**Senator Dick Durbin**
**Chair, Senate Judiciary Committee**
**Written Questions for Anthony Johnstone**
**Nominee to be United States Circuit Judge for the Ninth Circuit**
**October 19, 2022**

1. **You have served as an appellate advocate and also as a scholar of the law. At the University of Montana, you have taught courses and written on a host of important legal topics, including federalism. In short, you have approached the law not only from a practical standpoint, but also from a theoretical and academic one.**

   **How do you think this breadth and depth of experience—in practice and in academia—will benefit you on the Ninth Circuit?**

   Response: More than two decades as a law clerk, litigation associate, assistant attorney general, state solicitor, and sole practitioner have given me the opportunity to practice a broad range of matters in diverse settings. From antitrust and securities law, to civil rights and criminal law, to natural resource and nonprofit law, to immigration and federal Indian law, to constitutional and election law, I have represented many different clients and concerns as an advocate. More than a decade at the University of Montana has given me an opportunity to study these and other areas in depth as a teacher and scholar. Our law school prepares students for the people-oriented practice of law, and to that end all members of the faculty possess substantial practice experience in the subjects they teach. In my courses the classroom becomes a moot courtroom where we integrate theory and practice. Students engage each in practical legal arguments to test our understanding of the law, develop our advocacy skills, and above all integrate norms of civil disagreement into our professional identities. Beyond the classroom I regularly explain the rule of law and current legal issues to public audiences, often under tight deadlines. My scholarship takes these issues one step further by bridging gaps or resolving tensions in the law, with attention to the central role of states in our federal system. As faculty member I perform these roles independently while collaborating with my colleagues to fulfill the common mission of the school even when—especially when—we face difficult and sometimes divisive issues together.

   I believe my practice and academic experience reflects both the diverse docket and the collaborative process of the Court of Appeals where I once served as a clerk. My work also reminds me that in every case on that docket, no matter what the subject, someone's life, liberty, or livelihood is at issue. As an advocate I make the best arguments under the law on behalf of my clients. Win or lose I expect the courts to hear my client's claims attentively, review the record carefully, weigh the case impartially, apply the law faithfully, and explain the decision clearly, with collegiality among judges even in dissent. If confirmed, I will do my best to be that kind of judge—the kind of judge I have had the honor to appear before as a lawyer over the course of my career.

**Senator Chuck Grassley, Ranking Member**
**Questions for the Record**
**Mr. Anthony Devos Johnstone**
**Judicial Nominee to the United States Court of Appeals for the Ninth Circuit**

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

   Response: The Supreme Court has held the Due Process Clause of the Fifth and Fourteenth Amendments protects those fundamental rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

2. **Should you be confirmed, what specific factors will you take into consideration when deciding whether to overturn circuit precedent?**

   Response: The Ninth Circuit has held a court may overturn circuit precedent only when sitting *en banc* or when that precedent is "clearly irreconcilable" with an intervening decision of the United States Supreme Court decision or, in the case of state law, a state court of last court. *See* Fed. R. App. P. 35(a)(1); *Miller v. Gammie*, 335 F. 3d 889, 892-93 (9th Cir. 2003) (*en banc*).

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

   Response: I disagree with this statement. Judges are bound to the Constitution as law.

4. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: No. Federal judges must apply Supreme Court precedent faithfully.

5. **Do you believe lower courts are bound by decisions of the Supreme Court?**

   Response: Yes. "[A] precedent of [the Supreme] Court must be followed by the lower federal courts…." *Hutto v. Davis*, 450 U.S. 370, 375 (1982) (*per curiam*).

6. **Do you believe lower courts can distinguish a Supreme Court decision based on facts or arguments that were not crucial to the Court's decision?**

   Response: "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.). "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold." *United States v. Montery-Camargo*, 208 F. 3d 1122, 1132 n. 17 (9th Cir. 2000) (*en banc*).

7. **Are circuit court and Supreme Court decisions binding on anyone other than the parties to the case?**

Response: Yes. Please see my answer to Question 5.

8. **If you are confirmed, do you believe you would be bound by previous decisions by a circuit court panel?**

   Response: Yes. Please see my answer to Question 2.

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

   Response: Living constitutionalism is "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

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

    Response: Policymaking officials are responsible for identifying election integrity and identifying problems in their communities that concern them. The Supreme Court has held a government's "interest in preserving the integrity of the electoral process is undoubtedly important." *Doe v. Reed*, 561 U.S. 186, 197 (2010). As a judicial nominee, I should not comment on the merits of an election integrity matter. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of any opinions about the policies at issue.

11. **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 not familiar with this statement. I believe the Constitution is binding as law. *See* U.S. Const. Art. VI.

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

    Response: I teach hundreds of Supreme Court decisions every year and have had the honor to appear as counsel in several cases before the Court. I do not think any one case can exemplify a judicial philosophy. If I were confirmed, my judicial philosophy would be guided by the judicial oath to decide cases "faithfully and impartially." 28 U.S.C. § 453. I understand "faithfully" to mean according to precedent and the text, structure, and history of the law at issue. I understand "impartially" to mean without any personal or political bias.

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

    Response: I worked on approximately one hundred Ninth Circuit decisions during my clerkship and have had the honor to appear as counsel in several cases before that court. I do not think any one case can exemplify a judicial philosophy. Please see my answer to Question 13.

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

Response: Policymaking officials are responsible for allocating the government funding, including law enforcement funding, that they believe is appropriate for their communities. As a judicial nominee, I should not comment on the merits of a law enforcement funding matter. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of any opinions about the policies at issue.

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

Response: Yes. *See* U.S. Const. Amend. I ("Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances.").

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

Response: "Empathy" is not a factor to be considered in imposing a sentence. *See* 18 U.S.C. § 3553.

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

Response: I agree the Supreme Court has held the Constitution does not require the appointment of counsel in a civil case except in a limited set of some cases in which an indigent litigant, if he loses, may be deprived of his physical liberty. *Lassiter v. Dep't of Soc. Servs.,* 452 U.S. 18, 26-27 (1981). Aside from appointed counsel, a belief that a person does not deserve a lawyer generally does not determine whether that person may hire a lawyer.

**18. 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: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown vs. Board of Education* is one of a small number of well-established decisions that holds a uniquely foundational position in constitutional law and does not present a matter that is likely to arise in any court. Given this, and consistent with the responses of prior nominees, I can answer yes. If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon

3(A)(6). *Loving v. Virginia* is one of a small number of well-established decisions that holds a uniquely foundational position in constitutional law and does not present a matter that is likely to arise in any court. Given this, and consistent with the responses of prior nominees, I can answer yes. If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). The Supreme Court overturned *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: It is illegal under federal statutes to threaten Supreme Court justices and other federal government officials. *See, e.g.,* 18 U.S.C. § 115.

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

Response: 18 U.S.C. § 1507 prohibits picketing, parading, or demonstrating in or near a court or residence of 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."

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

Response: The Supreme Court has not ruled on the facial constitutionality of 18 U.S.C. § 1507. The Supreme Court has upheld an analogous state statute on its face. *Cox v.* Louisiana, 379 U.S. 559 (1965). As a judicial nominee, I should not comment on the constitutionality of a law. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent to any case involving 18 U.S.C. § 1507.

**22. One of your criticisms of the Supreme Court in *Citizens United* was the length of the opinion. In your opinion, how long should an opinion invalidating state law be to avoid the perception that "the [Supreme] Court" gave [the state] the back of its hand"?**

Response: To the best of my knowledge I have not criticized *Citizens United* based on the length of the opinion. The statement refers to the State of Montana's position in

*American Tradition Partnership v. Bullock*, when as State Solicitor I argued against a summary reversal that would facially invalidate a state law without providing the state an opportunity to argue its case. As a judicial nominee, I should not comment on the merits of Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its merits.

**23. Please point to the precise text in the Constitution that enshrines the "right" to an abortion.**

Response: The Supreme Court has held the Constitution does not provide a right to an abortion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which overruled the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey* that such a right was implicit in the recognition of "liberty" by the Due Process Clause of the Fourteenth Amendment.

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

Response: The Supreme Court has held "States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen* v. *California,* 403 U.S. 15, 20 (1971).

