do not recall having the opportunity to handle matters involving intermediary liability for online service providers.

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

Response: As a Deputy Attorney General and a Deputy Legal Affairs Secretary, I advised the Governor and others in his administration about First Amendment issues that were raised by several pieces of legislation that were then pending before the California Legislature, as well as disclosure requirements under California law. In addition, as a Deputy Attorney General I was second chair in the case of *Brown v. Entertainment Merchant's Association*, 564 U.S. 786 (2011), in which the Supreme Court invalidated a California law prohibiting the sale of "violent" video games to minors. None of these matters involved intellectual property or copyright to the best of my recollection.

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

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

Response: If confirmed, in deciding a case that turned on the interpretation of a federal statute, I would start with the text itself, accompanied by any binding precedent that interprets the statute at issue. If there is no binding precedent, I would consult dictionary definitions and canons of construction. If that did not resolve the issue, I would consult precedents from other circuits, as well as decisions interpreting similar texts. If the text was ambiguous after taking these steps, only then would I consult legislative history that provides clear evidence of congressional intent.

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

Response: I would apply the binding precedents of the Supreme Court and the Ninth Circuit in deciding what level of deference should be given to an agency interpretation of a statute, depending on the facts and circumstances of the case. *See, e.g., Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc*., 468 U.S. 837 (1984); *Inhale, Inc. v. Starbuzz Tobacco Inc.*, 755 F.3d 1038, 1041-42 (9th Cir. 2014) ("When interpreting the Copyright Act, we defer to the Copyright Office's interpretations in the appropriate circumstances. Because *Chevron* deference does not apply to internal agency manuals or opinion letters, we defer to the Copyright Office's views expressed in such materials only to the extent that those interpretations have the power to persuade.") (internal citations and quotations omitted).

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

Response: In my 15 years of practicing law and 4 years as a state court judge, I have not had the opportunity to litigate in this area of the law. However, if confirmed, I would thoroughly research the subject matter and I would apply all binding precedent of the Supreme Court and the Ninth Circuit to any case raising this issue.

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

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

Response: If confirmed, I would be required to interpret the text as written and apply the binding precedents of the Supreme Court and the Ninth Circuit to any case before me. It would be for Congress to make any changes to the DMCA in response to changes in technology.

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

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

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

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

Response: In the district to which I am nominated, there are no divisions with a single federal district court judge, and under the district's local rules cases are assigned at random by an Automated Case Assignment System, such that I do not believe this is an issue in the Eastern District of California.

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

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

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

Response: I am unfamiliar with the concept of forum selling, however as described I do not believe it is appropriate for judges to attract a particular type of case or litigant, but should rather neutrally decide the cases assigned to them.

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

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

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.