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

Response: The Supreme Court has held "'[t]rue threats'" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

**26. You have said that the Ninth Circuit case *Young v. Hawaii* "was decided on narrow grounds." At your hearing, you claimed that you were speaking about the effect the decision might have on legislation in Montana. Under the standard announced in *Young v. Hawaii*—holding that there was no constitutional right to open or concealed carry of firearms—does the Second Amendment protect against any restrictions by governments on carrying a firearm outside of the home for self-defense?**

Response: In *Young v. Hawaii* the Ninth Circuit announced a standard based on its understanding of the Supreme Court's holding in *District of Columbia v. Heller* "to require one of three levels of scrutiny" for a "restriction [that] burdens conduct protected by the Second Amendment." *Young*, 992 F.3d 765, 784 (9th Cir. 2021). In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court clarified that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context," and elaborated "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. 2111, 2127. Under that test, *Bruen* held a "proper cause"

restriction on carrying a handgun in public, analogous to the restriction at issue in *Young*, was unconstitutional. *Bruen*'s standard is controlling precedent, and accordingly the Supreme Court vacated the Ninth Circuit's judgment in *Young*. *See Young v. Hawaii,* 2022 WL 2347578, at *1 (U.S. 2022).

**27. 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.

**28. 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.

**29. 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: Yes. I am a member of the American Constitution Society, the advisor of our law school's student chapter, and a member of its State Attorneys General Project Advisory Committee. In these capacities I regularly communicate with persons associated with the American Constitution Society.

**30. 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.

**31. 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.

**32. 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?**

**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?**

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.

33. **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?**
    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?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

34. **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?**
    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.**
    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.**
    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.

35. **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?**
b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response: No.

36. **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?**
    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?**
    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.

37. **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?**
    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?**
    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: I am not currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary. Nor have I been in contact with anyone at either entity at any point during my nomination process.

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

Response: On March 21, 2022, Senator Jon Tester's staff contacted me regarding my interest in being considered for a vacancy on the United States Court of Appeals for the Ninth Circuit in Montana. On March 24, 2022, I submitted a resume to Senator Tester's staff. On May 24, 2022, I interviewed with staff for Senator Steve Daines. On June 9, 2022, I interviewed with attorneys from the White House Counsel's Office. On July 7, I interviewed with Senator Daines. Since July 15, 2022, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On September 2, 2022, the President announced his intent to nominate me. On September 6, 2022, the President sent my nomination to the United States Senate.

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

Response: On October 19, 2022, I received these questions from the Office of Legal Policy at the Department of Justice. I reviewed the questions, conducted research, and drafted my responses. I received feedback from the Office of Legal Policy. After considering this feedback, I submitted my final responses to the Committee.

**Questions for the Record for Anthony Devos Johnstone**
**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**
**Anthony Johnstone, Nominee to be United States Circuit Judge for the Ninth Circuit**

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

Response: If confirmed, my judicial philosophy would be guided by the judicial oath to decide cases "faithfully and impartially." 28 U.S.C. § 453. I understand "faithfully" to mean according to precedent and the text, structure, and history of the law at issue. I understand "impartially" to mean without any personal or political bias.

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

Response: If confirmed, I would faithfully apply the meaning of the statute's text and any precedent previously interpreting that law and end there when possible. In the rare case in which the text remains ambiguous considering precedent, the context of the statutory structure, and appropriate canons of statutory construction, I would consult other public materials, including legislative history, for the limited purpose of evidencing the text's meaning.

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

Response: If confirmed, I would faithfully apply the meaning of the constitutional text and any precedent previously interpreting that provision and end there when possible. In the rare case in which the meaning of the constitutional provision remains ambiguous considering precedent, I would be guided by Supreme Court precedent on how to interpret the meaning of that text, including the provision's relationship to the structure of the Constitution and history that bears on the meaning of the provision's text.

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

Response: The Supreme Court generally determines the meaning of the Constitution's text as "understood by the voters … in their normal and ordinary as distinguished from technical meaning" at the time of ratification of that text. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citations omitted).

**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 Supreme Court has held statutory "words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citations omitted). For example, the meaning of "domestic Violence" in Article IV of the U.S. Constitution from 1787 is different from the meaning of "domestic violence" in Title 18 of the U.S. Code from 1994. Sometimes a later change to a legal definition may result in a departure from the original understanding of another law that implicitly incorporated that definition. For example, courts read state "elector" qualifications for jurors, originally held to include only men at enactment, to include women after the ratification of the Nineteenth Amendment. *See, e.g., Commonwealth v. Maxwell*, 114 A. 825, 829 (Pa. 1921); *cf. New Prime, Inc.*, 139 S. Ct. at 539 ("statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included.").

**6. What are the constitutional requirements for standing?**

Response: The Supreme Court has held that to meet Article III requirements, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

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

Response: Congress may make "all Laws which shall be necessary and proper for carrying into Execution" the powers the Constitution vests in Congress, the Government, and "any Department or Officer thereof." U.S. Const. Art. I, sec. 8, cl. 18. Under the Necessary and Proper Clause, Congress may legislate where the end is "legitimate … within the scope of the constitution" by "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). The Necessary and Proper Clause, while sweeping, excludes the exercise of any "great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them." *Id.* at 411.

**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 and presented with the issue of congressional power in a case, I would faithfully apply precedent on the scope of the powers the parties have put at issue, regardless of whether Congress referenced a specific constitutional enumerated power. The Supreme Court has held the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012) (citation omitted).

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

Response: The Supreme Court has held the Due Process Clause of the Fifth and Fourteenth Amendments protects those enumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

**10. What rights are protected under substantive due process?**

Response: The Supreme Court has held substantive due process to include, for example, the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; *Rochin v. California*, 342 U.S. 165 (1952); the right to engage in private, consensual sexual acts, *Lawrence v. Texas*, 539 U.S. 558 (2003); and right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

**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: The Supreme Court has held substantive due process does not provide heightened protection for either a right to abortion or economic rights. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483 (1955). Laws regulating both areas are subject to rational basis review. *See Dobbs*, 142 S. Ct. at 2284; *Williamson*, 348 U.S. at 491.

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

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power": "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has identified "suspect" classes with reference to "an immutable characteristic determined solely by the accident of birth" or "such disabilities, or … such a history of purposeful unequal treatment, or … such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974). Under this test, the Supreme Court has identified race, religion, and alienage as "inherently suspect distinctions." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: In the Federalist 51, James Madison wrote "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Checks and balances in the separation of powers are the way the Constitution ensures "[a]mbition [is] made to counteract ambition," by connecting "[t]he interest of the man … with the constitutional rights of the place." In a government under law but "administered by men," this is the Constitution's design for the government "to control itself."

**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 and presented with a separation of powers issue in a case, I would faithfully apply precedent on the scope of the powers the parties have put at issue, while also attending to the limited authority the Constitution grants the judiciary. *See, e.g., Nixon v. United States*, 505 U.S. 224, 234-235 (1993) (holding the Constitution does not authorize judicial review of Senate impeachment trials).

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

Response: A judge should consider only the facts and the law in a case, not empathy.

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

Responses: Judges should work to avoid both outcomes. Incorrectly upholding a law as constitutional may unduly injure the parties challenging it, but it remains subject to repeal or nonenforcement according to the constitutional judgments of coordinate branches or other officials bound by oath to support the Constitution. U.S. Const. art. VI, cl. 3. Incorrectly invalidating a law as unconstitutional may unduly obstruct the public interests in enforcing it and does not allow the full scope of reconsideration by other officials, but those public interests sometimes may be accomplished through alternative, albeit potentially less effective, constitutional means.

**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: Although I am aware of this phenomenon, I have not studied it closely. Congress enacted many more laws subject to judicial review after the Civil War, which may account for part of the change. For the downsides of aggressive and passive judicial review, please see my response to Question 17.

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

Response: Judicial review is "the province and duty of the judicial department to say what the law is" when the Constitution and another law conflict with each other and "the courts must decide on the operation of each." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* The Federalist No. 78 (Hamilton). Judicial supremacy is "the principle that the federal judiciary is supreme in the exposition of the law of the Constitution" and its decisions bind other officials as supreme law. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

**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 legislative, executive, and judicial officers in the United States are "bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3. The rule of law requires respect for duly rendered judicial decisions and allows elected officials who disagree with a decision multiple means of appealing, overruling, or otherwise abrogating the decision. As a judicial nominee, I should not comment on how elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

**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: The judicial power excludes the executive's force as the "sword of the community" as well as the legislature's will to "prescribe the rules by which the duties and rights of every citizen are to be regulated." Federalist No. 78 (Hamilton). A judge should keep in mind that the judicial power consists exclusively of independent judgment, the efficacy of which depends on the quality of those judgments. *Id.*

**22. 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: The Supreme Court has held "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 (1989). If confirmed, I would faithfully apply precedent regardless of questions about its underpinnings. In cases where there is no applicable precedent, I would consult the sources discussed in my response to Question 3.

**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: Group identity is not one of the factors that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

**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 that definition. Equity means "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

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

Response: Equality means "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019).

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

Response: I am unaware of any Supreme Court decision that has addressed or adopted the definition above in the context of the Equal Protection Clause.

**27. How do you define "systemic racism?"**

Response: Systemic discrimination means "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society." Black's Law Dictionary (11th ed. 2019). I understand systemic racism to mean systemic discrimination on the basis of race.

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

Response: Critical race theory means "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: I understand systemic racism to be a claim that some adherents of critical race theory make.

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

**Questions for the Record for Anthony Devos Johnstone, nominated to be United States Circuit Judge for the Ninth Circuit**

## 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: The United States Constitution and federal laws prohibit racial discrimination. *See, e.g.,* U.S. Const. amend. XIV; U.S. Const. amend. XV; 1866 Civil Rights Act, 42 U.S.C. § 1981; 1964 Civil Rights Act, Title VI, 42 U.S.C. § 2000d *et seq.*; 1964 Civil Rights Act, Title VII, 42 U.S.C. § 2000e *et seq.*; 1965 Voting Rights Act, 52 U.S.C. § 10301 *et seq.*

**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 has held the Due Process Clause of the Fifth and Fourteenth Amendments protects those unenumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

**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: I teach hundreds of Supreme Court decisions every year and have had the honor to appear as counsel in several cases before the Court. I do not think any one justice can exemplify my judicial philosophy. If confirmed, my judicial philosophy would be guided by the judicial oath to decide cases "faithfully and impartially." 28 U.S.C. § 453. I understand "faithfully" to mean according to precedent and the text, structure, and history of the law at issue. I understand "impartially" to mean without any personal or political bias.

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

Response: Originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). If confirmed, I would faithfully apply precedent, regardless of its interpretive methodology, and the text, structure, and history of the law at issue.

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

Response: Living constitutionalism is "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). If confirmed, I would faithfully apply precedent, regardless of its interpretive methodology, and the text, structure, and history of the law at issue.

**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 confirmed and presented with a rare constitutional issue of first impression, I would be bound by the constitutional text and faithfully apply Supreme Court precedent on how to interpret the meaning of that text. For example, the Supreme Court interprets "Congress shall make no law … abridging the freedom of speech" in the First Amendment to mean "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 675 U.S. 155, 163 (2015). The Supreme Court interprets "the right of the people to keep and bear Arms, shall not be infringed" in the Second Amendment to mean "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2126 (2022) (citations omitted).

**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: The Supreme Court generally determines the meaning of the Constitution's text as "understood by the voters … in their normal and ordinary as distinguished from technical meaning" at the time of ratification of that text. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citations omitted). Similarly, statutory "words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citations omitted). Sometimes a later change to a legal definition may result in a departure from the original understanding of another law that incorporated that definition. For example, courts read state "elector" qualifications for jurors, originally held to include only men at enactment, to include women after the ratification of the Nineteenth Amendment. *See, e.g., Commonwealth v. Maxwell*, 114 A. 825, 829 (Pa. 1921); *cf. New Prime, Inc.*, 139 S. Ct. at 539 ("statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included.").

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

Response: No. The Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Thus, "although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022).

**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 judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon

3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

**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 judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

**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 judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown vs. Board of Education* is one of a small number of well-established decisions that holds a uniquely foundational position in constitutional law and does not present a matter that is likely to arise in any court. Given this, and consistent with the responses of prior nominees, I can answer yes. If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: Under the Bail Reform Act of 1984, as amended, a rebuttable presumption in favor of pretrial detention arises where there is probable cause to believe that the person committed any of the following: (a) certain drug offenses for which the maximum term of imprisonment is ten years or more; (b) certain firearms, conspiracy, or international terrorism offenses; (c) certain other listed terrorism offenses for which the maximum term of imprisonment is ten years or more; (d) certain human trafficking offenses; and (e) certain offenses involving minors. *See* 18 U.S.C. § 3142(e)(3). A rebuttable presumption in favor of pretrial detention also arises where the person recently committed certain federal or analogous state offenses while on pretrial release. *See* 18 U.S.C § 3142(e)(2).

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

Response: According to the statute, the presumption arises when certain offenses suggest "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(2); *cf.* 18 U.S.C. § 3142(e)(3). The Supreme Court has noted "Congress specifically found that these individuals [who have been arrested for a specific category of extremely serious offenses] are far more likely to be

responsible for dangerous acts in the community after arrest. *United States v. Salerno*, 481 U.S. 739, 750 (1987), *citing* S.Rep. No. 98-225, at 6-7.

**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. "Congress shall make no law … prohibiting the free exercise [of religion]." U.S. Const. Amend. I. This fundamental right is incorporated against the states by the Fourteenth Amendment. All laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). The Supreme Court has considered the free exercise claims of organizations including small businesses. *See Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion). The Religious Freedom Restoration Act further prohibits federal law that substantially burdens a person's exercise of religion unless the law is the least restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000bb-1. This rule applies to organizations, including closely held for-profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court has held that government must satisfy strict scrutiny to treat religious organizations or religious people non-neutrally or apply laws to them that are not generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* at 546.

**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: The Supreme Court held the executive order likely violated the applicants' First Amendment right to free exercise of religion. The order's regulations "cannot be viewed as neutral because they single[d] out houses of worship for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). While the Court held "stemming the spread of COVID-19 is unquestionably a compelling interest," the Court found "no evidence that the applicants have contributed to the spread of COVID-19" and "other less restrictive rules … could be adopted to minimize the risk to those attending religious services." *Id.* at 67. Holding the applicants established a likelihood of success on the merits, and otherwise met the requirements for relief, the Court enjoined the order. *Id.* at 66.

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

Response: The Supreme Court held "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The California COVID regulations at issue permitted a range of businesses to assemble more people indoors than they permitted for at-home religious exercise. *Id.* at 1297. The Court found these secular activities did not pose any lesser public health threat than the applicant's religious exercise, and the State could have allowed at-home religious exercise with precautions similar to those used in secular activities, so the regulations failed strict scrutiny. *Id.* at 1297-98. Holding the applicants established a likelihood of success on the merits, and otherwise met the requirements for relief, the Court enjoined the regulations. *Id.* at 1296.

**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: The Supreme Court held the Colorado Civil Rights Commission's hostility toward a baker's religiously sincere refusal of service violated the "First Amendment's guarantee that our laws be applied in a manner that is neutral to religion." *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018).

**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: The Supreme Court has held "it is not within the judicial function and judicial competence to inquire whether the petitioner … correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981). In addressing claimants' sincerely held religious beliefs, the Court has held "it is not for us to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

**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: Please see my response to Question 19. As a judicial nominee, I should not comment on the official position of a religion. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

**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: The Supreme Court held the "ministerial exception" developed under the religion clauses applied to two elementary school teachers at Catholic Schools and precluded courts from hearing their employment discrimination claims. Given the teachers' duties, the Court explained, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020).

**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: The Supreme Court held the City's foster parent referral policy was not generally applicable because it contained a system of discretionary individual exemptions from the policy that the City would not make available to Catholic Social Services. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Applying strict scrutiny, the Court held there was "no compelling reason why [the City] has a particular interest in denying an exception to CSS while making them available to others," and concluded the policy violated the Free Exercise Clause. *Id.* at 1882.

**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: The Supreme Court held the State's program of tuition assistance, which required participating private schools to be "nonsectarian," excludes "otherwise eligible schools on the basis of their religious exercise." *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). Applying strict scrutiny, the Court held "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* at 1998.

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

Response: The Supreme Court held the School District violated the Free Exercise and Free Speech Clauses by disciplining a high school coach for engaging in personal prayer in the coach's personal time. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2433 (2022). The Court held the District's targeting of the coach's religious exercise and speech failed under either strict scrutiny or more lenient standards when "the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id.*

**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: Justice Gorsuch wrote that the County "misapprehended" the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *Mast v. Fillmore County*, 141 S. Ct. 2430, 2432 (2021). RLUIPA provides "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person ... unless the government demonstrates that imposition of the burden ... is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). Considering *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), Justice Gorsuch wrote that under RLUIPA "the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish," and that it failed to do so in rejecting Petitioners' alternative to the County's required septic system technology. *Id.* at 2432.

**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: The Supreme Court has not ruled on the constitutionality of 18 U.S.C. § 1507. The Supreme Court has upheld an analogous state statute on its face. *Cox v.* Louisiana, 379 U.S. 559 (1965). As a judicial nominee, I should not comment on the constitutionality of a federal law and whether or how canons of constitutional avoidance may apply to it. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving 18 U.S.C. § 1507, I would faithfully interpret the law according to precedent and the text, structure, and history of the law, and faithfully apply precedent to resolve any questions about its constitutionality.

**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: I am not familiar with any such court trainings. If confirmed, I would not support providing trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist. I would expect court trainings to comply with federal law.

**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: If confirmed, I would select law clerks and staff based on their merits and in compliance with all applicable federal law prohibiting racial discrimination in hiring.

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

Response: The executive and legislative branches are responsible for making political appointments and must comply with the Constitution in doing so. As a judicial nominee, I should not speculate on the constitutionality of hypothetical political appointments. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving this issue, I would faithfully apply the Constitution and precedent.

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

Response: Systemic issues in the criminal justice system are questions for policymakers. If confirmed and presented with a case involving a specific claim of racial discrimination in the criminal justice system, I would faithfully apply the law to the specific facts giving rise to the claim.

**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 power to change the size of the Supreme Court belongs to Congress. *See* U.S. Const. art. III, § 1. As a judicial nominee, I should not opine on the size of the U.S.

Supreme Court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply Supreme Court precedent regardless of its 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: The Supreme Court has held, based on the original public meaning of the Second Amendment, that it "protect[s] an individual right to armed self-defense," subject to limits demarcated by "the historical understanding of the Amendment." *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

**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: The Supreme Court has held restrictions on the right to bear arms are prohibited unless the government demonstrates "that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2126 (2022) (citations omitted).

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010).

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

Response: The right to own a firearm is a fundamental right like other individual rights specifically enumerated in the Constitution. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court held the right to keep and bear arms is protected under "a test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. 2111, 2127. The Supreme Court has not suggested that this test is any less protective of the right to keep and bear arms than the means-ends scrutiny protecting other individual rights.

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

Response: The right to own a firearm is a fundamental right like the right to vote. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court held the right to keep and bear arms is protected under "a test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. 2111, 2127. The Supreme Court has not suggested that this test is any less protective than tests it applies to 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: The President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The executive branch generally has "absolute discretion" to decide whether to initiate civil enforcement or criminal prosecution proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a judicial nominee, I should not speculate on the legality of hypothetical executive refusals to enforce a law. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving this issue, I would faithfully interpret the law according to precedent and the text, structure, and history of the law, and faithfully apply precedent to resolve any questions about the constitutionality of a refusal to enforce the law.

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

Response: Prosecutorial discretion generally concerns an executive official's decision of whether to initiate a criminal prosecution or, less commonly, a civil enforcement proceeding. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). A substantive administrative rule change requires an agency to engage in a rulemaking process provided by Congress in the Administrative Procedure Act or other applicable law. *See, e.g.,* 5 U.S.C. § 553.

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

Response: No. The death penalty for federal offenses is enacted by Congress and may not be abolished by the President. *See* 18 U.S.C. § 3591 *et seq.* The death penalty for state offenses is enacted by individual states and may not be abolished by the President. *See* U.S. Const. amend. X.

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

Response: The Supreme Court held the Centers for Disease Control and Prevention (CDC) lacked the authority to impose a nationwide moratorium on evictions in counties experiencing substantial COVID-19 transmission. *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021). The CDC relied on the Public Health Service Act, which authorizes "such regulations as … are necessary to prevent the introduction, transmission, or spread of communicable diseases" between states or foreign countries, and lists several measures for doing so: "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of [infected] animals or articles …, and other measures, as in [the Surgeon General's] judgment may be necessary." 42 U.S.C. § 264(a). The Court held the statutory authorization, as informed by the particular measures, did not provide the clear Congressional authorization required for an agency "to exercise powers of 'vast economic and political significance.'" *Id.* at 2489 (citations omitted).

**42. *Hawaii v. Young* concerned the State's concealed carry permitting scheme, ban on the open carry of weapons, and whether these laws violated the plaintiff's Second Amendment rights. In your own words, the case was "…decided on narrow grounds…" and "…the Ninth Circuit ruled consistently with previous Supreme Court decisions, as the State of Hawaii argued it had a right and obligation to regulate firearms in public spaces in the name of public safety."**

**a. In a post-*Bruen* landscape are "may-issue" permitting schemes, such as the one at issue in *Hawaii* constitutional?**

Response: No. The second statement is a reporter's words. In another interview about *Young* I explained that "[w]hile it won't have much of an impact in Montana, I'd say likely, this is not the last word on this question." The Supreme Court in *Bruen* subsequently held a "proper cause" restriction on carrying a handgun in public, analogous to the restriction at issue in *Young*, was unconstitutional. *Bruen's* standard is controlling precedent, and accordingly the Supreme Court vacated the Ninth Circuit's judgment in *Young*. *See Young v. Hawaii,* 2022 WL 2347578, at *1 (U.S. 2022).

**43. In the past, you have declared your support for affirmative action, saying, "…thousands of minority students are admitted to law schools with below average LSAT scores and college GPAs. A disproportionate share of them are black students. Many are from middle or upper-middle-class backgrounds. Affirmative Action may have helped them get into college already. In law school, they will probably not make law review unless membership consideration includes racial criteria. After graduation, they may struggle to pass the bar."**

**a. I am Hispanic and served on the Harvard Law Review. Do you believe I was selected on account of my race?**

Response: No. This statement and the underlying data are taken from an argument I made as a law student, at the beginning of my 2L year, that state law schools should be able to consider factors other than LSATs and college GPAs, including narrowly-tailored race-conscious factors, in admitting applicants who will become successful lawyers. This argument is consistent with the Supreme Court's decisions in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). At the time I had not yet taken Constitutional Law, taken an oath to become a lawyer, practiced Constitutional Law for two decades, or taught Constitutional Law for more than a decade. I have not revisited this statement or the underlying data for 25 years. The Supreme Court is now considering two cases involving the use of race as a factor in university admissions. *See Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (argued Oct. 31, 2022). As a judicial nominee, I should not comment on the merits of pending cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving the use of race as a factor in university admission decisions, I would faithfully apply precedent regardless of whether it sustains or overrules the holding in *Grutter*.

**b. Justice Jackson served with me on the Harvard Law Review as well. She also happens to be African-American. Do you beleive she only made the Harvard Law Review because of her race?**

Response: No. Please see my response to Question 43(a).

**c. In 2022, nearly twenty years after the *Grutter* decision, is the use of race as a factor in university admission decisions still appropriate? If yes, when will it become inappropriate?**

Response: In 2003 the Supreme Court upheld, under strict scrutiny, a narrowly tailored race-conscious admissions program. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In that case, the Court also stated "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* 343 (2003). The Supreme Court is now considering two cases involving the use of race as a factor in university admissions. *See Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (argued Oct. 31, 2022). As a judicial nominee, I should not comment on the merits of pending cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving the use of race as a factor in university admission decisions, I would faithfully apply precedent regardless of whether it sustains or overrules the holding in *Grutter*.

**d. Given your above statements, will you commit to recusing from any case concerning the use of racial quotas in hiring, retention, admission, or selection, in both the public and private space?**

Response: If confirmed, I would commit to meeting all ethical obligations faithfully and fully. I would evaluate the existence of a potential conflict of interest on a case-by-case basis and determine appropriate action based on the standards of 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable principles of judicial ethics, to determine whether to recuse.

**44. In 2017, during Justice Neil Gorsuch's confirmation process, you said, "unfortunately we are seeing the greatest level of politicization of the confirmation process that we have seen in decades. And that is bad for the court and it is bad for the confidence in the court."**

**a. Does protesting in front of the homes of Supreme Court Justices help to instill public confidence in the Court?**

Response: I have criticized the politicization of the Supreme Court by outside political forces, and its impact on public confidence in the Court. I have not studied the impact of such protests on public confidence in the Court.

**b. Does protesting in front of the homes of Supreme Court Justices decrease the politicization of the Court?**

Response: I have criticized the politicization of the Supreme Court by outside political forces, and its impact on public confidence in the Court. I have not studied the impact of such protests on the politicization of the Court.

**45. Following the decision in *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), you worked on a briefing in a subsequent Montana case to challenge its validity. You were summarily reversed in a one paragraph opinion.**

**a. Is *Citizens United* binding Supreme Court precedent?**

Response: Yes. I did not challenge the validity of *Citizens United*. In *Western Tradition Partnership v. Bullock*, I fulfilled my duties as State Solicitor to defend

Montana law, and consistent with those duties argued that Montana's law and the facts in that case were materially distinguishable from the law and facts presented in *Citizens United.* The Montana Supreme Court upheld the Montana law, and the Supreme Court summarily reversed without argument in a 5-4 decision.

**b. If you are confirmed to the Ninth Circuit, will you faithfully apply binding Supreme Court precedent, including *Citizens United?***

Response: Yes.

**46. On November 11, 2021, you provided commentary to a *Montana Free Press* article entitled "OPI's Montana School Law Conference explores hot-button education issues," relating to parental rights in education. You said "parental rights are not absolute" and that, "[p]erhaps the most important lesson here with respect to parental rights is that the Montana Constitution sets up a process for parents, students and other Montana stakeholders to be heard with respect to the educational system, first and foremost through their school districts and the boards of trustees who have primary supervision and control over the schools in each school district."**

**a. Are parents the primary supervisor and authority over their children? What if their children attend government schools?**

Response: I did not provide commentary to the newspaper article referenced. I did present at OPI's Montana School Law Conference, where I summarized two views on parental rights from *Troxel v. Granville*, 530 U.S. 57 (2000). The Supreme Court held "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66. Justice Scalia, dissenting, wrote "while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." *Id.* at 91 (emphasis in original). As a judicial nominee, I should not comment on merits of parental rights under the Constitution. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving parental rights, I would apply precedent faithfully, including *Troxel v. Granville* as applicable.

**b. In a disagreement between teachers and parents about the content of curriculum taught to students, whose opinion is decisive? Whose opinion should be decisive, in your mind?**

Response: The Montana Constitution, the subject of the referenced comments, provides "[t]he supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." Mont. Const. art. X, § 8. As a judicial nominee, I should not comment on merits of parental control over curriculum. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving a disagreement between teachers and parents about the content of curriculum, I would faithfully interpret the applicable law according to precedent and the text, structure, and history of the law, and faithfully

apply precedent to resolve any questions about the constitutionality of the law.

**Senator Ben Sasse**
**Questions for the Record for Anthony Devos Johnstone**
**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: If confirmed, my judicial philosophy would be guided by the judicial oath to decide cases "faithfully and impartially." 28 U.S.C. § 453. I understand "faithfully" to mean according to precedent and the text, structure, and history of the law at issue. I understand "impartially" to mean without any personal or political bias.

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

   Response: Originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). If confirmed, I would faithfully apply precedent, regardless of its interpretive methodology, and the text, structure, and history of the law at issue.

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

   Response: Textualism is "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Black's Law Dictionary (11th ed. 2019). If confirmed, I would faithfully apply the meaning of the law's text and any applicable precedent and end there when possible. In the rare case in which the text remains ambiguous considering precedent, the context of the statutory structure, and appropriate canons of statutory construction, I would consult other public materials, including legislative history, for the limited purpose of evidencing the text's meaning.

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

   Response: No. The Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Thus, "although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to

circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022).

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

   Response: I teach hundreds of Supreme Court decisions every year and have had the honor to appear as counsel in several cases before the Court. I admire many attributes of many justices, but I do not think any one justice exemplifies my jurisprudence. Please see my response to Question 2.

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: The Ninth Circuit has held a court may overturn circuit precedent only when sitting *en banc* or when that precedent is "clearly irreconcilable" with an intervening decision of the United States Supreme Court decision or, in the case of state law, a state court of last court. *See* Fed. R. App. P. 35(a)(1); *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (*en banc*). If confirmed and presented with such a case, I would faithfully apply any other relevant Supreme Court precedent, regardless of its interpretive methodology, and the text, structure, and history of the constitutional provision at issue.

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: The Ninth Circuit has held a court may overturn circuit precedent only when sitting *en banc* or when that precedent is "clearly irreconcilable" with an intervening decision of the United States Supreme Court decision or, in the case of state law, a state court of last court. *See* Fed. R. App. P. 35(a)(1); *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (*en banc*). If confirmed and presented with such a case, I would faithfully apply any other relevant Supreme Court precedent, regardless of its interpretive methodology, and the text, structure, and history of the statutory provision at issue.

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: Legislative history should only play a role in providing evidence of the meaning of the statute's text, not the intent of legislators. "What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 942 (2017). General principles of justice should only play a role to the extent they have been reduced to canons consistent with legislative practice, established by precedent, and applicable to the statute at issue.

**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: Identification with a particular minority group is not one of the factors that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

**Senator Josh Hawley**
**Questions for the Record**

**Anthony Johnstone**
**Nominee, U.S. Court of Appeals for the Ninth Circuit**

1. **You represented the State of Montana in an effort to preserve Montana's law regulating political contributions, despite the then-recent *Citizens United* ruling. The U.S. Supreme Court summarily reversed the Montana Supreme Court's decision upholding the law, an action which you described as "the Court g[iving] Montana the back of its hand."**

    a. **Did you advise the State of Montana to pursue this action in the first place?**

    Response: The State of Montana did not pursue this action in the first place. It was defendant and respondent, not plaintiff or petitioner, in *Western Tradition Partnership v. Bullock*. I defended Montana law in state courts, and the Montana Supreme Court's decision upholding that law in the Supreme Court, consistent with my duties as State Solicitor at the time.

    b. **If so, why did you choose to pursue this case, in light of the Supreme Court's clear ruling in *Citizens United*?**

    Response: Please see the response to Question 1(a). I fulfilled my duties as State Solicitor to defend Montana law, and consistent with those duties argued that Montana's law and the facts in that case were materially distinguishable from the law and facts presented in *Citizens United.*

2. **In commenting on the Ninth Circuit's 2021 decision in the case of *Young v. Hawaii*, which effectively wrote the right to *bear* arms out of the U.S. Constitution, you stated that the "Ninth Circuit ruled consistently with previous Supreme Court decisions, as the State of Hawaii argued it had a right and obligation to regulate firearms in public spaces in the name of public safety." The U.S. Supreme Court subsequently vacated and remanded *Young* in light of its opinion in *NYSRPA v. Bruen*.**

    a. **Do you still believe that *Young* was consistent with Supreme Court precedent at the time it was decided?**

    Response: This statement is a reporter's words. I recall that I explained to the reporter that the Ninth Circuit in *Young* cited previous Supreme Court decisions in holding the right to keep and bear arms "doesn't prohibit states from regulating open carry," and this question was subject to a circuit split that likely would lead to review by the Supreme Court. In another interview about *Young* I explained my belief that "[w]hile it won't have much of an impact in Montana, I'd say likely, this is not the last word on this question."

**b. Do you believe the holding in *Young* can survive the Supreme Court's recent decision in *Bruen*?**

Response: No. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court clarified that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context," and elaborating "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. 2111, 2127. Under that test, *Bruen* held a "proper cause" restriction on carrying a handgun in public, analogous to the restriction at issue in *Young*, was unconstitutional. *Bruen's* holding, not *Young's*, is controlling precedent, and accordingly the Supreme Court vacated the Ninth Circuit's judgment in *Young*. *See Young v. Hawaii,* 2022 WL 2347578, at *1 (U.S. 2022).

**3. You have vocally supported affirmative action policies, suggesting that those policies have clear winners. In *Grutter v. Bollinger*, the Supreme Court stated that "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003). That interest, of course, was student body diversity. We're coming up on 2028 in just a few years. The Supreme Court's 2016 decision in *Fisher v. University of Texas at Austin* didn't change what *Grutter* said about this countdown.**

**a. Do you believe that affirmative action produces not simply winners, but also losers?**

Response: As a law student, at the beginning of my 2L year, I made an argument that state law schools should be able to consider factors other than LSATs and college GPAs, including narrowly-tailored race-conscious factors, in admitting applicants who will become successful lawyers. This argument is consistent with the Supreme Court's decisions in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). At the time I had not yet taken Constitutional Law, taken an oath to become a lawyer, practiced Constitutional Law for two decades, or taught Constitutional Law for more than a decade. I have not revisited that argument for 25 years. The Supreme Court is now considering two cases involving affirmative action policies. *See Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (argued Oct. 31, 2022). As a judicial nominee, I should not comment on the merits of pending cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving affirmative action policies, I would faithfully apply precedent regardless of whether it sustains or overrules the holding in *Grutter*.

**b. Do you believe that race-based affirmative action is helping or harming Asian-American students?**

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

**c. In your view, should affirmative action programs have an expiration date?**

Response: In 2003 the Supreme Court upheld, under strict scrutiny, a narrowly tailored race-conscious admissions program. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In that case, the Court also stated "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* 343 (2003). The Supreme Court is now considering two cases involving affirmative action policies. *See Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (argued Oct. 31, 2022). As a judicial nominee, I should not comment on the merits of pending cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case involving affirmative action programs, I would faithfully apply precedent regardless of whether it sustains or overrules the holding in *Grutter*.

**4. In a 2017 article, you were quoted as saying that "we're seeing the greatest level of politicization in the confirmation process that we've seen in decades." In that context, you were referring to the fact that then-Judge Merrick Garland did not receive a Senate hearing.**

**a. Do you believe that the Supreme Court nomination of Robert Bork was less politicized than the nomination of Merrick Garland?**

Response: No. In making that statement I understood the Supreme Court nomination of Robert Bork was also politicized.

**b. Do you believe that the Supreme Court nomination of Clarence Thomas was less politicized than the nomination of Merrick Garland?**

Response: No. In making that statement I understood the Supreme Court nomination of Clarence Thomas was also politicized.

**c. Do you believe that the D.C. Circuit nomination of Miguel Estrada was less politicized than the nomination of Merrick Garland?**

Response: My statement referred to the confirmation process for Supreme Court nominations. I did not consider nominations to other courts.

**d. Do you believe that the Supreme Court nomination of Janice Rogers Brown was less politicized than the nomination of Merrick Garland?**

Response: I am not familiar with the Supreme Court nomination of Janice Rogers Brown. I did not consider nominations to other courts.

**e. Do you believe that the era of the Warren Court represented a less politicized era of the Supreme Court?**

Response: My statement referred to the confirmation process and not eras of the Supreme Court's work. As a judicial nominee, I should not comment on the merits of a particular era at the Supreme Court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed I would faithfully apply Supreme Court precedent regardless of its era.

**5. 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 could not comment on a Justice's understanding of the judicial oath. If I were confirmed, my judicial philosophy would be guided by the judicial oath to decide cases "faithfully and impartially." 28 U.S.C. § 453. I understand "faithfully" to mean according to precedent and the text, structure, and history of the law at issue. I understand "impartially" to mean without any personal or political bias.

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

Response: The Supreme Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," but has "held that federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). The Court therefore recognizes several major abstention doctrines.

The ecclesiastical abstention doctrine concerns abstention from adjudication of religious "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," "founded in a broad and sound view of the relations of church and state under our system of laws." *Watson v. Jones* 80 U.S. (13 Wall.) 679, 727 (1872). The Ninth Circuit, "careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others," has held courts may avoid interference with religious doctrine by either (1) "deferring to the decision-making authorities of hierarchical churches" or (2) "resolv[ing] property disputes by applying secular principles of property, trust and corporate law when the instruments upon which those principles operate are at hand." *Maktab Tarighe Oveyssi Shah Maghsoudi v. Kianfar*, 179 F.3d 1244, 1248-49 (9th Cir. 1999).

The *Pullman* doctrine concerns abstention from federal constitutional adjudication of an unresolved state law issue "if a definitive ruling on the state issue [by state courts] would terminate the controversy." *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 498 (1941). In the Ninth Circuit, "*Pullman* abstention is appropriate when (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain." *Confederated Salish & Kootenai Tribes v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994).

The *Burford* doctrine concerns abstention from federal equitable and similar adjudication of an issue arising from a state regulatory scheme when the issue "so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943); *see also Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (requiring abstention in cases raising unsettled issues of state law "intimately involved with [the States'] sovereign prerogative"). The Ninth Circuit "generally requires certain factors to be present for [*Burford*] abstention to apply: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Savings & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

The *Younger* doctrine concerns abstention from federal equitable interference with ongoing state criminal and similar enforcement proceedings out of comity, "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In the Ninth Circuit "*Younger* abstention is appropriate when: (1) there is 'an ongoing state judicial proceeding'; (2) the proceeding 'implicate[s] important state interests'; (3) there is 'an adequate opportunity in the state proceedings to raise constitutional challenges'; and (4) the requested relief 'seek[s] to enjoin' or has 'the practical effect of enjoining" the ongoing state judicial proceeding.'" *Arevalo v. Hennesy*, 882 F.3d 763, 765 (9th Cir. 2018) (citation omitted).

The *Colorado River* doctrine concerns abstention from federal adjudication in favor of a concurrent state court proceeding based on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citation omitted). The Ninth Circuit considers eight factors in determining *Colorado River* 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." *United States v. State Water Resources Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021) (citation omitted).

The *Rooker-Feldman* doctrine concerns abstention from federal district court adjudication of claims that are "inextricably intertwined" with those a state court has already decided. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983). "[T]he doctrine arises out of a pair of negative inferences drawn from two statutes: 28 U.S.C. § 1331, which establishes the district court's 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States'; and 28 U.S.C. § 1257, which allows Supreme Court review of '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.'" *Gruntz v. County of Los Angeles*, 202 F.3d 1074, 1078 (9th Cir. 2000) (*en banc*). The Ninth Circuit holds *Rooker-Feldman* "applies only [1] when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* [2] seeks as her remedy relief from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).

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

Response: Yes. In more than two decades of representing the State of Montana and other clients in constitutional litigation, to the best of my knowledge I have worked on two cases defending Montana laws against religious liberty claims.

**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: In *Canyon Ferry Church Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), I served as lead counsel for the State of Montana in defending federal free speech and free exercise challenges to Montana's campaign finance disclosure laws as applied to a church's campaign-related activities. After the district court upheld the laws, the Ninth Circuit reversed, invalidating the application of disclosure laws to the church's activities as a violation of the freedom of speech. It did not reach the free exercise claims.

In *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020), I served as co-counsel for the Montana Department of Revenue in defending state and federal equal protection and free exercise challenges to a Montana law requiring an education tax credit program to be implemented in compliance with the Montana Constitution's prohibition on aid to religious schools. Several *amici curiae* raised religious liberty arguments both in support of and in opposition to the Department's position. The Supreme Court reversed the

Montana Supreme Court, invalidating the application of the no-aid provision to the education tax credit program.

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

Response: The courts' interpretation of the Constitution's text should be "guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

Response: In interpreting federal law I start with the text and any precedent previously interpreting that law and end there when possible. In the rare case in which the text remains ambiguous considering precedent, the context of the statutory structure, and appropriate canons of statutory construction, I would consult other public materials, including legislative history, for the limited purpose of evidencing the text's meaning.

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

   Response: I use legislative history as evidence of the meaning of the statute's text, not the intent of legislators. The most probative materials are a statute's history of amendments, revisions, and repeals that have been formally enacted by Congress. *See, e.g., Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) (ruling out an interpretation based on amendment history). In decreasing order of probative value, committee reports, sponsor statements, colloquy, rejected proposals, and non-legislator statements are to be viewed skeptically considering the legislative process, and again only for the limited purpose of evidencing the text's meaning. "What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 942 (2017).

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

   Response: The U.S. Constitution should be interpreted according to precedent from domestic not foreign courts, and its own text, structure, and history, not those of foreign laws.

10. **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: An execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment when "the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain," and "the risk is substantial when compared to the known and available alternatives." *Glossip v. Gross*, 576 U. S. 863, 878 (2015) (citations omitted); *Atwood v. Shinn*, 36 F.4th 901, 904 (9th Cir. 2022) (applying *Glossip*).

**11. 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. "[T]he Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Glossip v. Gross*, 576 U.S. 863, 880 (2015).

**12. 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: In *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 73-74 (2009), the Supreme Court held a habeas corpus petitioner has no "freestanding right to access DNA evidence for testing" under the Due Process Clause, and reversed the Ninth Circuit's decision to the contrary.

**13. 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.

**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 facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

Response: In general, a state governmental action "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." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). State action that is not generally applicable, however, triggers strict scrutiny regardless of its neutrality. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), any government action "that imposes a substantial burden on the religious exercise of a person" is prohibited regardless of its facial neutrality "unless the government demonstrates that imposition of the burden ... is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental

interest." 42 U.S.C. § 2000cc(a)(1). The Ninth Circuit has held a "substantial burden" is a "significantly great restriction or onus upon [religious] exercise," including a "outright ban[s]" on religious exercise as well as "lesser restrictions" such as threats of "punishment[ ] to coerce a religious adherent to forgo her or his religious beliefs," or actions that cause "substantial delay, uncertainty, and expense" to worship. *Johnson v. Baker*, 23 F.4th 1209, 1215-16 (9th Cir. 2022).

**15. 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: State government must satisfy strict scrutiny to treat religious organizations or religious people non-neutrally. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). A state governmental action discriminates in this way if "the object or purpose of the law is suppression of religion or religious conduct," *id.* at 533, if it applies a facially neutral law with hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018), if a law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if a law "treat[s] any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original); *see also Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020).

**16. 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 "it is not within the judicial function and judicial competence to inquire whether the petitioner … correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981). In addressing claimants' sincerely held religious beliefs, the Court has held "it is not for us to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Still, a "pretextual assertion of a religious belief to obtain [protection] for financial reasons would fail." *Id.* at 717 n. 28; *see also Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994).

**17. 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: *Heller* held the Second Amendment protects the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-

defense, and to maintain any lawful firearm in the home operable for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635 (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.

**18. 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: Justice Holmes explained he meant "a constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). I agree that judges should interpret the Constitution faithfully and impartially, and personal views should not affect a "judgment upon the question whether statutes embodying [other views] conflict with the Constitution of the United States." *Id.* at 76 (Holmes, J., dissenting).

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

Response: *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), abrogated the holding in *Lochner*. If confirmed, I would faithfully apply Supreme Court precedent regardless of any opinions about its "correctness."

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

**a. If so, what are they?**

Response: The Supreme Court has held "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 (1989). If confirmed, I would faithfully apply all Supreme Court precedent.

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

Response: Yes.

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

**a. Do you agree with Judge Learned Hand?**

Response: I understand Judge Hand's statement as part of an explanation of the importance of defining the relevant market, a fact-intensive inquiry that determines market share. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) ("There are various ways of computing 'Alcoa's' control of the aluminum market — as distinct from its production — depending upon what one regards as competing in that market."). That explanation is consistent with the Supreme Court's statement that "[t]he proper market definition in [a monopolization] case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers," *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992), or producers in the case of a monopsony claim, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 321-22 (2007) (monopsony and monopoly claims "are analytically similar"). If confirmed, I would faithfully apply the antitrust laws and precedent on monopolization regardless of whether it is consistent with Judge Hand's statement.

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

Response: Please see my response to Question 20(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 has not specified a minimum percentage of market share for a company to constitute a monopoly under Section 2 of the Sherman Act. Market share is one aspect of monopoly power, which is one of two elements of the offense of monopoly: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570-571 (1966). The Ninth Circuit has observed, "numerous [monopolization] cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power," and "[w]hen the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price." *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F. 3d 1421, 1438 (9th Cir. 1995). The Ninth Circuit, in accord with other circuits, has also expressed reluctance "to apply bright-line rules regarding market share in deciding whether a defendant has market power to restrict output or

raise prices," and instead "carefully analyz[es] certain telltale factors in the relevant market: market share, entry barriers and the capacity of existing competitors to expand output." *Id.* at 1438 n. 10. If confirmed, I would faithfully apply the antitrust laws and precedent on monopolization based on a careful analysis of the record in any case presenting the issue.

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

Response: The Supreme Court has held "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Therefore, "only limited areas exist in which federal judges may appropriately craft the rule of decision," including admiralty, certain controversies between states, and other subjects strictly "necessary to protect uniquely federal interests." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: If confirmed and presented with the issue of the scope of a state constitutional right, I would look to state law to determine the scope of a state constitutional right. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Therefore, "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: The interpretation of a legal text should begin with its ordinary meaning, which may vary between identical texts adopted in different contexts, including who adopted the text and when it was adopted. For example, the meaning of "domestic Violence" in Article IV of the U.S. Constitution from 1787 is different from the meaning of "domestic violence" in Title 18 of the U.S. Code from 1994. Similarly, "Federal and state courts … can and do apply identically worded procedural provisions in widely varying ways." *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011).

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

Response: The federal Constitution is "the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A state constitutional rights provision that provides less protection than the federal provision is displaced by the federal provision; a state constitutional rights provision that provides more protection should be enforced according to the law of the state. *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: As a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown vs. Board of Education* is one of a small number of well-established decisions that holds a uniquely foundational position in constitutional law and does not present a matter that is likely to arise in any court. Given this, and consistent with the responses of prior nominees, I can answer yes. If confirmed, I would faithfully apply precedent regardless of any opinions about its "correctness."

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

Response: Federal Rule of Civil Procedure 65 authorizes a federal court to issue injunctions. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Supreme Court has affirmed nationwide, or universal, injunctions in limited circumstances. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017). The legal authority for nationwide injunctions is a matter of recent dispute. *See, e.g. Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). If confirmed, I would faithfully apply precedent on injunctions regardless of the outcome of this dispute.

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

Response: Please see my response to Question 24(a).

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

Response: Please see my response to Question 24(a).

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

Response: Please see my response to Question 24(a).

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

Response: Federalism serves at least two important functions in our constitutional system. "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: Please see my response to Question 6.

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

Response: Generally, damages are a retrospective remedy to redress past injury, while injunctions are a prospective remedy to prevent future injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). The availability of damages or an injunction to a litigant is established by the facts and law at issue in a particular case, rather than general views as to advantages and disadvantages of either remedy.

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

Response: The Supreme Court has held the Due Process Clause of the Fifth and Fourteenth Amendments protects certain substantive rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

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

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

Response: The Free Exercise Clause protects "not only belief and profession but the performance of (or abstention from) physical acts," including "such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878 (1990).

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

Response: Please see my response to Question 30(a).

**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 14.

**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 16.

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993 … unless such law explicitly excludes such application by reference" to the Act. 42 U.S.C. § 2000bb-3.

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

Response: No.

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

**a. What do you understand this statement to mean?**

Response: Although I am not familiar with the context of this statement, I understand it to mean a good judge decides cases faithfully and impartially according to the law, regardless of any personal views of the result.

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

Response: Yes.

**a. If yes, please provide appropriate citations.**

Response: In more than two decades of practicing law in dozens of published cases and many more cases that did not result in published opinions, my primary role has been to defend statutes from constitutional challenges. To the best of my knowledge I once took a position that a state statute was unconstitutional under the federal and state constitutions in *White et al. v. Martz*, No. CDC-2002-133 (Mont. 1st Dist. July 24, 2002), a challenge to Montana's systems for providing the assistance of counsel. In more than a decade of scholarship spanning thousands of pages of publications and presentations, my primary role has been to explain the federal and state

constitutions and laws. To the best of my knowledge, while I have posed questions about the constitutionality of laws for instructional and scholarly purposes, I have not published a paper or given a presentation with a primary thesis that a federal or state statute was unconstitutional beyond explaining a case in which a court so held.

**33. 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.

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

Response: No, I would not use the term "systematically racist" to describe our country. I believe the United States continues toward the "more perfect Union" the Constitution promises in its Preamble because of Americans' faithful efforts to fulfill that promise through equal justice under law.

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

Response: Yes.

**36. How did you handle the situation?**

Response: My personal views include a commitment to the rule of law that has guided me to and through my career as a lawyer and law professor. When serving as an advocate that commitment includes asserting the client's position under the rules of the adversary system, and not my own.

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

Response: Yes.

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

Response: Several of the Federalist Papers have shaped my views in my legal scholarship, and I have relied upon many of them in my published articles. With respect to the role of the federal judiciary, Alexander Hamilton's Federalist 78 has most shaped my views.

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

Response: The Supreme Court has stated this is "a profound moral issue" on which it has not expressed "any view." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2241, 2256 (2022). As a judicial nominee, I should not comment on the

merits of this issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of any personal beliefs on the matter.

**40. 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: To the best of my knowledge the only other time I have testified under oath was on September 12, 2012, before United States Senate Judiciary Committee regarding "The Citizens United Court and the Continuing Importance of the Voting Rights Act." The video is available at https://www.judiciary.senate.gov/meetings/the-citizens-united-court-and-the-continuing-importance-of-the-voting-rights-act.

**41. 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.

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

**a. Apple?**

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

**b. Amazon?**

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

**c. Google?**

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

**d. Facebook?**

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

**e. Twitter?**

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

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

Response: Yes.

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

Response: In more than two decades of practicing law I have regularly provided colleagues editorial comments on briefs I have not signed. Cases in which I have provided significant drafting assistance without my name appearing on the filed brief include *State of Montana v. Talen*, No. CV 16-35-H-DLC (D. Mont.); *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020); and *White et al. v. Martz*, No. CDC-2002-133 (Mont. 1st Dist. July 24, 2002).

**44. Have you ever confessed error to a court?**

Response: No.

**a. If so, please describe the circumstances.**

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

Response: I believe that nominees have a duty to answer the Committee's questions truthfully to allow the Senate to provide its advice and consent, and consistently with the Code of Conduct for United States Judges as applicable to nominees to ensure the impartiality of the judiciary.

**Questions from Senator Thom Tillis**
**for Anthony Devos Johnstone**
**Nominee to be United States Circuit Judge for the Ninth Circuit**

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 "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). It is not appropriate.

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

   Response: I believe that impartiality is an expectation for a judge. *See* 28 U.S.C. § 453.

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: In every judicial decision at least one party will have an undesirable outcome. The only outcome a judge should pursue is the faithful application of the law to the case. If confirmed, as a judge I would reconcile the law with a party's undesirable outcome by explaining the outcome in terms the parties can understand as the rule of law even if they disagree with the outcome.

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

   Response: No.

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

   Response: If confirmed, I would faithfully and impartially apply the Second Amendment according to Supreme Court precedent. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. 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 and law presented in the case and faithfully apply precedent. That precedent may include, as applicable, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), on the right to keep and bear arms, and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), on the application of enumerated rights during a crisis such as COVID-19. No crisis, including a pandemic, suspends constitutional rights except in the narrow circumstances prescribed by the Constitution itself. *See* U.S. Const. art. I, § 9, cl. 2; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring) ("The appeal … that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted.").

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

   Response: If confirmed, I would evaluate the facts and law presented in the case and faithfully apply precedent. The Supreme Court has held "officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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

    Response: The protection of qualified immunity under § 1983 is question for Congress. As a judicial nominee, I should not comment on the merits of qualified immunity. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of any opinions about the merits of qualified immunity.

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

    Response: Please see my response to Question 10.

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

    a. **What experience do you have with copyright law?**

Response: I studied copyright law in law school, teach copyright law issues adjacent to my courses in Constitutional Law, Legislation, and Public Regulation of Business, and occasionally discuss copyright law adjacent to my areas of scholarship with colleagues who specialize in copyright. As a scholar, I am also a producer and consumer of copyrighted works through my casebook and articles, including in copyrighting my works and securing copyright permissions for others' works.

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

Response: I have not had any particular experiences 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: I have not had experience addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: I have litigated several First Amendment and free speech issues in state courts, the Ninth Circuit, and the United States Supreme Court. I have taught the First Amendment and free speech issues for approximately 15 years as an adjunct and full-time professor, including as a stand-alone First Amendment course.

**13. 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 applying federal law to the facts in a particular case I would start with the text and any precedent previously interpreting that law and end there when possible. In the rare case in which the text remains ambiguous considering precedent, the context of the statutory structure, and appropriate canons

of statutory construction, I would consult other public materials, including legislative history, for the limited purpose of evidencing the text's meaning. The Supreme Court has stated "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 942 (2017). Therefore, Congressional intent is expressed by the statute's text. The role of legislative history, when used, is to evidence of the meaning of the statute's text, not the intent of certain legislators.

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

Response: The role of an agency's advice and analysis in the interpretation and application of the law depends on the clarity of the law and the circumstances of the agency's advice and analysis. "If a court, employing traditional tools of statutory construction," finds that the law's meaning is clear, it must apply that clear meaning because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984). Generally, where the law's meaning is ambiguous, formal agency interpretations based on "a permissible construction of the statute" may be entitled to deference under *Chevron*, 467 U.S. at 843. Informal agency advice and analysis is entitled to deference only to the extent that those interpretations have the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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

Response: The Digital Millennium Copyright Act provides a safe harbor for a service provider under certain circumstances. *See* 17 U.S.C. § 512(c)(1). The scope of this safe harbor, and whether these or other circumstances should suffice to put an online service provider on notice of copyright infringement, is a question of copyright law for Congress to decide. As a judicial nominee, I should not comment on the merits of that law. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of any opinions about its merits.

**14. 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: Statutory "words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citations omitted). The generality of most statutes allows courts to faithfully apply their ordinary meaning in unforeseen circumstances. Accordingly, the Supreme Court has noted that application of copyright law's general terms has "adapt[ed] to prevent the exploitation of protected works through [a] new electronic technology." *Twentieth Century Music Corporation v. Aiken 8212 452*, 422 U.S. 151, 158 (1975) (discussing the application of the Copyright Act of 1909 to the post-enactment emergence of broadcast media). The Supreme Court has "stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). As a judicial nominee, I should not comment on the specific application of the DMCA to dominant platforms, automation, or algorithms. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and presented with a case under the DMCA in today's digital environment, I would faithfully apply the law regardless of any opinions about its merits.

**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 14(a). The Supreme Court has held "the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 (1989).

**15. 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: "Judge shopping" and "forum shopping" is a problem to the extent it undermines the perception of fairness and of the judiciary's evenhanded administration of justice. As a judicial nominee, I should not comment on the merits of specific local venue rules. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply any relevant local venue rules.

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

Response: Yes. If confirmed, I would not engage in conduct to attract a particular type of litigant.

**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: No.

**16. 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?**

Response: The concentration of a particular type of litigation in just one or two judicial districts is a matter for Congress under venue statutes and district courts under local rules. As a judicial nominee, I should not comment on the merits of venue statutes and local rules. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed I would faithfully apply these statutes and rules regardless of any view about their merits.

**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: It is generally appropriate for Congress under venue statutes and district courts under local rules to inquire about the impact of such statutes and rules on the administration of justice. As a judicial nominee, I should not comment on the merits of venue statutes and local rules. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply these statutes and rules regardless of any view about their merits.

**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? Should such a rule apply only where a single judge sits in a division?**

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

**17. 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 judicial nominee, I should not comment on the merits of mandamus against a single judge. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the law regardless of the district judge who sat on the case.

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

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

**Senate Judiciary Committee Hearing**

**Nominations**

**Questions for the Record**

**for Anthony Johnstone**

**to be United States Circuit Judge for the Ninth Circuit**

**QUESTIONS FROM SENATOR BLACKBURN**

1. **Shortly after the Supreme Court issued its opinion in *Citizens United v. Federal Election Commission*, you commented on the Court's overruling of two previous campaign finance decisions in that case. In a keynote speech at the University of Montana, you asked: "Why did the Supreme Court undo [two previous] decisions, and in so doing threaten to undermine the stability of the law?"**
    a. **Do you believe that anytime the Court overrules one of its precedents, it "undermine[s] the stability of the law"?**

    Response: No. The Supreme Court has explained "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018). When the Court overrules one of its precedents, it considers several factors including "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79. By applying these factors, the Court can promote stability of the law, or at least minimize instability, when it overrules one of its precedents.

2. **During the confirmation process for now-Justice Gorsuch, you stated that "we are seeing the greatest level of politicization of the confirmation process" and that "everything is on the table for the Senate."**
    a. **Please explain why, in your view, the Senate confirmation process is at "the greatest level of politicization."**

    Response: I was referring to the fact that the Senate had never previously denied an elected president the opportunity to fill a Supreme Court vacancy that occurred before the election of his successor.

    b. **Please explain the meaning of the phrase "everything is on the table for the Senate" that you used.**

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

    c. **During the Reagan Administration, Senate Democrats blocked or indicated they would block several of President Reagan's nominees, including Judges Robert Bork and Douglas Ginsburg, in 1987—which was not even an election year.**

**Would you characterize these nominations processes as "politicized," as you did for Justice Gorsuch's confirmation?**

Response: Yes.

3. **You wrote an article for the 2017 Pepperdine Law Review Symposium. In that article, you stated that "the Court's politicization threatens the integrity of both the Court and political institutions."**
   a. **Please explain the basis for this assertion.**

      Response: The basis for the assertion is explained in the article. It included evidence showing declining public confidence in the Supreme Court and concerns, best summarized by Alexander Hamilton in Federalist 78, "that the judiciary is beyond comparison the weakest of the three departments of power … and that all possible care is requisite to enable it to defend itself…."

   b. **Do you believe that the Court is currently a politicized institution?**

      Response: By "politicized" I referred to the impact of outside political forces on the Court as an institution. I believed then and believe now that the Court is a principled institution in its own work notwithstanding those outside political forces.